IN THE SUPREME COURT OF FLORIDA

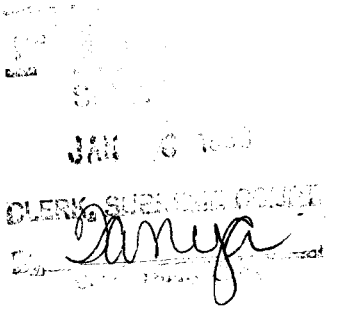
KAYLE BARRINGTON BATES,

Appellant,

v. CASE NO. 67,422

STATE OF FLORIDA,

Appellee.



INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

KAYLE BATES is the appellant in this capital case. This is the second time this case is before this Court; the first time this Court remanded for resentencing. Bates v. State, 465 So.2d 490 (Fla. 1985). The record of the resentencing now on appeal consists of two volumes and references to them will be indicated by the letters "RR." References to the original record on appeal will be indicated by either "R," or "T."

II STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Bay County on July 6, 1982, charged Kayle Bates with first degree murder (by premeditation or during the course of a felony), kidnapping, robbery, and sexual battery (R-1-3). Bates' attorney filed a motion to suppress a statement taken from him by the police (R-159-160) and a motion for change of venue (R-164-167). The court denied the motion to suppress (T-1147), and it deferred ruling on the motion for change of venue until trial at which time it denied that motion (T-1375).

Bates was tried before the Honorable W. Fred Turner from January 17-20, 1983, and found guilty by a jury of premeditated first degree murder (R-202), kidnapping, robbery, and attempted sexual battery (R-202-203).

During the penalty phase of the trial, the state presented no additional evidence. Bates took the stand as well as his father (T-952), and both pleaded that the jury recommend mercy (T-954,956). After the court instructed the jury, they returned a recommendation of death (R-210).

The court, following the jury's recommendation, sentenced Bates to death. The court found in aggravation:

> 1. The murder was committed during the course of a kidnapping, robbery, and attempted sexual battery.
>
> 2. The murder was committed for the purpose of preventing or avoiding lawful arrest.
>
> 3. The murder was committed for pecuniary gain.

> 4. The murder was especially heinous, atrocious, and cruel.
>
> 5. The murder was committed in a cold, calculated, and premeditated manner without a pretense of moral or legal justification.

(R-222-223).

In mitigation, the court found that Bates had no significant history of prior criminal activity (R-224).

On appeal, this Court affirmed Bates' convictions but reversed the sentences and remanded for resentencing as the trial court had impermissibly found that the murder was committed (1) for the purpose of preventing or avoiding lawful arrest, and (2) in a cold, calculated, and premeditated manner without a pretense of moral or legal justification. Bates v. State, 465 So.2d 490 (Fla. 1985). Specifically, regarding resentencing, this Court said:

> Hence, we vacate the death sentence and remand to the trial court for a reweighing of the valid aggravating circumstances against the mitigating evidence.

Id. at 493.

On remand, before the Honorable W. Fred Turner, Circuit Judge for the Fourteenth Judicial Circuit, Bates presented additional mitigating evidence. He called three witnesses who testified about his childhood and youth. He also presented evidence of his military service record. Finally, he presented the testimony of a psychologist who examined Bates for purposes of resentencing.

The court resentenced Bates to death (RR-39-42). In

doing so, it read the same sentencing order it had previously read without the two impermissible aggravating factors. The court made no mention in the order of the mitigating evidence Bates had presented at the resentencing hearing.

Accordingly, the court in resentencing Bates to death found in aggravation that:

> 1. The murder was committed during the course of a kidnapping, robbery, and attempted sexual battery.
>
> 2. The murder was committed for pecuniary gain.
>
> 3. The murder was especially heinous, atrocious and cruel.

(RR-40-41).

In mitigation, the court found only that Bates had no significant history of prior criminal activity (RR-41-42).

This appeal follows.

III STATEMENT OF THE FACTS

Shortly after 1:00 p.m. on June 14, 1982, Geraldine Gilchrist called the State Farm Insurance Agency Office in Lynn Haven, near Panama City (T-304). Janet White answered the phone in an excited voice (T-308) and suddenly started screaming (T-305). The phone was hung up (T-305), but, because of what she had heard, Gilchrist called the Lynn Haven Police Department (T-305-306).

