In the Supreme Court of Florida

KAYLE B. BATES,

Appellant,

v.

CASE NO.: SC2023-1683
CAPITAL CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "PCR 2023", followed by the appropriate page number. Appellant, KAYLE BARRINGTON BATES, the defendant in the trial court, will be referred to as appellant, the defendant, or by name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court does not typically conduct an oral argument in the appeals of successive postconviction motions and should not do so in an appeal of a motion to interview a juror that was filed as the first step to the filing of a successive postconviction motion.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal, in a capital case, of a denial of a motion to interview a juror who served on the guilt phase jury in 1983.

Facts of the crimes

On the afternoon of June 14, 1982, Janet White, a State Farm Insurance clerk, returned from lunch around 1:00 p.m., as was her normal practice. As she came into the office, she answered the phone. Unknown to her, she was not alone. Kayle Barrington Bates had stopped by the office earlier that day, talked with her, and left. Bates had returned to the area and parked his truck in the woods some distance behind the building where it could not be seen and waited. While she was out at lunch, Bates had broken into the office and was there waiting for her to return. When Bates surprised White, she let out a bone-chilling scream and fought for her life. He overpowered her and forcibly took her from the office building to the woods where he savagely beat, strangled, and attempted to rape her, leaving approximately 30 contusions, abrasions, and lacerations on various

parts of her face and body. *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1283 (11th Cir. 2014).

Bates was found at the scene of the crime and he had the victim's blood on his clothing. *Bates v. State*, 3 So.3d 1091, 1097 (Fla. 2009). He had the victim's ring in his pocket. *Id.* at 1097. A watch pin found in the office was consistent with Bates' watch which was missing a pin. His hat was found near the victim's body as was a buck knife case of the type his wore. There were two green fibers found on the victim's clothing that were consistent with Bates' pants. *Id.* Bates gave various different confessions. *Id.*

Procedural history

Bates was convicted of first-degree murder, armed robbery, attempted sexual battery, and kidnapping. *Bates v. State*, 465 So.2d 490 (Fla. 1985). Bates raised several guilt phase issues in his direct appeal in the Florida Supreme Court, none of which involved the voluntariness of his confession. The Florida Supreme Court affirmed the convictions but remanded for reconsideration of the trial court's

sentencing order. *Bates*, 465 So.2d at 493. On remand, the trial court sentenced Bates to death again and the Florida Supreme Court affirmed the death sentence. *Bates v. State*, 506 So.2d 1033 (Fla. 1987).

The state postconviction court granted relief on a claim of ineffectiveness of trial counsel. *Bates v. Dugger*, 604 So.2d 457 (Fla. 1992).

At the second penalty phase, Bates was represented by Thomas H. Dunn and Harold Richmond. On May 25, 1995, the second jury recommended a death sentence by a vote of nine to three. *Bates v. State*, 750 So.2d 6, 9 (Fla. 1999). The trial court found three aggravating factors: (1) capital murder committed during an enumerated felony (kidnapping and attempted sexual battery); (2) pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel (HAC). *Bates*, 750 So.2d at 9. The trial court found two statutory mitigating circumstances: (1) no significant history of prior criminal history which it gave significant weight; and (2) the age mitigator based on Bates' age of being twenty-four at the time of the

murder which it gave little weight. *Id.* at 9. The trial court also found eight nonstatutory mitigating circumstances.[1] On July 25, 1995, the trial court again sentenced Bates to death.

In the direct appeal of the resentencing, the Florida Supreme Court again affirmed the death sentence. *Bates*, 750 So.2d at 18.

Bates filed a petition for writ of certiorari in the United States Supreme Court regarding the resentencing. On October 2, 2000, the United States Supreme Court denied review. *Bates v. Florida*, 531 U.S. 835 (2000) (No. 99-9526).

On September 10, 2001, Bates filed an initial motion for postconviction relief in state court. On September 24, 2004, Bates filed an amended initial postconviction motion raising eighteen (18)

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[1] The eight nonstatutory mitigating circumstances were: (1) some emotional distress at the time of the murder which it gave significant weight; (2) ability to conform his conduct to the requirements of the law was impaired to some degree which it also gave significant weight; (3) family background which it gave some weight; (4) national guard service which it gave little weight; (5) Bates was a dedicated soldier and patriot which it gave little weight; (6) low-average IQ which it gave little weight; (7) Bates' love for his wife and children and his being a supportive father which it gave some weight; and (8) his being a good employee which it gave little weight. *Id.* at 9.

claims. (2PCR Vol. IV 528-612). On October 26, 2004, the State filed an answer. (2PCR Vol. IV 616-682). The postconviction court conducted a case management conference, commonly referred to as a *Huff* hearing. *Huff v. State*, 622 So.2d 982 (Fla. 1993). On October 16-17, 2006, the postconviction court held an evidentiary hearing regarding two claims of ineffectiveness related to mitigation. The trial court denied the amended initial postconviction motion.

On September 30, 2003, as part of the initial state postconviction proceedings, Bates filed a rule 3.853 motion for DNA testing of several items of evidence. (2PCR Vol. II 325-330). The State filed a response to the motion opposing DNA testing due to the strength of the evidence against Bates including his confession. (2PCR Vol. III 357-373). On March 18, 2004, the state postconviction court, Judge Sirmons presiding, denied the first motion for DNA testing. (2PCR Vol. III 451-457).

Bates appealed the denial of postconviction relief and the denial of the motion for DNA testing to the Florida Supreme Court. *Bates v. State*, 3 So.3d 1091 (Fla. 2009). The Florida Supreme Court affirmed

the denial of postconviction relief and affirmed the denial of the first motion for DNA testing. Bates also filed a state habeas petition raising two claims of ineffective assistance of appellate counsel which the Florida Supreme Court denied. *Bates*, 3 So.3d at 1106-07.

Terri Lynn Backhus and Suzanne Myers Keffer of Capital Collateral Regional Counsel – South (CCRC-S), represented Bates in the postconviction proceedings in the state trial court; in the postconviction appeal, and in the state habeas proceedings in the Florida Supreme Court.

On March 13, 2009, Bates, represented by Terri Backhus, filed a § 2254 petition for writ of habeas corpus in the federal district court raising seventeen claims, none of which involved a claim regarding the voluntariness of his confession. *Bates v. McNeil*, 5:09–cv–00081–MCR (N.D. Fla). The federal district court denied habeas relief. The district court, as part of its prejudice analysis regarding one of the claims, noted the "overwhelming" evidence of Bates' guilt including his confession; his presence at the scene just minutes after the crime; the victim's ring in his pocket; a watch pin found inside the victim's State

Farm office and Bates' watch having a missing pin; his hat near the victim's body; and the knife case found near the stabbed victim being the exact type that Bates wore. (Doc #30 at 11).

The Eleventh Circuit affirmed the denial of federal habeas relief. *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1284 (11th Cir. 2014). The Eleventh Circuit noted that the "evidence of guilt presented against Bates during the three-day trial was overwhelming." *Bates*, 768 F.3d at 1284.

Bates then filed a petition for writ of certiorari in the United States Supreme Court regarding the denial of federal habeas relief. The United States Supreme Court denied review on October 5, 2015. *Bates v. Jones*, 136 S.Ct. 68 (2015) (No. 14-9864).

On January 8, 2016, Bates represented by Seth Miller of the Innocence Project of Florida, filed a second postconviction motion for DNA testing. The motion requested DNA testing of many of the same items as the first motion for DNA testing. On January 28, 2016, the state trial court, Judge Fensom presiding, ordered the State to respond to the second motion for DNA testing. On March 24, 2016,

the State responded to the second motion for DNA testing. The State pointed out that the law-of-the-case doctrine applied regarding all of the items listed in the first motion for DNA testing. The State also argued that DNA testing of the few new items should be denied due to the strength of the State's case, including Bates' confession. The state trial court denied the second motion for DNA testing.

Bates, represented by the Innocence Project of Florida and CCRC–S, appealed the denial of his second DNA motion to the Florida Supreme Court. The Florida Supreme Court held that Bates was procedurally barred from seeking postconviction DNA testing of same items that were in the previous motion for DNA testing. *Bates v. State*, 218 So.3d 426 (Fla. 2017) (SC16-1178).[2] The Florida Supreme Court also addressed the new additional items that had not been listed in the first DNA motion.[3] The Florida Supreme Court observed that the

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[2] The same items were: (1) the victim's panties; (2) the victim's vaginal swab; (3) semen smear slides; (4) the victim's skirt and hosiery; (5) an acid phosphatase test; (6) the victim's vaginal washing; and (7) the blue cord used to strangle the victim. *Bates*, 218 So.3d at 427 (listing items sought to be DNA tested for the second time).

