IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

v. CASE NO. 67,422

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I STATEMENT OF THE CASE AND FACTS

Bates relies upon the statement of the case and facts as presented in his initial brief.

II ARGUMENT

ISSUE PRESENTED

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

The state's argument has two parts. First, the court erred in allowing new mitigating evidence to be presented at this resentencing hearing. Second, the court could ignore this evidence. For several reasons, the state's arguments are unpersuasive.

As to the argument that the trial court should not have heard new mitigating evidence, the reply is quite easy. Judge Turner wrote this Court a letter (see Appendix 1) asking it for guidance regarding resentencing, and this Court responded by refusing "to give any assistance." (T 65) (See Appendix 2). Judge Turner, in accordance with this Court's response, allowed Bates "to present any mitigating factors which he care[d] to present ... " (RR 14). It is unfair to Judge Turner and Bates for this Court to now say that he was wrong in permitting Bates to present additional mitigating evidence when its response to his inquiry did not say he could not do so. Moreover, if Judge Turner erred, Bates is the one who suffers, as he relied upon the trial court ruling allowing him to present this new mitigating evidence.

Moreover, even if the trial court clearly erred in permitting Bates to present this evidence, is this Court now going to close its eyes to the strong mitigating evidence?

If a trial court is a "search for the truth" what does justice say when this Court ignores relevant evidence bearing upon the appropriateness of a death sentence? For this Court to accept the state's argument, it must find the mote in Judge Turner's eye but ignore the beam in its own.

Regarding the court's treatment of the evidence, the state says the trial court considered the evidence but refused to find mitigation Bates said was proven. Appellee's brief at pages 9-10. The only evidence it can cite for this position is the court's statement that it considered all of the evidence (RR 39-42). The problem with this statement is that it is only part of the court's sentencing order, and except for small modifications, that order was the same one it had used in its original sentencing. While that fact does not, by itself, render the new sentence invalid, it does support Bates contention that the trial court did not consider the new evidence presented at the resentencing hearing. All the original sentencing order and the resentencing order mentioned are the father's testimony in Bates lack of significant criminal history. The court made absolutely no mention of Dr. McMahon's testimony or that of Bates' employer and friends, and from reading the resentencing order, one could not deduce that Bates had presented any additional mental mitigating evidence. From the court's summary of dismissal of Dr. McMahon's testimony for the flimsiest of reasons omit(R 163), it is clear that the trial court did not consider her testi-

mony. This is evident by the absence of any discussion of it in its sentencing order. The trial court's sentencing order thus fails for two reasons: it presents no reasons for rejecting Bates' mitigating evidence and as such it lacks that unmistakable clarity required by this Court. Mann v. State, 420 So.2d 578 (Fla. 1982). Second, it was not the product of reasoned judgment because it had no rational reasons for rejecting the unrebutted testimony of the new mitigating evidence. State v. Dixon, 283 So.2d 1 (Fla. 1972).

The state has cited several cases to support its argument that the trial court is bound only to consider mitigating evidence, not find it. Card v. State, 453 So.2d 17 (Fla. 1984). Riley v. State, 413 So.2d 1173 (Fla. 1982); Porter v. State, 429 So.2d 293 (Fla. 1982) But, if mitigating evidence is present and is unchallenged, unrebutted and not even seriously contested, can the trial court really only consider it but not find it as mitigating evidence and do so without presenting any legitimate reasons for rejecting it? Is not this the height of whimsey, caprice, and arbitrariness to have heard unchallenged and unrebutted evidence of mitigation but simply refuse to find that mitigation because the trial judge does not want to find it? Where is the reasoned judgment that Dixon demands? If jurors are told

that they must obey the law,[1] should not a judge also obey it? Certainly the implication of the decisions in Lockett v. Ohio, 438 U.S. 586 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) and Eddings v. Oklahoma, 455 U.S. 104 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) is that if a court must consider mitigating evidence, it must use that evidence in determing the appropriateness of a sentence. That is, the trial court must consider this evidence when it determines whether to impose a life or death sentence and not merely consider whether it should consider it as a mitigating evidencew. If evidence or a mitigating factor is present, and it is unrebutted or unchallenged, mitigation should be found.

That is not to say the defendant, as a result of finding that mitigation, be sentenced to life. Instead, it really means that the trial judge will have to do what he should do anyway: weigh the aggravating factors against the mitigating factors. Certainly conducting such a complete character analysis is not easy, and that may explain Florida's preference for requiring the trial judge rather than the jury to perform this duty. Proffitt v. Florida, 428 U.S. 242 49 L.E.2d 913, 96 S.Ct. 2960 (1976). But that difficulty does not justify allowing trial judges to ignore mitigating evi-

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[1] "In closing, let me remind you that it is important that you follow law spelled out in these instructions in citing your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate rules we all share." Instruction 2.09, Standard Instructions in Criminal Cases.

dence in determining the appropriate sentence if it merely "considered" it.

What the state is urging this Court to do in this case is to overlook the trial court's obvious ignoring of mitigating evidence. If Florida's death penalty scheme, however, is to retain a constitutional as moral viability, this Court must rise above the sematic games the state is encouraging this Court to play, and require trial courts to find as well as consider all rebutted and unchallenged mitigating evidence. To do otherwise, reduces Florida's capital sentencing procedure to judicial exercise nit picking rather than assuring justice is done.

III CONCLUSION

Based upon the arguments presented here and in Bates initial brief, 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 has been furnished by hand to Assistant Attorney General Gregory G. Costas, The Capitol, Tallahassee, Florida, 32302, this 25th day of February, 1986.

DAVID A. DAVIS
Assistant Public Defender