A few minutes after 1:00 p.m., Jim Dickerson, an agent with the State Farm Insurance Company, returned from lunch to his office (T-312-313). He saw White's car and noticed that something was wrong as he walked into his office (T-314). The drapes in his office had been pulled, and his calculator unplugged, and his sliding glass door unlocked and left slightly open (T-315). As Dickerson returned to the front of the store, the police arrived (T-336).

Several other policemen arrived, and they began to search the area. About 50 steps behind the agency is a wooded area, and hidden among some bushes (T-417) they found White's body (T-417). A lot of blood covered her face, and her clothing was ripped (T-418-419). She had been stabbed twice in the chest (T-440); there were several bruises about her head (front and back), eyes, and legs (T-444). She had an abrasion about her neck (T-440). Also while there was no trauma about the vagina, there was evidence of sperm in her vagina (T-463).

As the police secured the scene, Bates walked out of the woods carrying some cattails (T-364,365). An officer stopped him, asked for some identification, and then put him into his police car (T-367). Bates was wet, his clothing muddy, and the left side of his shirt looked like it had blood on it (T-365). He said that he wanted to go to his delivery truck which was parked near a tree behind the insurance agency (T-366). Bates worked as a truck driver for a Tallahassee paper company and his delivery route included stops in Lynn Haven and Panama City (T-368,778). On this day, he drove an 18 foot "Air National" truck (T-379).

Bates was taken to a police station, read his Miranda rights, then questioned about the murder (T-569-570). Initially, he denied any knowledge of the murder, saying that he had parked his delivery truck far behind the office to avoid being spotted by a supervisor and to eat lunch and pick some cattails for the house he was living in (T-570,593). The blood stains he said came from his gums and were due to a gum disease he had (T-571).

Officer McKeithen, the interrogator, told Bates to empty his pockets and Bates laid a woman's ring on his desk (T-573). Janet White's husband identified the ring as belonging to his wife (T-574). Bates then admitted stopping at the agency but only to ask for directions (T-575-576). White could not help him, and as he left, he found the ring in front of the office (T-576). He went

into the woods to get the cat tails (T-576), and as he came out he saw White's body (T-576). He went to it, panicked when he saw she was dead, and ran (T-577).

When confronted with some additional evidence, Bates changed his story. He said that he saw a white man struggling with White, and when he attempted to help her, the man hit him in the lip (T-609). Bates then ran into the woods (T-609).

McKeithen confronted Bates again (T-610), and Bates told his final story. He said that when he went inside the office for information, White initially acted friendly, but for some unknown reason, she began throwing things and getting mad (T-611). She squirted some mace on his arm (T-634), and he grabbed for the mace, and the two began to struggle (T-611). Somehow, she got a pair of scissors and during the struggle, she accidentally stabbed herself (T-611). Bates also admitted trying, but failing, to have sexual intercourse with White (T-638-639). Bates, however, denied taking the ring from White's hand (T-642).

At trial, Bates denied making the statements (T-803). He said that after he had talked with White, he had parked his delivery truck in some shade behind the agency, eaten his lunch, and gone to sleep. When he awoke, he checked his delivery tickets and then walked back to the agency to ask to use the telephone (T-784-786). Inside, he noted the disarray and left (T-790). He walked around back, found White's body, panicked and fled (T-792).

IV SUMMARY OF THE ARGUMENT

Upon remand for resentencing, the trial court heard the testimony of a psychologist, Dr. Elizabeth McMahon and several other witnesses who testified on Bates' behalf. Dr. McMahon unequivocally said that when Bates committed this murder:

> 1. He was under the influence of an extreme mental or emotional disturbance.
>
> 2. His capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> 3. It was not premeditated.

In resentencing Bates to death the court made no mention of Dr. McMahon's testimony, and in fact, it read its original sentencing order, less the two aggravating factors this Court said were not proven.

The court orally rejected Dr. McMahon's testimony because her view of the death penalty "somehow" colored her opinion, and she did not have a thorough factual understanding of the case. As a matter of fact, the court was wrong, and also as a matter of law the court erred.

Dr. McMahon's views on the death penalty did not prevent her from not recommending clemency in 15 of the 17 clemency hearings she conducted for men on death row. Moreover, neither the prosecutor or the court made any effort to show how her purported bias in any way effected her opinion.