[3] The additional items were: (1) debris from the victim's clothing, including a Caucasian hair which Bates alleged could not be his

evidence of Bates' guilt was "overwhelming" and then described the evidence. *Bates*, 218 So.3d at 427-28 (citing *Bates*, 3 So.3d at 1099). The Florida Supreme Court affirmed the lower court's order denying the second motion for postconviction DNA testing. *Id*. at 428.

On June 6, 2019, Bates, represented by Sarah S. Butters and other attorneys from the firm of Holland & Knight, filed a successive state habeas petition raising claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *Bates v. Jones*, SC16-1199. The State moved to strike the habeas petition because it was filed by attorneys that were not postconviction counsel of record. The Florida Supreme Court granted that motion and the successive state habeas petition was dismissed.

On October 21, 2016, Bates, represented by Capital Collateral Regional Counsel - South (CCRC-S) and pro bono counsel, Sarah Butters, filed a first successive postconviction motion raising claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). On November 10, 2016, the State filed an

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because he is African American; and (2) clippings of the victim's fingernails.

answer. On December 2, 2016, the trial court held a case management conference. After the case management conference, Bates filed a motion to file a supplemental postconviction motion based on a recently issued Florida Supreme Court case. The State filed an objection. On February 10, 2017, the trial court granted the motion allowing the filing of a supplemental briefing on the issue of the retroactivity of *Hurst*. On February 10, 2017, CCRC-S and pro bono counsel filed a memorandum of law which was 38 pages. On February 10, 2017, the trial court struck the memorandum because it was over 25 pages, in violation of Rule 3.851(e)(2). On March 2, 2017, Bates filed amended memorandum of law in compliance with the page limitation in the applicable rule of court. On March 7, 2017, the State filed an answer to the amended memorandum. On March 23, 2017, the trial court held a second case management conference. On April 10, 2017, the state postconviction court denied the successive postconviction motion, ruling that *Hurst* was not retroactively applicable to Bates.

The Florida Supreme Court affirmed the trial court's denial of the first successive postconviction motion based on *Hurst*. *Bates v. State*, 238 So.3d 98 (Fla. 2018) (No. SC17-850). The Florida Supreme Court also denied a state habeas petition raising *Hurst*-related claims. *Bates v. State*, 238 So.3d 98 (Fla. 2018) (No. SC17–1224). The Florida Supreme Court denied *Hurst* relief on non-retroactivity grounds because Bates' death sentence became final in 2000, which was before *Ring v. Arizona*, 536 U.S. 584 (2002), had been decided. *Bates*, 238 So.3d at 99 (citing *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017)).

Procedural history of current motion to interview

On May 31, 2023, Scott Gavin of CCRC–S, filed a motion to interview Juror Hubert Donald Gilmore, who served as a juror in the 1983 trial. (PCR 2023 at 41-48). The motion asserted that Gilmore's second cousin was married to the victim's sister. (PCR 2023 at 43,¶5.) The motion to interview asserted that Gilmore never disclosed his family connection to the victim during jury selection. (PCR 2023 at 45, ¶10 citing T. 1217, 1222, 1225, 1258, 1264, 1282, 1286, 1311,

1314,1345, 1367, 1372). Juror Gilmore stated during voir dire that he did not know the victim. (PCR 2023 at 45,¶10 citing T. 1345). Juror Gilmore also stated during voir dire that neither he nor any relative of his "had ever been the victim of a crime." (PCR 2023 at 85).

On June 2, 2023, the State filed a response to the motion to interview Juror Gilmore. (PCR 2023 at 49-71). The State argued that the motion was untimely under Florida Rule of Criminal Procedure 3.575, which requires any motion to interview a juror be filed within ten days. (PCR 2023 at 57-58). The State also asserted that the motion to interview did not contain sufficient allegations to warrant an interview of a juror whose jury service was completed nearly forty years ago. (PCR 2023 at 58). The State asserted that only "extreme" allegations of juror bias, such as the racial bias at issue in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), warranted juror interviews at the postconviction stage. (PCR 2023 at 62-64).

On June 20, 2023, CCRC-S filed a reply. (PCR 2023 at 72-80). The reply argued against the proposed standard of *Pena-Rodriguez* being applied in postconviction litigation. (PCR 2023 at 72-73,75). The reply

argued the normal standard that applies in direct appeals for motion to interview a juror should apply in postconviction litigation, relying on a direct appeal case. (PCR 2023 at 73 citing *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001)). The reply argued that the Florida Supreme Court "allowed" juror interviews in a capital postconviction case citing *Martin v. State*, 322 So.3d 25 (Fla. 2021).(PCR 2023 at 73-74). The reply also pointed that at Bates' trial, a prospective juror informed the court that his wife's first cousin was Randy White, the victim's husband and the trial court "almost immediately excused that prospective juror." (PCR 2023 at 73, n.1 citing T. 1288). The reply argued that *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), was the "clearly established federal law," ignoring the even more on point case of *Pena-Rodriguez v. Colorado* is also "clearly established federal law" and that both *McDonough Power Equip* and *Pena-Rodriguez* were direct appeal cases, not postconviction cases. (PCR 2023 at 74-75). The reply also addressed the timeliness of the motion to interview arguing that there was "good cause" for not filing the motion within ten days. (PCR 2023 at 77-78). While stating that

Bates "could not have discovered" the juror's family tree earlier, as the trial court noted, Bates never established the starting date for his discovery. (PCR 2023 at 77). The reply also addressed the State's concern regarding such motions being filed decades after the trial would lead to juror harassment, especially in capital cases, by arguing that in "no context" does asking a former juror if they knew they were related to the victim of the crime "amount to juror harassment." (PCR 2023 at 78). But counsel ultimately admitted that granting a motion to interview one juror will lead to additional motions to interview the remaining jurors in the same case. (PCR 2023 at 78-79).

On November 6, 2023, the state postconviction court denied the motion to interview the juror. (PCR 2023 at 83-88).

On November 20, 2023, CCRC-S filed a motion for rehearing. (PCR 2023 at 91-105). The rehearing argued that no affidavit was required to file a motion to interview, despite the postconviction court ultimately overlooking that requirement. (PCR 2023 at 92-97). The rehearing also argued the timeliness of the motion relying on the one-year time frame for newly discovered evidence claims. (PCR 2023 at

97-100). On the merits, the rehearing asserted that his due process rights were violated. (PCR 2023 at 100-104).[4]

On December 21, 2023, the postconviction court summarily denied the rehearing. (PCR 2023 at 131).

On December 4, 2023, Bates, represented by CCRC–S, filed a notice of appeal. (PCR 2023 at 106-108). This appeal follows.

[4] On December 13, 2023, the State addressed the issues raised in the rehearing in its notice to the trial court of the stay entered by this Court pending its ruling on the rehearing. (PCR 2023 at 122-129).

SUMMARY OF THE ARGUMENT

ISSUE I

Bates asserts the postconviction court abused its discretion by denying the motion to interview Juror Hubert Donald Gilmore. The motion alleged that Juror Gilmore's second cousin was married to the victim's sister and that the juror failed to disclose that family connection during jury selection. But, as the postconviction court properly concluded, the motion to interview the juror was untimely. The rule of court governing juror interviews, Florida Rule of Criminal Procedure 3.575, requires any motion to interview be filed within ten days of the verdict, unless good cause is shown. The guilty verdict at issue was rendered in January of 1983. The motion was filed over 40 years late. In postconviction proceedings, Bates must prove that the juror was actually biased against him, not merely that he failed to disclose information regarding a distant family connection by marriage under this Court's decisions in *Martin v. State*, 322 So.3d 36 (Fla. 2021), and *Boyd v. State*, 324 So.3d 908 (Fla. 2021). But, as the trial court properly found, there was "no evidence of actual bias" on the

part of Juror Gilmore based on the marriage of his second cousin. This Court should clarify that only "extreme" allegations of juror bias, such as the racial bias at issue in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), warrant juror interviews at the successive postconviction stage to prevent juror harassment and invasion of privacy. The postconviction court did not abuse its discretion in denying the untimely and unwarranted motion to interview a juror who served over 40 years ago.

ISSUE II

Bates asserts that Rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar violates the Fifth, Sixth, Eighth, and Fourteenth Amendments in addition to violating the right of access to courts and the right to habeas corpus under both the United States constitution and the state constitution. This issue is not preserved because it was not raised as a separate claim below nor did Bates obtain a ruling from the postconviction court on the constitutionality of Rule 4–3.5(d)(4). Furthermore, the constitutional challenge to Rule

4–3.5(d)(4) is barred by the law of the case doctrine. Bates previously raised a similar constitutional challenge in a prior postconviction appeal. Alternatively, the challenge is meritless under this Court's precedent. This Court has consistently and repeatedly rejected constitutional challenges to Rule 4–3.5(d)(4) for decades. Moreover, the rule violates neither the access to courts provision or the habeas provision of either the federal or state constitution.