Dr. McMahon had made a thorough review of the facts in

in this case. Although she had not seen the photographs admitted at trial and talked with the investigators, she had read the presentence investigation report, this Court's opinion, and Bates' initial and reply briefs. Specifically, the statement of the facts in the initial brief refer to the several statements Bates had given when interrogated.

By failing to consider Dr. McMahon's testimony, the court erred as a matter of law. In matters such as these, the normal standard of review is to determine if there is an abuse of discretion. Here, Dr. McMahon's testimony was unrebutted and uncontradicted, and as such, this Court cannot simply look to see if the trial court abused its discretion. Instead this Court must determine if the trial court erred as a matter of law in not considering her testimony.

Moreover, even if the trial court can somehow be said to have considered her testimony, that fact is not sufficiently clear for purposes of appellate review.

Finally, the unrebutted evidence clearly shows that two statutory mitigating factors exist as well as the mitigating factor of Bates' non-criminal lifestyle. The trial court, however, completely ignored these mitigating factors and found only the same one it had originally found, that Bates had no significant criminal history. Ignoring all this new mitigating evidence, however, was error.

V ARGUMENT

ISSUE PRESENTED

THE COURT ERRED AS A MATTER OF LAW AND FACT IN NOT CONSIDERING THE MITIGATING EVIDENCE PRESENTED AT BATES' RESENTENCING HEARING.

At the resentencing hearing, Bates called a Dr. Elizabeth McMahon, a psychologist, to testify about his mental and emotional makeup. Without objection from the state (RR-70), the court accepted Dr. McMahon as an expert in forensic pschology (RR-70). While her testimony will be discussed in greater detail later, part of her unrebutted testimony was that (1) Bates committed this murder while under the influence of an extreme mental or emotional disturbance (RR-85), (2) the capacity of Bates to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as substantially impaired (RR-85-86), and (3) Bates did not commit this murder with a premeditated intent (RR-86). The court's sentencing order made no mention of these factors and was in fact the same sentencing order it had originally sentenced Bates to death, less the two aggravating factors this Court said were not proven (RR-39-42). Bates v. State, 465 So.2d 490 (Fla. 1985). Although the court said it considered all the mitigating evidence (RR-41), nowhere did it discuss why it had rejected Dr. McMahon's testimony, and only orally

and at the sentencing hearing did it say why it rejected, as a matter of law, Dr. McMahon's testimony:

> I was a little disappointed in Dr. McMann. First of all, I think her view of the death penalty somehow colors her objectivity in the matter. Secondly, I would think that any expert in that field would want to acquaint herself thoroughly with the facts of the case, including coming and looking at the evidence introduced at trial and this sort of thing. She said she contented herself with briefs filed, certain other papers and then in talking to Mr. Bates. I would have hoped that she had made a rather thorough basis for her opinion.

(RR-163).

Legally and factually, the court was incorrect in totally rejecting the most significant evidence that would have explained Bates' character, and the court's flimsy reasons for ignoring Dr. McMahon's testimony do not withstand scrutiny.

A. The Standard of Review and its Limits

Normally, a trial court has discretion in believing or rejecting an expert's opinion. Jennings v. State, 453 So.2d 1109 (Fla. 1984); Stano v. State, 460 So.2d 890 (Fla. 1984). As Jennings and Stano demonstrate, the exercise of that discretion is virtually immune from attack when the trial court is presented with conflicting expert opinion. In those cases, the many experts significantly contradicted and rebutted each other's evaluations of Jennings and Stano. In upholding the trial

court's rejection of the two statutory mitigating factors, Section 921.141(6)(b),(f), Florida Statutes (1983), in those cases, this Court said that it is the trial court's duty to resolve conflicting decisions, and an appellate court will not reverse if there is substantial, competent evidence to support a trial court's ruling. Accord Mason v. State, 438 So.2d 374 (Fla. 1983); Johnson v. State, 442 So.2d 185 (Fla. 1984). While Bates accepts this holding, this case differs from the normal situation in that Dr. McMahon's testimony was unrebutted, uncontradicted, and uncontested.[1] In such instances, the trial court cannot simply ignore such unrebutted evidence.

> A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. 3 Am.Jur., 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety.

Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956)

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[1] McMahon's testimony was uncontested in that the state presented no witnesses to challenge it even though the trial court offered to let the state present rebuttal evidence (RR-63). While the state did cross-examine Dr. McMahon, she never retreated or modified her evaluation of Bates, and in fact, the state's cross-examination and the court's examination appear to be nothing more than arguing with the witness. See e.g. RR-96,106-107.

* * *

> Certainly, the trial court is not absolutely bound by expert opinion as to competency. On the other hand, courts should not ignore uncontested expert testimony particularly when strongly supported by other relevant evidence. Lane v. State, 388 So.2d 1022 (Fla. 1980).

Trucci v. State, 438 So.2d 396, 397 (Fla. 4th DCA 1983). See also Redondo v. Jessup, 426 So.2d 1146, 1147 (Fla. 3d DCA 1983). This exception to the normal appellate standard is especially compelling in capital cases with its extreme concern for imposing a correct sentence. The trial court should impose a sentence of death only if after weighing the aggravating and mitigating factors, it has found death the appropriate sentence.

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> * * *
>
> Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and chaneled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1972).

Thus because this is a capital case and because Dr.

McMahon's testimony was uncontradicted, the normal abuse of discretion standard is inapplicable. Instead, the court here erred as a matter of law in rejecting Dr. McMahon's expert opinion because her view of the death penalty "somehow colors her objectivity in the matter," and she had not made herself thoroughly acquainted with the facts of the case (RR-167). Holland, supra. As such, this Court is now correcting an erroneous application of a rule of law rather than looking for an abuse of discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The rule of law that the trial court ignored was that it must consider all relevant mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed. 2d 1, 102 S.Ct. 869 (1982). Consequently, the normal test for an abuse of discretion, whether reasonable men could differ as to the propriety of the court's action, id. at 1203, is inapplicable. Instead, if the trial court here applied the incorrect rule, reversal is mandated.

B. The Court was factually incorrect regarding McMahon's familiarity with the case and her "opposition" to the death penalty as affecting her opinion.

1. McMahon's familiarity with the case.

During the state's cross-examination and the court's examination of Dr. McMahon, Dr. McMahon admitted she had not seen the photographs of the victim (RR-81), talked with

investigators in the case, or read Bates' statements when questioned by the police (RR-88). Dr. McMahon, however, was familiar with the facts of this case. She had the presentence investigation report (RR-88) which was gathered from the records of the clerk of court and the state attorney's office (see PSI at page 1). She also had a copy of this Court's opinion which included the trial court's findings in support of the death sentence (RR-87). Finally, she had Bates' initial and reply briefs which gave a factual summary of the events surrounding this murder (RR-87-88). Significantly, the statement of the facts in Bates' initial brief told of the police officer's interrogation of Bates and Bates' subsequent alterations to his story. See Bates' initial brief at pages 5-6. To say that Dr. McMahon did not have a thorough factual basis for her opinion is simply in error.[2] She certainly had as much information as she would have had had she conducted a pretrial competency hearing.

Moreover, Bates is unaware of any case which says that a psychologist must talk with investigators or view photographs of the victim or crime scene in order to render a valid opinion. In a sense, the actual facts of the case assume minor importance as the object of the examination is the defendant's mental condition and not to determine the

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[2]Apparently, the trial court never read what Dr. McMahon had reviewed.

truth of what he said. Jones v. State, 289 So.2d 725, 727 (Fla. 1974). The cases Bates has found uniformly agree that the personal interview is a prerequisite in order to render a valid opinion of a subject's mental condition. Jones, Murphy v. State, 252 So.2d 385 (Fla. 3d DCA 1971), Rollerson v. United States, 343 F.2d 269, 274 (CA DC 1964) ("The basic tool of psychiatric study remains the personal interview..."). See, Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L.Rev. 427, 496 (1980).

Recently, the American Bar Association adopted criminal justice mental health standards, and Standard 7-3.11 presents the qualifications for testifying about a person's mental condition. Of particular significance is subparagraph (a)(iii):

> STANDARD 7-3.11. EXPERT WITNESSES: QUALIFICATIONS FOR TESTIFYING ABOUT A PERSON'S MENTAL CONDITION.
>
> (a) QUALIFICATIONS. EXPERT OPINION TESTIMONY ABOUT A PERSON'S MENTAL CONDITION IS DESIGNED TO ASSIST THE TRIAL FACTFINDER. BECAUSE SUCH TESTIMONY OFTEN ASSUMES EXTRAORDINARY IMPORTANCE IN CASES THAT INVOLVE A PERSON'S MENTAL CONDITION. NO WITNESS SHOULD BE QUALIFIED BY THE COURT TO PRESENT EXPERT OPINION TESTIMONY ON A PERSON'S MENTAL CONDITION UNLESS THE COURT DETERMINES THAT THE WITNESS:
>
> * * *
>
> (iii) HAS PERFORMED AN ADEQUATE EVALUATION, INCLUDING A PERSONAL INTERVIEW WITH THE INDIVIDUAL WHOSE MENTAL CONDITION