ARGUMENT

ISSUE I

Whether the Postconviction Court Abused its Discretion in Denying the Untimely Motion to Interview Juror Gilmore, Who Served as a Juror at the 1983 Trial? (Restated)

Bates asserts the postconviction court abused its discretion by denying the motion to interview Juror Hubert Donald Gilmore. The motion alleged that Juror Gilmore's second cousin was married to the victim's sister and that the juror failed to disclose that family connection during jury selection. But, as the postconviction court properly concluded, the motion to interview the juror was untimely. The rule of court governing juror interviews, Florida Rule of Criminal Procedure 3.575, requires any motion to interview be filed within ten days of the verdict, unless good cause is shown. The guilty verdict at issue was rendered in January of 1983. The motion was filed over 40 years late. In postconviction proceedings, Bates must prove that the juror was actually biased against him, not merely that he failed to disclose information regarding a distant family connection by marriage under this Court's decisions in *Martin v. State*, 322 So.3d 36 (Fla.

2021), and *Boyd v. State*, 324 So.3d 908 (Fla. 2021). But, as the trial court properly found, there was "no evidence of actual bias" on the part of Juror Gilmore based on the marriage of his second cousin. This Court should clarify that only "extreme" allegations of juror bias, such as the racial bias at issue in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), warrant juror interviews at the successive postconviction stage to prevent juror harassment and invasion of privacy. The postconviction court did not abuse its discretion in denying the untimely and unwarranted motion to interview a juror who served over 40 years ago.

The postconviction court's ruling

The postconviction court denied the motion to interview the juror. (PCR 2023 at 83-88). The postconviction court noted that Bates had recently filed a motion to interview Juror Hubert Donald Gilmore who served as a juror during the 1983 trial. (PCR 2023 at 83). But, the lower court noted, the defendant had not provided the date on which he claimed "another inmate informed him that one of his jurors was

related to the victim" in the motion to interview. (PCR 2023 at 83-84). Instead, the motion to interview stated that Bates' federal habeas counsel, after conducting genealogy research, had determined, on June 22, 2022, that Juror Gilmore's second cousin was married to the victim's sister at the time of the trial. (PCR 2023 at 84). Bates argued that Juror Gilmore's failure to disclose this family connection as well as his answering no to the question of whether he or a relative had ever been the victim of a crime gave him reason to believe the verdict was subject to legal challenge as required to file a motion to interview a juror. (PCR 2023 at 84).

The postconviction court noted that the State responded that the motion to interview was untimely and that the allegations did not warrant a juror interview. (PCR 2023 at 84).

The postconviction court found the motion to interview was untimely. (PCR 2023 at 85-86). The lower court observed that Rule 3.575 required motions to interview be filed within 10 days of the verdict, unless "good cause" is shown. (PCR 2023 at 85-86).[5] The

[5] The postconviction court noted that Rule 3.575 required motions to interview jurors either be under oath or accompanied by

lower court noted that the motion "was filed approximately 40 years" after the trial and more than one year after Bates learned of the alleged "distant" family relationship between Juror Gilmore and the victim. (PCR 2023 at 86 & n.1). The lower court noted that Bates asserted that he could not have learned that the family connection between Juror Gilmore and the victim's sister because the sister, Mary Lou Floyd, had assumed the last name of Gilmore upon her marriage, unless he received direct information from another person, such as the inmate. (PCR 2023 at 86). But even assuming that was sufficient good cause, the lower court reasoned, the motion was still untimely under Rule 3.575, because there was nearly a year between federal counsel's discovery of the information on June 2, 2022, and the filing of the motion on May 31, 2023. (PCR 2023 at 86). The lower court relied upon *Belcher v. State*, 9 So.3d 665 (Fla. 1st DCA 2009), which held that a motion to interview was untimely under the Rule 3.575 because counsel waited more than a month after learning of potential misconduct to raise the issue and upon the trial court's order in *State*

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an affidavit but "elected to overlook" this deficiency. (PCR 2023 at 85).

v. Dailey, 2019 WL 8195120; No. 521985CF00708XXXXNO (Fla. 6th Cir. Ct. Oct. 14, 2019), which ruled that defendant could not wait until after his death warrant was signed to seek to interview jurors where information had been known to defense counsel for over two years. (PCR 2023 at 86).

The postconviction court noted that, under this Court's recent decision in *Martin v. State*, 322 So.3d 25, 34-35 (Fla. 2021), postconviction claims of jury misconduct require a showing of: (1) whether there is a sufficient claim of dishonesty by the juror at issue and (2) whether the alleged dishonesty established the juror's "actual bias against the Defendant." (PCR 2023 at 85).

Alternatively, construing the claim as being a claim of newly discovered evidence, the postconviction court again found the motion to be untimely. (PCR 2023 at 86). Relying on this Court's decision in *Byrd v. State*, 14 So.3d 921, 924 (Fla. 2009), the lower court concluded that the motion was not filed within one year of when the

claim could have been discovered with due diligence, as required for a claim of newly discovered evidence to be timely. (PCR 2023 at 86).[6]

The postconviction court then addressed the legal sufficiency of the allegations in the motion to interview the juror. (PCR 2023 at 86-87). The postconviction court noted that it needed to determine if the postconviction claim was a "sufficient claim of dishonesty," and, if so, if the dishonesty resulted in the "juror's actual bias against the Defendant." (PCR 2023 at 86). The lower court concluded that claim failed "as to both considerations." (PCR 2023 at 86).

The lower court determined that Bates had not established that Juror Gilmore was dishonest during voir dire. (PCR 2023 at 86-87). The lower court observed that Bates had failed to assert that Juror Gilmore was "even aware" of this distant relationship with his second cousin's wife or had knowledge of the wife's relationship to the victim and concluded any such claim was "speculative." (PCR 2023 at 87). So, there was "no evidence" to suggest that Juror Gilmore was

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[6] This finding was presumably based on the lower court's earlier observation that the motion did not include the date the inmate had informed Bates that one of the jurors was related to the victim. (PCR 2023 at 83-84).

dishonest when he responded in the negative to the question of "whether he or a relative had ever been the victim of a crime." (PCR 2023 at 87). The lower court noted the ambiguity of the word "relative" and how far distant a family connection the term was meant to encompass. (PCR 2023 at 87). The postconviction court concluded that Juror Gilmore's answer, "even if mistaken," did rise to the "level of dishonesty" that entitled a defendant to relief. (PCR 2023 at 87).

Additionally, the lower court also concluded that Bates had not established any actual bias against Bates on the part of juror Gilmore. (PCR 2023 at 87). The postconviction court stated there was "no evidence of actual bias" on the part of the juror. (PCR 2023 at 87).

The postconviction court noted the competing interests at stake between a fair trial and the policy against jury harassment. (PCR 2023 at 87 citing *State v. Hamilton*, 574 So.2d 124, 130 (Fla. 1991)). The postconviction court explained that, under Florida Rule of Criminal Procedure 3.575, a party who has reason to believe that the verdict may be subject to legal challenge may move to interview a juror, but that Florida law has a "strong public policy" against litigants

harassing jurors and upsetting verdicts and "allows juror interviews only in limited circumstances." (PCR 2023 at 84). The postconviction court, quoting *Tanner v. United States*, 483 U.S. 107, 119-21 (1987), noted it was doubtful the "jury system could survive" routine postverdict investigation into juror misconduct and such inquiries made "for the first time days, weeks, or months after the verdict," would "seriously disrupt" finality and that the jury system would be "undermined by a barrage of postverdict scrutiny of juror conduct." (PCR 2023 at 84-85). The postconviction court, quoting this Court in *Devaney v. State*, 717 So.2d 501, 505 (Fla. 1998), noted that permitting juror interviews "would sow the seeds for the destruction" of the jury system." (PCR 2023 at 85). The lower court noted improper inquiry of jurors would poorly serve the ends of justice, obstruct finality, and cheapen the investment made by the jurors in their verdict. (PCR 2023 at 87-88). The lower court observed the juror interviews "are necessarily and understandably limited to rare circumstances" but concluded that this case was not that rare case. (PCR 2023 at 88). The postconviction court observed, "it would

certainly be unreasonable to interrupt the life of Juror Gilmore" to question him "about a relationship that he may not know" anything about or how it would relate to the jury service that "he performed over forty years ago," characterizing such an interview as constituting "needless prying and harassment." (PCR 2023 at 88). For those reasons, the postconviction court denied the motion to interview Juror Gilmore. (PCR 2023 at 88).

Preservation

The issue is preserved. § 924.051(1)(b), Fla. Stat. (2022); § 924.051(3), Fla. Stat. (2022). This Court's "precedent is clear that to be preserved, the issue or legal argument must be raised and ruled on by the trial court." *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). Bates filed a motion to interview a juror and properly obtained a ruling from the postconviction court denying that motion. Therefore, the issue is preserved.

Standard of review

The standard of review of a motion to interview a juror is an abuse of discretion. *Joseph v. State*, 336 So.3d 218, 236 (Fla. 2022), *cert. denied*, *Joseph v. Florida*, 143 S.Ct. 183 (2022); *Foster v. State*, 132 So.3d 40, 65 (Fla. 2013); *Johnston v. State*, 63 So.3d 730, 739 (Fla. 2011); *Anderson v. State*, 18 So.3d 501, 519 (Fla. 2009) (citing *Marshall v. State*, 976 So.2d 1071, 1077 (Fla. 2007)); *see also United States v. Nerey*, 877 F.3d 956, 972 (11th Cir. 2017) (citing *United States v. Cuthel*, 903 F.2d 1381, 1382 (11th Cir. 1990)); *United States v. Riley*, 544 F.2d 237, 242 (5th Cir.1976)). This Court has repeatedly explained over the years that a trial court abuses its discretion "only when no reasonable person would take the view adopted by the trial court." *Figueroa-Sanabria v. State*, 366 So.3d 1035, 1048 (Fla. 2023) (quoting *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980)); *Wells v. State*, 364 So.3d 1005, 1013 (Fla. 2023), *cert. denied*, *Wells v. Florida*, 144 S.Ct. 385 (2023).

A trial court denying a motion to interview a juror, who served on jury nearly four decades ago, involving a claim of juror bias based on

a relationship created by the marriage of a second cousin, certainly is perfectly reasonable. The postconviction court was understandably concerned about juror harassment and "needless prying" into distant family connections of a juror. (PCR 2023 at 88). The postconviction court did not abuse its discretion by denying a motion to interview a juror that was filed forty years after that juror's service.

Untimely

The motion to interview the juror was extraordinarily untimely. This Court in *Martin v. State*, 322 So.3d 25, 38 (Fla. 2021), noted that whenever a defendant raises a standalone juror misconduct claim in postconviction proceedings, "there will always be threshold questions about the timeliness of such a claim," because such a claim will necessarily be predicated on information about the juror asserted to have been unavailable at the time of the original trial. This Court properly highlighted the timeliness requirement of any standalone juror misconduct claim.

The rule of court governing motions to interview jurors, Florida Rule of Criminal Procedure 3.575, provides:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview.

To be timely under the Rule 3.575, the motion to interview Juror Gilmore had to be filed in January of 1983. But the motion to interview was not filed until May of 2023. The motion to interview the juror was filed over 40 years late.

While there is an exception in Rule 3.575 to the time limitation for "good cause," establishing good cause requires a showing of diligence. The First District has held that a motion to interview jurors was untimely and there was no showing good cause in a case, despite the

motion being filed within two months of the verdict and during the direct appeal stage, not in the postconviction stage. In *Belcher v. State*, 9 So.3d 665 (Fla. 1st DCA 2009), the First District concluded that the trial court properly denied a motion to interview three jurors for failing to disclose on a juror questionnaire that their family members had been previously prosecuted for committing crimes, for being untimely. The motion to interview the three jurors was made approximately two months after the verdict, not within 10 days, which made the motion untimely under the rule. The First District rejected the argument that the "good cause" exception in the rule applied because defense counsel knew of the possible juror misconduct earlier and did not file the motion to interview sooner. Basically, the First District views the "good cause" provision of Rule 3.575 as having a diligence requirement.

Bates, however, has not established his diligence and therefore he has not established good cause for purposes of Rule 3.575. While the motion for rehearing filed in the trial court relied on the good cause exception in Rule 3.575, the rehearing simply asserted that "good

cause" existed without establishing any diligence. There was no explanation why it took Bates decades to conduct the genealogical research of Juror Gilmore. Current state postconviction counsel, CCRC-S, who has been state postconviction counsel of record since approximately 2001, did not conduct the genealogy research for over two decades. *Cf. Bates v. State*, 3 So.3d 1091, 1096 (Fla. 2009) (listing CCRC-S as counsel of record in the initial postconviction appeal after the resentencing). CCRC-S provides no reason whatsoever for their lack of diligence in discovering the juror's family connection and therefore cannot establish "good cause." Neither Bates nor his state postconviction counsel were diligent in conducting the genealogical research. Indeed, it is hard to conceive of any cause that could operate to excuse a delay involving such a lengthy time frame as four decades. There is no good cause under the rule.

Nor was Bates diligent in filing the motion itself. IB at 48. Rule 3.575 envisions any motion to interview a juror will be filed within days of the discovery of the information. But state postconviction counsel, CCRC-S, waited months after receiving the information about

the juror's family tree from federal habeas counsel, CHU-N, to file the motion to interview. CCRC-S provided no explanation for the delay in filing the motion itself. Rather, CCRC-S incorrectly asserts that Bates was entitled to one full year to file the motion relying on *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008). *See Melton v. State*, 367 So.3d 1175, 1176–77 (Fla. 2023) (explaining that a capital defendant has one year from the date the evidence was discoverable by due diligence to timely file the claim of newly discovered evidence citing *Jimenez*). But *Jimenez* is the caselaw governing the timely filing of general claims of newly discovered evidence under Rule 3.851, not the caselaw specifically governing the timely filing of a motion to interview a juror under Rule 3.575. But this motion was a motion to interview the juror, not a successive 3.851 postconviction motion. The specific rule governing motions to interview jurors controls over the general postconviction rule of 3.851. *Williams v. State*, 232 So.3d 933, 939 (Fla. 2017) (noting the principle of statutory construction that the more specific provision controls over the general provision); *Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991) (explaining

that a specific provision controls over a more general one). The time frame of Rule 3.575 controls over the time frame of Rule 3.851 and *Jimenez*. Having invoked Rule 3.575 as the basis for his motion to interview the juror, Bates must comply with its time frame of ten days. Bates did not have a year to file a timely motion to interview the juror after being given the information by federal habeas counsel. Instead, once given the research, Bates had ten days to timely file the motion under Rule 3.575.

Bates seems to rely on a prior challenge to an entirely different rule to establish his diligence. IB at 49. Bates points to his prior challenges to the constitutionality of Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar which prohibits attorneys from questioning jurors with seeking prior authorization. But his prior challenges to Rule 4-3.5(d)(4) are irrelevant to a proper Rule 3.575 timeliness analysis. The diligence required is diligence in discovering the juror's undisclosed information and diligence in then filing the motion to interview the juror itself, not the diligence in raising constitutional challenges to an entirely different rule in prior litigation. The motion

to interview the juror was filed decades late and neither Bates nor his counsel were diligent in the search for the family connection or diligent in filing the motion to interview itself.

Furthermore, as the postconviction court noted, Bates and his attorneys did not provide the court with the "date of the revelation" from another inmate that a juror on his jury was related to the victim. (PCR 2023 at 83-84). No relevant details regarding the inmate or the inmate's source of knowledge were given. The only date provided to the postconviction court was the date on which an investigator with CHU-N had completed the genealogy research, which was given as June 2, 2022. (PCR 2023 at 84).

As the postconviction court properly concluded, the motion to interview was seriously untimely. On that basis alone, the trial court did not abuse its discretion in denying the motion to interview the juror.

Merits

The trial court also properly denied the motion to interview Juror Gilmore under the applicable rule of court and this Court's existing precedent of *Martin v. State*, 322 So.3d 36 (Fla. 2021), and *Boyd v. State*, 324 So.3d 908 (Fla. 2021). In postconviction proceedings, Bates must prove that the juror was actually biased against him, not merely that he failed to disclose information during jury selection. As the trial court properly found, there was "no evidence of actual bias" on the part of Juror Gilmore from a distant family connection created by the marriage of second cousin. (PCR 2023 at 87).

Standalone claims of juror misconduct in postconviction proceedings

The motion to interview Juror Gilimore was the first step to raising a standalone postconviction claim of juror misconduct during jury selection in a second successive postconviction motion.