IS IN QUESTION, RELEVANT TO THE LEGAL AND CLINICAL MATTER(S) UPON WHICH THE WITNESS IS BEING CALLED TO TESTIFY.

American Bar Association, Standing Committee on Association Standards for Criminal Justice, Proposed Criminal Justice Mental Health Standards.

As the commentary makes clear, the standard rejects the hypothetical question and courtroom observation as being a legitimate sole basis for expressing an opinion upon a subject's mental condition.[3] The conclusion drawn is that the personal interview is crucial to making an evaluation, as it is from that meeting that the expert draws his conclusions. See Rollerson, supra, at 274.

In this case Dr. McMahon conducted a 5 1/2 to six hour evaluation of Bates (RR-70). That evaluation involved intellectual, personality and memory type evaluations (RR-71). Following that phase, Dr. McMahon conducted an "intensive

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[3] On the other hand, the United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 77 L.Ed.2d 1090, 102 S.Ct. 3383 (1984) held that a hypothetical question is an acceptable alternative to a personal examination. Id. at 903-905. The American Bar Association has rejected the hypothetical question alternative to the personal interview examination because of the incompleteness of the information available to put in the question. See Commentary to Standard 7-3.11, ABA Standing Committee on Association Standards for Criminal Justice, Proposed Criminal Justice Mental Health Standards. Nevertheless, if the hypothetical question can form the basis for an evaluation, surely the fact that Dr. McMahon, in this case, did not see the photographs or talk to investigators does not, as a matter of law, render her opinion inadmissible.

diagnostic interview." (RR-71). She also spent an hour with Bates just letting him tell his story (RR-71).

That she listened to Bates tell his version, however, does not mean she based her evaluation upon the assumption that what he told her was true. Cirack v. State, 201 So.2d 706 (Fla. 1967).

To the contrary, Dr. McMahon repeatedly said she accepted the jury's verdict and the facts supporting it.

> THE COURT: Why do you approach him on the avenue that even though a jury has found you guilty, I don't think you're guilty?
>
> THE WITNESS: I--Your Honor, I'm not sure where you got the idea I approached him from that point of view. I approached him from the point of view that he had committed this act. I mean, that's it; that's what has been found; that's what he's been sentenced for, that's it; and the man denies to me that he has done it, I can say, you know, a lot of things about that, but I can't make him tell me anything any different.

(RR-104) (see also RR-89-90,94,95).

In fact, Dr. McMahon said Bates deceived himself more than anyone else (RR-100).[4]

As in McKenzie v. State, 332 So.2d 48 (Fla. 2d DCA 1978) and Jones v. State, 289 So.2d 725 (Fla. 1974), it is evident that Dr. McMahon was "not interested in whether the defendant's statements to [her] are true or false.

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[4]That is, Bates adamantly denied committing the murder (RR-80,108,115) which is consistent with his dynamics (RR-109).

[She] merely evaluates the statements made by the defendant during the course of the interview. Jones at 727.

> Q Okay, and that decision, your expert opinion is based upon numbers and numbers of years of study and examination of what you have done throughout your career and what he told you?
>
> A And, the testing which goes beyond what he tells us.
>
> Q But, that's what he tells you is very important?
>
> A Is what?
>
> Q Very important.
>
> A What the individual says is oftentimes less important than the test material, okay, because they can distort, they can try and run a sham, or they can try to con, or they can try to do everything, and I'm assuming that many people in this situation are going to give self-serving statements; but they don't know what is a healthy versus unhealthy response on a Rorschach Block.

(RR-97).

Thus, assuming that Dr. McMahon did not have the facts of this case, that assumption would not have necessarily invalidated her opinion. Nevertheless, Dr. McMahon did have all the essential facts concerning this case when she conducted her personal interview with Bates. Thus the court was factually wrong when it said she did not have a thorough factual basis upon which to base her opinion of Bates, and the court also erred as a matter of law in rejecting her testimony because it assumed that a detailed

factual knowledge of the case was essential to render a valid opinion. That, however, has never been the law. See Jones, supra.

Accepting the court's rationale means that the examiner, before she conducts her examination, must examine all of the evidence in a case and talk with all the investigators involved before she can render a valid opinion of the defendant's mental condition. That requirement borders on the ludicrous. What relevance to Bates' mental condition did the photographs of the victim or of the crime scene in this case have to this case? (RR-81). Yet the trial court asked Dr. McMahon if she had seen them.[5] Perhaps by looking at the photographs, the trial court thought Dr. McMahon would soften her opinion of Bates' mental condition because of the terrible act Bates had done. But that would have then involved Dr. McMahon in the sort of forensic perjury that the court said she committed because of her position on the death penalty.

C. Dr. McMahon's "opposition" to the death penalty.

The prosecutor, immediately before Dr. McMahon was excused, asked the following questions:

> THE COURT: Okay, that's all of the questions I have.

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[5] Dr. McMahon clearly saw this murder as being very tragic (RR-119-120) and nothing in her testimony can even remotely suggest that she slanted her opinion because of some sympathy for Bates. See e.g. RR-100.

MR. DAVIS: I don't have any other questions, Your Honor.

MR. APPLEMAN: One question, Your Honor.

BY MR. APPLEMAN:

Q Do you believe in the death penalty?

A Do I believe in it?

Q Yes.

A It exists, I have to believe in it.

Q Do you agree with it?

A From a clinical point of view, no, sir. I don't think it does any good.

Q Personally?

A No.

MR. APPLEMAN: Thank you.

(RR-124-125).

The court then engaged Dr. McMahon in a discussion of the deterrent effect of the death penalty (RR-125-127,129-130). Apparently from this exchange, the court justified rejecting Dr. McMahon's opinion because

> I think her views on the death penalty somehow colors her objectivity in the matter.

(RR-163).

As a matter of fact, the court was wrong, and as a matter of law, the court erred in rejecting Dr. McMahon's testimony.

1. Dr. McMahon's "beliefs."

It is evident from Dr. McMahon's statements that her "opposition" to the death penalty was on a clinical, intellectual, abstract, or academic level and that her "opposition" had not interfered with her ability to perform objective evaluations. Her objectivity was most clearly demonstrated by the fact that she had performed 17 evaluations in connection with clemency hearings for death row inmates (R-125). These examinations typically went beyond the legal focus of sanity or competency, and she had the freedom to look at anything for use as possible clemency (RR-128). Surely, under such loose restrictions, if she wanted to express her opposition to the death penalty, this would have been the easiest place to do so. After all, this Court has rejected mere personality disorders as mitigation, Hargrave v. State, 366 So.2d 1 (Fla. 1979), Sireci v. State, 399 So.2d 964 (Fla. 1981), yet if Dr. McMahon were willing to express her "opposition" to the death penalty she could easily have done so by recommending clemency to people who have such disorders.

Instead, whatever her intellectual opposition to the death penalty may be, in 15 of those 17 clemency examinations, Dr. McMahon did not recommend clemency (RR-128). Obviously, along with Dr. McMahon's belief that the death penalty is not a deterrent statistically is the conviction that there are people for whom the death penalty law was

written. In short, her general opposition to the death penalty has not interfered with her objectivity.

If Bates has shown her objectivity, neither the court or the state made any effort to explain or specifically demonstrate how Dr. McMahon's beliefs in any way distorted her evaluation of Bates in this case. The state did not object to her qualifications as an expert (RR-70), Bystrom v. Equitable Life Assurance, 416 So.2d 1133 (Fla. 3d DCA 1982), and it only asked a couple of questions concerning her beliefs about the death penalty. Of those questions, none of them focused upon Dr. McMahon's examination in this case and how her opposition to the death penalty may have affected her evaluation in this case.

Similarly, the court never was able to link Dr. McMahon's general objections to the efficacy of the death penalty to this case. All it could say was that Dr. McMahon's opposition "somehow" colored her opinion. The court could point to no specific distortion due to her beliefs that significantly altered her evaluation. Rejecting her testimony because of her death penalty views, as a matter of law, was error.