Under this Court's current caselaw, to prevail on a standalone postconviction claim of juror misconduct during jury selection, the defendant must establish two prongs: (1) the juror "failed to answer

honestly a material question" during voir dire; and (2) the juror was "actually biased against the defendant." *Boyd v. State*, 324 So.3d 908, 914 (Fla. 2021) (quoting *Martin v. State*, 322 So.3d 25 (Fla. 2021) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). This Court in *Martin* explained that claims of juror non-disclosure under *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), are limited to the direct appeal stage. This Court in *Martin* Court held that *De La Rosa* does not apply in postconviction proceedings. As this Court observed, "the *De La Rosa* standard is far too lenient for the postconviction context." *Martin*, 322 So.3d at 37. A juror's "mistaken but honest answer to a question—either because the juror mistakenly believed his answer was correct or because the question was unclear—will not warrant postconviction relief." *Martin*, 322 So.3d at 34-35. But proving a juror's dishonesty to a material question "does not end the analysis, because the defendant additionally must establish that the dishonesty resulted in prejudice." *Martin*, 322 So.3d at 35. In postconviction proceedings, the defendant "must establish that the juror's misconduct resulted in the defendant being denied his

constitutional right to an impartial jury." *Id*. at 35; *id*. at 32 (stating that the issue here was whether the juror's "failure to disclose certain facts during voir dire," resulted in the denial of the "right to be tried by an impartial jury"). And to make that showing, the defendant must prove "actual juror bias against the defendant." *Martin*, 322 So.3d at 35 (citing *Boyd v. State*, 200 So.3d 685, 697 (Fla. 2015)). Bias against the State rather than the defendant cannot be the basis for a defendant's claim of actual bias. For example, a convicted felon who denies his criminal history during jury selection, cannot be the basis for a claim of jury bias, because, typically a convicted felon's bias, if any, would be against the State due to the State's prior prosecution of him.[14]

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[14] While *Martin* involved testimony from a juror at an evidentiary hearing in the postconviction context, the Florida Supreme Court did not address the issue of the motions to interview jurors in the case. The lower court had not granted a motion to interview the juror in *Martin*. Rather, the prosecutor simply agreed to a deposition of the juror. And while the Attorney General's Office had filed an objection to the motion to interview juror Smith in that case, once the deposition of the juror occurred, the harm of juror harassment had already occurred and the State did not further object to the juror testifying at the evidentiary hearing to allow the judge to weigh the juror's credibility.

Here, the failure to disclose a distant family connection by marriage of a second cousin does not amount to actual bias on the part of the juror, as required by this Court's decision in *Boyd* and *Martin*. This claim really amounts to a improper claim of non-disclosure for purposes of exercising peremptory challenges under the direct appeal standard of *De La Rosa*, rather than a proper claim of actual juror bias under the postconviction standard of *Martin*. The trial court properly concluded that there was "no evidence of actual bias" on the part of Juror Gilmore, as required by *Martin* and *Boyd*. (PCR 2023 at 87).

No reason under the applicable rule

The rule governing motion to interview jurors, Rule 3.575, provides:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may

> be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview.

Under the rule, the trial court properly denied the motion because there is no reason to believe the 1983 verdict would be subject to legal challenge based on Juror Gilmore being actually biased. Regardless of what is disclosed by Juror Gilmore about his family connection, or his knowledge of that relationship, or his non-disclosure of that relationship, during an interview with him, such a claim is not cognizable in these postconviction proceedings under *Boyd* and *Martin* because no actual bias can be established merely on the basis of such a distant family relationship. Any interview would be an exercise in futility under the current precedent of *Boyd* and *Martin*. As the trial court found, there was "no evidence of actual bias" on the part of Juror Gilmore, as required by *Boyd* and *Martin*. (PCR 2023 at 87). The 1983 verdict would not be subject to being challenged based on a distant family relationship and therefore, the trial court properly denied the motion under Rule 3.575.

The no-impeachment rule

There was a prohibition on interviewing jurors regarding their verdicts in English common law. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). The prohibition is commonly referred to as Lord Mansfield's Rule. American common law followed Lord Mansfield's Rule. *McDonald v. Pless*, 238 U.S. 264 (1915).

The no-impeachment rule was codified in the Federal Rule of Evidence and many states have an equivalent rule. Fed. R. Evid. 606(b); Colo. R. Evid. 606(b). Florida has a statutory prohibition on juror's testifying about their jury service to impeach the verdict. § 90.607(2)(b), Fla. Stat. (2024) (providing upon "an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment").

The no-impeachment rule also prohibits inquiries into a juror's response to voir dire questions during jury selection. In *Warger v. Shauers*, 574 U.S. 40 (2014), in the direct appeal of a civil case, the United States Supreme Court, in an unanimous opinion, held that the no-impeachment rule prohibited using one juror's testimony regarding

another juror's statements during jury deliberation to establish the other juror's nondisclosure during jury selection. Warger was involved in a motorcycle accident with a truck driven by Shauers and he sued in federal district court. *Id.* at 42. Plaintiff's counsel asked the prospective jurors if there was any juror who thought, "I don't think I could be a fair and impartial juror on this kind of case." *Id.* at 43. One juror, who was later selected as the jury foreperson, answered no. Shortly after the verdict in favor of the truck driver, another juror contacted Plaintiff's attorney and informed him that during the deliberation, the foreperson revealed that her daughter had been in an accident and if her daughter had been sued, it would have "ruined her life." Warger filed a motion for new trial asserting the foreperson had deliberately lied during jury selection, relying on *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). The federal district court denied the motion relying on the no-impeachment rule, codified in Federal Rule of Evidence 606(b). On appeal, Warger argued that Rule 606(b) did not apply when a litigant offers evidence to show that a juror was dishonest during jury selection. *Id.* at 44. Warger insisted

that a claim based on nondisclosure during jury selection was not inquiry into the validity of the verdict, so Rule 606(b) did not apply. *Id.* at 48. The United States Supreme Court held that Rule 606(b) applied. *Id.* at 44. The Court relied on the plain meaning of Rule 606(b)'s terms. The Court also relied on the common law no-impeachment rule, commonly referred to as Lord Mansfield's rule, which prohibited impeachment of the jury's verdict, usually including jury selection. *Id.* at 45 (citing *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)). The Court noted that part of the reason for Lord Mansfield's rule was to promote the finality of verdicts. *Id.* at 45. The *Warger* Court also relied on their prior decision in *McDonald v. Pless*, 238 U.S. 264 (1915). *Id.* at 47. The *Warger* Court also rejected a constitutional attack on rule 606(b) as being foreclosed by *Tanner v. United States*, 483 U.S. 107 (1987). *Id.* at 50-51. The Court applied the logic of *Tanner* to jury nondisclosure claims. *Id.* at 53. The Court also noted jury impartiality and juror nondisclosure during jury selection was protected in other ways including bringing any juror bias to the court's attention before the verdict is reached and employing nonjuror

evidence after the verdict is reached. *Id.* at 51. The *Warger* Court added a caveat in a footnote about "extreme" cases of juror nondisclosure where "almost by definition," the right to an impartial jury was denied but concluded Warger was not such a case. *Id.* at 51 n.3.

The United States Supreme Court discussed the history of the no-impeachment rule and creating an exception to the rule in the "extreme" case of ethnic bias in the direct appeal case of *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210-11, 215 (2017).

Juror harassment, invasion of privacy, and finality

The United States Supreme Court, this Court, and the postconviction court in this case, all have expressed concerns about the effects on the jury system of permitting juror interviews. The United States Supreme Court in *Tanner v. United States*, 483 U.S. 107, 120 (1987), stated that it was doubtful "the jury system could survive such efforts to perfect it" by allowing postverdict investigations into juror misconduct. The United States Supreme Court has stated that to prevent juror harassment and to protect the finality of verdicts,

such interview should be permitted only in "extreme" cases. *Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014). And both *Tanner* and *Warger* were direct appeal cases, not postconviction cases. This Court in *Devaney v. State*, 717 So.2d 501, 505 (Fla. 1998), has also expressed the worry that permitting juror interviews "would sow the seeds for the destruction" of the jury system and held a juror's subjective beliefs inhere in the verdict and cannot be characterized as jury misconduct. The postconviction court warned that the jury system would be "undermined by a barrage of postverdict scrutiny of juror conduct" quoting *Tanner v. United States*, 483 U.S. 107, 121 (1987), and (PCR 2023 at 84-85). The lower court noted that inquiry of jurors would "poorly serve the ends of justice, obstruct finality, and cheapen the investment made by the jurors in their verdict." (PCR 2023 at 87-88 quoting *Aragon v. State*, 853 So. 2d 584, 589-90 (Fla. 5th DCA 2003)).

The possibility of juror harassment and invasion of privacy as well as the disruption to the finality of verdicts that permitting juror interviews that concern the courts, of course, is much greater at the

postconviction stage and even greater at the successive postconviction stage.

Permitting such claims encourages the harassment of capital jurors and the invasion of their privacy many years after their service. Capital postconviction attorneys will scrutinizing the capital juror's social media accounts for any posts revealing their views. *United States v. Nucera*, 67 F.4th 146, 166 (3d Cir. 2023) (affirming the denial of motion for new trial based on a juror's innocuous social media posts not being sufficient to show that jurors' voir dire answers were false). The juror at issue in *Martin*, for example, was questioned about his juvenile delinquency adjudication for a sexual relationship with a friend of his younger sister as a teenage boy, despite that information being protected by statute. § 985.04, Fla. Stat. (2021) (providing that juvenile criminal justice records are "confidential and exempt from § 119.07(1) and § 24(a), Art. I of the State Constitution"). The difficulties of finding jurors to serve on lengthy capital trials will only increase when citizens realize that they can be harassed decades later

and be questioned regarding the most private details of their lives based on doing their civic duty.