2. The court's legal error

In Mann v. State, 420 So.2d 578 (Fla. 1982) this Court said that the trial court should make its findings of mitigation crystal clear. Conversely, if the court rejects,

in total, the unrebutted, uncontradicted testimony of an expert testifying at the penalty phase of a trial, those reasons for doing so should also be crystal clear.

This Court in State v. Dixon, 283 So.2d 1 (Fla. 1972) said that ultimately imposition of a death sentence should not be discretionary but based upon a reasoned judgment.

In this case, the trial court's reasons for rejecting Dr. McMahon's testimony do not have support in the record or the required crystal clarity. There is little reasoning evident in the court's rejection of Dr. McMahon's testimony, and it is obvious that the trial court rejected her opinion, not because it was defective, but because the court did not like it. Rejecting it for that reason, however, was completely arbitrary, and this Court should remand for resentencing or imposition of a life sentence. Good reasons exist for doing so.

D. The mitigating factors present

The court in resentencing Bates to death merely restated its original order concerning the presence of mitigating factors:

> After studying, considering and weighing all the evidence in the case, the Court makes the following findings of fact as to the mitigating circumstances.
>
> The Court has taken into account the testimony of the defendant and the defendant's father. The Court finds

> that the defendant has no significant history of prior criminal activity. The Court has considered all the possible mitigating circumstances listed under Florida Statute 921.141 (6) and any others that might apply. The Court finds, however, that the testimony and circumstances do not support any other mitigating circumstances. Even if the Court determined that each mitigating factor raised by the defendant had been established, that would not outweigh the overwhelming evidence of aggravating circumstances established by the testimony in this case.

(RR-41-42). Unlike the original sentencing hearing, however, the trial court at the resentencing hearing had significant new mitigating evidence that it chose not to consider. As a matter of law, this was error. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982).

1. Dr. McMahon's testimony

Dr. McMahon unequivocally said that the two statutory mitigating factors found in Section 921.141 (6)(b)(f), Florida Statutes (1983) applied to Bates.

> Q Would you say that Mr. Bates was under the influence of an extreme or significant emotional disturbance?
>
> A You mean at the time?
>
> Q At the time.
>
> A I have to say that based on what my understanding of his behavior was, the act, itself, I would have to say yes.
>
> Q Would you say that the capacity of Bates to appreciate the criminality of

> his conduct or to the conform to the requirements of law was substantially impaired?
>
> A Yes. All of these are within a reasonable degree of psychological probability.

(RR-85-86). This testimony was never challenged, rebutted, or contradicted by the state or court, yet the court chose to ignore it.

In Eddings v. Oklahoma, supra, the trial court rejected, as a matter of law, mitigating evidence of Eddings' troubled youth. In reversing the trial court's subsequent imposition of the death sentence, the United States Supreme Court said:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-115 (footnotes omitted).[6]

[6] The purpose of mitigating evidence is to ameliorate the enormity of a defendant's guilt. Eutzey v. State, 458 So. 2d 755 (Fla. 1984). Here, Dr. McMahon's testimony had obvious relevance to the correctness of the death sentence. It would have also had relevance on the issue of Bates' premeditation (RR-86). Squires v. State, 450 So.2d 208 (Fla. 1984).

Here, the trial court, by excluding Dr. McMahon's testimony, has refused to consider as a matter of law the two applicable statutory mitigating factors. In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court cited Eddings for the proposition that the trial court must consider all evidence offered in mitigation. The trial court in Pope had given serious consideration to the mitigating evidence as this Court said was demonstrated by reading the transcript of the court's proceedings and discussion of the evidence in its sentencing order.

Here no similar evidence of such consideration exists. Despite Dr. McMahon's testimony (and other mitigating evidence), the court's sentencing order makes no mention of it. In fact, the court's sentencing order at the resentencing was exactly the same one it had entered in its original sentencing (less, of course, the two invalid aggravating factors). Unlike the trial court in Pope, this Court did not seriously consider the offered mitigating testimony of Dr. McMahon.

On the other hand, if the trial court did consider Dr. McMahon's testimony, that fact is not clear. In Mann v. State, 420 So.2d 578 (Fla. 1982) a psychiatrist said that Mann met the two statutory mitigating factors found in Section 921.141(6)(b)(f), Florida Statutes (1981), yet the trial court did not expressly find those two mitigating factors. What mitigation the trial court did find was ambigious, and in remanding for a new

sentencing hearing, this Court said:

> The trial judge's findings in regard to the death sentence should be unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet that test.