The postconviction court properly characterized any questioning Juror Gilmore "about a relationship that he may not know" anything about regarding jury service that "he performed over forty years ago," as "needless prying and harassment." (PCR 2023 at 88).

Opposing counsel's reliance on random dicta in *Wellons v. Hall*, 558 U.S. 220 (2010), observing that from "beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect," is misplaced. IB at 54. The actual holding of *Wellons* was that the claim of juror misconduct was not procedurally barred in federal habeas review. *Wellons* involved allegations of ex parte contacts between the jury and the judge; the planning of a reunion between the jurors and a bailiff; and a gifts from some jurors to the judge of chocolate shaped as a penis and to the bailiff of chocolate shaped as breasts. *Wellons*, 558 U.S. at 221. The High Court remanded the case to the Eleventh Circuit to reconsider it prior

decision regarding the procedural bar in light of *Cone v. Bell*, 556 U.S. 449, 466-67 (2009). On remand, following an evidentiary hearing, the Eleventh Circuit found that tasteless gifts were "inconsequential to the verdicts" and that Wellons received "a fair trial by an impartial jury." *Wellons v. Warden, Ga. Diagnostic Prison*, 695 F.3d 1202, 1212-14 (11th Cir. 2012). And the United States Supreme Court then denied review. *Wellons v. Humphrey*, 571 U.S. 869 (2013) (No. 12-10804).

Unlike *Wellons*, the allegations of juror misconduct in this case does not involve gifts or reunions. Rather, here, the allegations involve the juror's personal knowledge of the family tree of his second cousin's wife. The general vague dicta of *Wellons* decided in 2010 does not govern, especially not when there are later direct holdings from the United States Supreme Court to the contrary. The High Court has repeatedly expressed disapproval of inquiries of jurors due to concerns about undermining the jury's verdict and juror harassment including in the more recent case of *Warger v. Shauers*, 574 U.S. 40 (2014). The High Court refused to permit inquiries into a juror's blatant misrepresentation during jury selection based on the no-

impeachment rule, even during the direct appeal stage. *Warger*, 574 U.S. at 44 (holding the federal rule of evidence barring evidence of statements made during jury deliberations, Rule 606(b), also bars inquiries into whether a juror lied during voir dire). The *Warger* Court noted the threats to "both jurors and finality of verdicts" that such inquiries would pose. *Id.* at 50. *Warger*, not *Wellons*, governs.[15] The vague dicta in *Wellons* cannot justify interviewing a juror in 2023, who served on the guilt phase jury in 1983.

[15] The fact that *Warger* is a civil case governed by the Seventh Amendment's jury trial provision instead of Sixth Amendment's provision governing criminal cases does not matter. The Sixth Amendment's "impartial" jury guarantee was read into the Seventh Amendment long ago. *Warger*, 574 U.S. at 50 (stating that the "Constitution guarantees both criminal and civil litigants a right to an impartial jury"); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (stating that the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates "an impartial jury").

Proposed limitation on juror misconduct claims in successive postconviction litigation

The standalone claim of juror misconduct in *Martin* was raised in the initial postconviction proceedings. *Martin*, 322 So.3d at 30-31 (noting the standalone claim was raised in the amended initial postconviction motion). But in this case, the motion to interview a juror that would be used to support a standalone claim of juror misconduct that would be raised in second successive postconviction motion. And any second successive postconviction motion filed in this case, after interviewing the juror about his knowledge of his second cousin's wife family, would be filed over two decades after the initial postconviction motion was filed and over a decade after the denial of that initial postconviction motion was affirmed by this Court in 2019. *Bates v. State*, 3 So.3d 1091 (Fla. 2009).

This Court should clarify standalone claims of juror misconduct raised in successive postconviction litigation are limited to claims of actual bias by the juror against a protected class, as in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017). This Court should explain that, while the standard adopted in *Martin* governs initial

postconviction claims, a higher standard governs standalone juror misconduct claims in later successive postconviction litigation. It is common for courts to increase the legal standard in postconviction litigation.[16] And the same logic of those cases regarding the importance of finality supports increasing the standard of *Martin* further still in successive postconviction litigation.

To avoid the inevitable juror harassment and invasion of privacy that will occur, especially in capital cases, even under the *Martin* standard, this Court should limit standalone claims of juror misconduct in successive postconviction proceedings to those claims raising allegations of actual bias on the part of the juror against protected classes, such as in *Pena-Rodriguez*. The United States

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[16] *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (increasing the showing required for harmfulness to obtain federal habeas relief from the direct appeal standard of *Chapman v. California*, 386 U.S. 18 (1967)); *Weaver v. Massachusetts*, 582 U.S. 286 (2017) (increasing the standard to require a showing of prejudice from the direct appeal standard of *Waller v. Georgia*, 467 U.S. 39 (1984), which presumed prejudice); *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006) (same); *Carratelli v. State*, 961 So.2d 312 (Fla. 2007) (increasing the standard to require a showing of actual bias in state postconviction litigation from the direct appeal standard of *Singer v. State*, 109 So.2d 7, 22-23 (Fla. 1959)).

Supreme Court explained in *Peña-Rodriguez*, due to the uniquely insidious threat racial bias poses to the fairness of the jury system, there is a constitutional exception to the no impeachment rule. *Peña-Rodriguez*, 580 U.S. at 225. The United States Supreme Court explained that when a juror makes a clear statement indicating reliance on racial animus to convict a criminal defendant, the Sixth Amendment right to a fair trial "requires that the no-impeachment rule give way" to permit the trial court to consider the evidence of the juror's heightened bias. *Id.* at 255. But not even every "offhand comment" indicating racial bias justifies an inquiry. *Id.* Rather, the racial animus must be a "significant motivating factor in the juror's vote to convict." *Id.* at 255-56. For an inquiry to be required, there must be a showing that the juror made statements "exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 255. This Court should adopt a higher standard of *Peña-Rodriguez* to avoid the inevitable juror harassment and invasion of privacy that will result in

capital cases from the current standard for standalone claims of *Martin*.[17]

The harm to the finality of verdicts is obvious from the fact this motion to interview the juror was filed 40 years after the juror's service. CCRC-S counsel openly admitted in the reply filed in the lower court their intention to investigate the social media of all capital jurors as well as to conduct genealogical research of all capital jurors. (PCR 2023 at 79). That statement alone from one of the three capital collateral regional counsel offices should serve as a warning to this Court of the consequences to the jury system of not adopting a higher standard for successive postconviction standalone claims of juror

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[17] Applying the constitutional standard of *Pena-Rodriguez* to successive postconviction proceedings is being generous. *Pena-Rodriguez* was a direct appeal case. The United States Supreme Court has never held that the heightened actual bias standard against a protected class must be applied in the postconviction context, much less in the successive postconviction context. And several circuits have held that *Pena-Rodriguez* is not retroactive which lends support to the idea that it would not be required to be applied in postconviction proceedings at all. *Tharpe v. Warden*, 898 F.3d 1342, 1345-46 (11th Cir. 2018); *Richardson v. Kornegay*, 3 F.4th 687, 706 (4th Cir. 2021). But the heightened standard of racial or ethnic bias in *Pena-Rodriguez* is a good balance between allowing such standalone claims in successive postconviction litigation and finality.

misconduct. This Court needs to limits standalone postconviction claims of juror misconduct raised in successive postconviction litigation to "extreme" cases only.

Applying that higher standard to this case, there was no allegation in the motion to interview the juror filed in this case that Juror Gilmore expressed any racial bias against Bates, as occurred in *Pena-Rodriguez*. Rather, the motion simply alleged that the juror was related to the victim by the marriage of his second cousin and that the juror failed to disclose that relationship during jury selection. Under *Pena-Rodriguez*, even a closer undisclosed family connection would not be sufficient to be raised in postconviction proceedings because any such connection would not be an allegation of racial or ethnic bias on the part of the juror. Regardless of what is disclosed by Juror Gilmore about his family connection or his knowledge of that relationship, such a claim should not be cognizable in the successive postconviction context under *Peña-Rodriguez*. Any interview of the juror would necessarily be an exercise in futility under this higher standard. *United States v. Reyes*, 795 Fed. Appx. 10, 14 (2d Cir. 2019)

(concluding it was not sufficient to raise a valid claim under *Peña-Rodriguez* to merely point to the defendant's ethnicity and national origin because without more, there is no inference that the juror was motivated to convict due to racial bias).

The failure to disclose a family connection by marriage does not amount to actual bias required by *Martin*, much less under the heightened actual bias against a protected class standard of *Pena-Rodriguez* that should be adopted by this Court.

The postconviction court did abuse its discretion in denying the untimely and unwarranted motion to interview a juror whose jury service occurred over four decades ago.

ISSUE II

Whether the Bar Rule Prohibiting Juror Interviews without Prior Authorization from a Trial Court, Rule 4–3.5(d)(4) of the Rules Regulating The Florida Bar, is Unconstitutional in Violation of the Sixth Amendment Right to a Jury Trial? (Restated)

Bates asserts that Rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar violates the Fifth, Sixth, Eighth, and Fourteenth Amendments in addition to violating the right of access to courts and the right to habeas corpus under both the United States constitution and the state constitution. This issue is not preserved because it was not raised as a separate claim below nor did Bates obtain a ruling from the postconviction court on the constitutionality of Rule 4–3.5(d)(4). Furthermore, the constitutional challenge to Rule 4–3.5(d)(4) is barred by the law of the case doctrine. Bates previously raised a similar constitutional challenge in a prior postconviction appeal. Alternatively, the challenge is meritless under this Court's precedent. This Court has consistently and repeatedly rejected constitutional challenges to Rule 4–3.5(d)(4) for decades. Moreover,

the rule violates neither the access to courts provision or the habeas provision of either the federal or state constitution.

The postconviction court's ruling

The motion to interview juror Gilmore filed below cited Rule 4–3.5(d)(4) once but did not raise an actual constitutional challenge to the rule. (PCR 2023 at 41-48). The postconviction court denied the motion to interview the juror but did not specifically address the constitutionality of Rule 4–3.5(d)(4) because it was not raised as separate claim. (PCR 2023 at 83-88).

Preservation

The issue of the constitutionality of Rule 4–3.5(d)(4) is not preserved. § 924.051(1)(b), Fla. Stat. (2022) (defining preserved as meaning the "issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the

grounds therefor"); § 924.051(3), Fla. Stat. (2022) (stating an "appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error" and a "judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error."). This Court's "precedent is clear that to be preserved, the issue or legal argument must be raised and ruled on by the trial court." *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)).

Bates did not raise a constitutional challenge to Rule 4–3.5(d)(4) below in the motion to interview a juror. Nor did he obtain a ruling from the postconviction court regarding the constitutionality of Rule 4–3.5(d)(4). (PCR 2023 at 83-88). Therefore, the issue of the constitutionality of the rule is not preserved.

And it is implausible that a rule of the bar governing an attorney's post-trial conduct could be viewed as fundamental error. One cannot assert that the conviction "could not have been obtained" without the rule or that the rule vitiated the entire trial when the rule at issue applies to an attorney's conduct after a verdict has already been obtained. *Knight v. State*, 286 So.3d 147, 151 (Fla. 2019) (reasoning that one cannot plausibly claim fundamental error in the sense that the conviction "could not have been obtained" without the erroneous lesser included offense instruction or that the error vitiated the basic validity of the trial). The rule has no connection with the conviction obtained at the 1983 trial.

Standard of review

The standard of review for a claim of fundamental error is de novo. *State v. Smith*, 241 So.3d 53, 55 (Fla. 2018); *State v. Garcia*, 346 So.3d 581, 585 (Fla. 2022). Furthermore, the standard of review for the issue of the constitutionality of a rule of court, such as Rule 4–3.5(d)(4), is de novo. *Statler v. State*, 349 So.3d 873, 878–79 (Fla.

2022) (stating that issues of constitutionality are reviewed de novo), *cert. denied*, *Statler v. Florida*, 143 S.Ct. 836 (2023); *Love v. State*, 286 So.3d 177, 183 (Fla. 2019) (noting the issue presented a pure question of law reviewed de novo).

Law of the case doctrine

In addition to not being preserved, the issue of the constitutionality of Rule 4–3.5(d)(4) is barred by the law of the case doctrine. The law of the case doctrine requires that questions of law actually decided in a prior appeal govern the case through all subsequent stages of the proceedings in both the appellate and trial courts. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001) (citing *Greene v. Massey*, 384 So.2d 24, 28 (Fla. 1980)). And, while there is an exception to the doctrine for manifest injustice, the law of the case doctrine applies "except in unusual circumstances and for the most cogent reasons." *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965). The doctrine, which is designed to prevent relitigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047

(Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)); *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013).

Bates raised a constitutional attack on Rule 4–3.5(d)(4) in his initial postconviction appeal. *Bates v. State*, 3 So.3d 1091, 1105, & n.13 (Fla. 2009) (SC2007-0611) (rejecting an argument that the prohibition on jury interviews in Florida is unconstitutional as being procedurally barred because any such claim should have been raised in the direct appeal, not in the postconviction proceedings). Opposing counsel does not attempt to invoke the exception or even acknowledge this Court's previous conclusion that the issue was procedural barred. Therefore, the law of the case doctrine applies.[18]

Merits

[18] Bates, below in the postconviction court, attempt to use his prior constitutional challenge to the rule as an excuse for the untimeliness of his motion to interview the juror. But regardless of the timeliness of the motion, the constitutional challenge to Rule 4–3.5(d)(4) remains barred by the law of the case doctrine.

Rule 4–3.5(d)(4) does not violate the Sixth Amendment right to a jury trial or the state constitutional right to a jury trial. Art. I § 16(a), Fla. Const. Nor does the rule violate the right of access to courts or the right to habeas corpus.[14]

The federal and state constitutional provisions

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

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[14] Bates also raises due process and Eighth Amendment challenges to Rule 4–3.5(d)(4). But it is the Sixth Amendment that governs claims relating to the jury, not the Fourteenth Amendment or the Eighth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that the Fourth Amendment governed rather than the Fourteenth Amendment because the explicit text of the Fourth Amendment addressed the precise question at issue); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (explaining the more specific constitutional provision applies over a more general constitutional provision); *Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir. 2018) (concluding the specific language of the Fourteenth Amendment controlled over the more general language of the First Amendment citing *Graham*, 490 U.S. at 395 and *West v. Davis*, 767 F.3d 1063, 1067 (11th Cir. 2014)). It is the Sixth Amendment that contains an explicit reference to the right to an impartial jury, not the due process clause. And the Eighth Amendment's prohibition on cruel and unusual punishment has little to nothing to do with rules against juror interviews. Therefore, the State will limit its analysis to the Sixth Amendment and Article I § 16(a), of the Florida Constitution.

The Declarations of Rights of the Florida Constitution governing the Rights of the Accused and of Victims, Article I section 16(a), provides:

> In all criminal prosecutions the accused . . . shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. . .

Neither provision is violated by strict limits on juror interviews. Indeed, both the right to a jury trial and the prohibition on juror interviews, commonly referred to as Lord Mansfield's Rule, existed at common law and were not viewed as contradictory. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017) (Thomas, J., dissenting) (noting the "common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct" including "notorious partiality" citing 3 W. Blackstone, Commentaries 388).

The applicable Florida Bar rule

The rule governing interviewing jurors of the Rules Regulating the Florida Bar, Rule 4–3.5(d)(4), provides: a lawyer shall not:

* * *

> after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

Under the rule, a lawyer may interview a juror after establishing a legal ground for the interview and obtaining authorization from the trial court.

This Court's long-standing precedent

As this Court has stated, the claim that Rule 4-3.5(d)(4) is unconstitutional has been "repeatedly analyzed and rejected by this Court." *Hojan v. State*, 212 So.3d 982, 996-97 (Fla. 2017) (citing *Troy v. State*, 57 So.3d 828, 841 (Fla. 2011); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002); and *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001)). And this Court has upheld the constitutionality of the

rule for more than two decades. *Floyd v. State*, 18 So.3d 432, 459 (Fla. 2009) (stating: "we have repeatedly rejected claims that rule 4-3.5(d)(4) is unconstitutional" citing *Israel v. State*, 985 So.2d 510, 522 (Fla. 2008)); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla. 2008) (rejecting a constitutional challenge to Rule 4-3.5(d)(4)) citing *Barnhill v. State*, 971 So.2d 106, 116-17 (Fla. 2007)); *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001); *Arbelaez v. State*, 775 So.2d 909, 920 (Fla. 2000).

In the initial brief, Bates is asserting he is entitled to go fishing via random jury interviews, presumably of all 24 jurors involved in this case, for any possible misconduct, regardless of any concerns regarding juror harassment; the sheer length of time since the juror's service; or the finality of verdicts and sentences. IB at 54. But that assertion is contrary to this Court's reasoning upholding the constitutionality of this rule, in part, to prohibit such "fishing expeditions." *Hojan*, 212 So.3d at 996; *Arbelaez*, 775 So.2d at 920.

Access to courts

Bates claims Rule 4-3.5(d)(4) violates the right to access to court under both the United States constitution and the state constitution. Pet. at 56. Bates, however, raises an access to courts challenge without any supporting argument or citation to caselaw. The access challenge is insufficiently pled on appeal.[15] This Court should explicitly decline to address this claim.

Alternatively, the access challenge is meritless. The federal right of access to courts is an aspect of the First Amendment right to petition the government. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S.