Mann at 581.

At best, the trial court's findings in this case regarding the new mitigating evidence is ambiguous. Under the rationale of Mann, this case must be reversed for resentencing.

The trial court's rejection of Dr. McMahon's testimony also affected the weight that the court should have given the aggravating factors, especially Section 921.141(5)(h), Florida Statutes (1983) (especially heinous, atrocious, or cruel). Killings that are the direct product of an emotional rage or mental illness are not heinous, atrocious, or cruel. Huckaby v. State, 343 So.2d 29 (Fla. 1977); Halliwell v. State, 323 So.2d 557 (Fla. 1975). Murderers under the sway of passion or illness are presumably unable to enjoy the sufferings of others and though the method of killing is shocking, it is nevertheless not especially heinous, atrocious, or cruel because the mental or emotional turmoil causes the murder, not the defendant. Mann v. State, supra, Jones v. State, 322 So.2d 615 (Fla. 1976); Miller v. State, 332 So.2d 65 (Fla. 1976).

So it is in this case. In some way, Renee White triggered Bates, and in an emotional, uncontrollable eruption, he killed her.

> THE COURT: And, from that you find there's no premeditation in this case? You were emphatic about that.
>
> THE WITNESS: Your Honor, everything about this man would suggest that upon reflection he would not have done this.

(RR-111)

> Q He was able to fully form the conscious intent to do those particular acts, to rob her of her ring, to attempt to sexually assault her, and to remove her from that State Farm building?
>
> A I don't question that he was capable of doing those behaviors. I question the fully formed conscious intent. I would question that.

(RR-95)

> Q But, based upon that, you're able to say he was under diminished capacity at the time?
>
> A I'm saying that when this man becomes emotionally aroused, his ability to cognate, his ability to think clearly is severely impaired. He becomes disorganized.

(RR-97).

As heinous, atrocious, and cruel as this murder was, it is obvious that Bates' emotional condition controlled his acts. As such the murder was not especially heinous, atrocious, or cruel.

2. Bates' lifestyle

Bates does not have a criminal valid system (RR-76), and he is not criminally inclined (RR-109). Stronger, his values are in accord with those of average America (RR-76). Significantly, the evidence presented at the resentencing hearing supported this conclusion.

Bates was married, and he had two children. At the time of the crime he was employed (and had been employed for two years). His supervisor, Raymond O'Brien, trusted Bates (RR-139); Bates routinely delivered eight to twenty-two thousand dollars worth of paper products in a route that extended from Tallahassee to Panama City (RR-140). While Bates also handled the money, Mr. O'Brien said Bates never stole any products or money from him (RR-140). His customers never complained about him (RR-139), and he was polite (RR-139). Bates, in short, was an honest, hard-working man.

What is more his military career with the National Guard was, if not distinguished, average. Bates was trained as an infantryman and had a six year enlistment at the end of which he was discharged honorably (RR-143-144). As an enlisted man with the grade of specialist fourth class, Bates was never court-martialed or otherwise disciplined (RR-143-144). In short, he served an average tour of duty.

His neighbors, friends, and acquaintances all uniformly saw him as a good boy as he grew up (RR-133-138). He was a "typical youngster." (RR-135). He never was violent and was always courteous and polite (RR-135).

In sum, Bates was an average man trying to provide for himself and his family. Under Eddings, the fact that the trial court said that it had heard nothing new (RR-164) when obviously it had is reversible error. What the resentencing hearing clearly established were three mitigating factors in addition to the one (no significant criminal history) the court had found in the first sentencing hearing. In addition, there was evidence Bates could not have legally premeditated this murder (RR-111). Finally, in light of the explosion of Bates' emotional coiled spring, the three remaining aggravating factors shrink in significance.

Bates, therefore, asks this Honorable Court to reverse the trial court's sentence of death and remand with instructions to impose a sentence of life without the possibility of parole for 25 years.

VI CONCLUSION

Based upon the arguments presented here, Bates respectfully asks this Honorable Court to reverse the trial court's sentence of death and either remand for a new sentencing hearing or remand with instructions to impose a sentence of life without the possibility of parole for 25 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand delivery to Mr. Gregory G. Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Kayle Barrington Bates, #088568, S-3-N-5, Post Office Box 747, Starke, Florida, 32091, this 6th day of January, 1986.

DAVID A. DAVIS