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[15] *Dufour v. State*, 905 So.2d 42, 75 (Fla. 2005) (finding a claim was not sufficiently articulated and noting that the purpose of an appellate brief is to present arguments in support of the points on appeal); *Lynn v. City of Fort Lauderdale*, 81 So.2d 511, 513 (Fla.1955) (stating that a party may not simply pose a question and then dump the matter into the lap of the appellate court for decision and that the Court has no duty to answer questions raised in "perfunctory" manner); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (explaining that passing references to the matter in the appellate brief "without advancing any arguments or citing any authorities" constitutes a waiver of the issue on appeal citing cases); *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998) (finding that an issue raised in the brief without argument was abandoned citing *Cross v. United States*, 893 F.2d 1287, 1289 n.4 (11th Cir. 1990)); *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000) (declining to address an issue raised in one sentence in the appellate brief).

379, 387 (2011) (explaining that citing *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). It, however, is not clear if it applies to state courts. The federal right may well be limited to access to federal courts. *cf. Alfonso v. United States*, 752 F.3d 622, 627 (5th Cir. 2014) (concluding that the Louisiana state constitutional right of access to court guarantees the right of access to state courts, not to federal courts). Indeed, it would seem doubly odd for the federal courts to force open the courtroom doors of a state court, in the postconviction context, despite the federal courts having never recognized a federal constitutional right to state postconviction proceedings at all. *Lawrence v. Branker*, 517 F.3d 700, 717 (4th Cir. 2008) (noting there is no federal constitutional right to postconviction proceedings in state court citing *Lackawanna County Dist. Att'y v. Coss*, 532 U.S. 394, 402 (2001), and *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)).

The access to courts provision of the Florida Constitution, Article I, section 21, provides: the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." It is doubtful, however, that state constitutional

access to courts provision applies to postconviction litigation. And even if it does, Bates was *not* denied access to the postconviction court. He was permitted to file as well as litigate his motion to interview the jury. Having a motion denied is not a denial of access — it is a denial of relief. Rule 4-3.5(d)(4) does not violate either the federal or state right of access to courts.

The right to habeas corpus

Bates claims Rule 4-3.5(d)(4) violates the right to habeas corpus under both the United States constitution and the state constitution. Pet. at 56. Bates, however, raises a right to habeas corpus challenge without any supporting argument or citation to any caselaw. The

habeas challenge is insufficiently pled on appeal.[16] This Court should explicitly decline to address this claim too.

Alternatively, the habeas challenge is meritless. Historically, the Great Writ was mainly limited to prisoner "confined by the King without trial." *Edwards v. Vannoy*, 593 U.S. 255, 284 (2021) (Gorsuch, J., concurring). If, however, the prisoner was confined after being convicted of a crime, "the inquiry was usually at an end." *Id.* at 284. "Custody pursuant to a final judgment was ***proof*** that a defendant had received the process due to him." *Id.* (emphasis in original); *see*

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[16] *Dufour v. State*, 905 So.2d 42, 75 (Fla. 2005) (finding a claim was not sufficiently articulated and noting that the purpose of an appellate brief is to present arguments in support of the points on appeal); *Lynn v. City of Fort Lauderdale*, 81 So.2d 511, 513 (Fla.1955) (stating that a party may not simply pose a question and then dump the matter into the lap of the appellate court for decision and that the Court has no duty to answer questions raised in "perfunctory" manner); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (explaining that passing references to the matter in the appellate brief "without advancing any arguments or citing any authorities" constitutes a waiver of the issue on appeal citing cases); *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998) (finding that an issue raised in the brief without argument was abandoned citing *Cross v. United States*, 893 F.2d 1287, 1289 n. 4 (11th Cir.1990)); *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000) (declining to address an issue raised in one sentence in the appellate brief).

also Dep't of Homeland Sec. v. Thuraissigiam, 140 S.Ct. 1959, 1970-71 (2020) (stating that habeas is at its core a remedy for unlawful detention quoting *Munaf v. Geren*, 553 U.S. 674 (2008)).

The United States Supreme Court has recently explained in several cases that the Great Writ, enshrined in the U.S. Constitution under Article 1, section 9, clause 2, and the habeas statute, 28 U.S.C. § 2254, enacted in 1867, are not the equivalent. *Brown v. Davenport*, 596 U.S. 118, 127-28 (2022) (noting that, after the Civil War, Congress extended this authority, allowing federal courts to issue habeas writs to state custodians citing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385). The United States Supreme Court explained that the writ of habeas corpus ad subjiciendum, often called the "Great Writ," applied when "English monarchs jailed their subjects summarily and indefinitely" and the common-law courts employed the writ as a way to compel the crown to explain its actions—and, if necessary, ensure adequate process, such as a trial, before allowing any further detention. *Davenport*, 596 U.S. at 128. The High Court also explained that a prisoner could not use the Great Writ "to challenge a final

judgment of conviction issued by a court of competent jurisdiction." *Davenport*, 596 U.S. at 128. The purpose of the Great Writ "was to ensure due process attended an individual's confinement, a trial was generally considered proof he had received just that." *Davenport*, 596 U.S. at 128. The *Davenport* Court noted that this same understanding of the role of the Great Writ applied in America, and quoted Chief Justice Marshall's statements that a judgment of conviction after trial was "conclusive on all the world" and the judgment "itself" ended the Great Writ's role. *Davenport*, 596 U.S. at 129 (citing *Ex parte Watkins*, 3 Pet. 193, 202-03, 7 L.Ed. 650 (1830)). Once Bates was convicted in 1983 and sentenced to death in 1995, the "Great Writ" no longer applied to him.

This is equally true of the state constitutional habeas provision. Art. I, § 13, Fla. Const. The habeas corpus provision of the Florida Constitution, Article I, section 13, provides:

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

The state constitutional habeas provision was first adopted in 1838 and reflects the common law understanding of the Great Writ. Art. I, § 11, Fla. Const. (1838); *State ex rel. Deeb v. Fabisinski*, 111 Fla. 454, 460, 152 So. 207, 209 (1933) (stating that "Habeas corpus ad subjiciendum et recipiendum," commonly known as the Great Writ, was a "high prerogative writ" the object of which was the "liberation of those imprisoned without sufficient cause"); *Skipper v. Schumacher*, 124 Fla. 384, 402, 169 So. 58, 66 (1936) (explaining that the function of the writ of habeas corpus is not to determine whether a person has committed the crime or the justice of his detention on the merits, but to determine whether he is illegally imprisoned); *Allison v. Baker*, 152 Fla. 274, 275, 11 So.2d 578, 579 (1943) (stating the writ of habeas corpus is a high prerogative "writ of ancient origin" designed to obtain immediate relief from unlawful imprisonment without sufficient legal reasons). The state constitutional habeas provision was not meant to constitutionalize a right to state postconviction proceedings, much less a right to interview jurors. *Baker v. State*, 878 So.2d 1236, 1245 (Fla. 2004) (holding that a habeas corpus petition is not available in

Florida to obtain postconviction relief available by Rule 3.850). Once Bates was convicted in 1983 and sentenced to death in 1995, the state constitutional habeas provision no longer applied to him.[17]

Even applying the state constitutional habeas provision to Bates, this Court has held that reasonable limitations may be placed on the state constitutional habeas provision. *Haag v. State*, 591 So.2d 614, 616 (1992) (stating that the right to habeas relief, like any other constitutional right, is subject to "reasonable limitations"); *Johnson v. State*, 536 So.2d 1009, 1011 (Fla. 1988) (rejecting a constitutional challenge to the two-year time limitation of Rule 3.850 based on the state constitutional habeas provision). Obviously, refusing to permit a capital defendant to interview a juror, who served on a jury forty years ago, about his personal knowledge of the family tree of his second cousin's wife is a reasonable limitation on postconviction

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[17] The Suspension Clause applies to the constitutional provisions but not to the federal habeas statute, 28 U.S.C. § 2254, or to Rule 3.851. Due to the difference between the pre-trial nature of the Great Writ and the post-trial nature of statutory habeas review, Congress could completely abolish § 2254 without violating the Suspension Clause. That is equally true of Rule 3.851.

litigation. Rule 4-3.5(d)(4) does not violate the federal or state right of habeas corpus.

Accordingly, this Court should affirmed the summary denial of the motion to interview.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the denial of the motion to interview a juror.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **JAMES L. DRISCOLL, JR.**, Assistant Capital Collateral Counsel of CCRC-S, 110 S.E. 6th Street, Suite 701, Ft. Lauderdale, FL 33301; Phone: (954) 713-1284, email: driscollj@ccsr.state.fl.us; and **JEANINE COHEN**, Assistant Capital Collateral Counsel of CCRC-S, 110 S.E. 6th Street, Suite 701, Ft. Lauderdale, FL 33301; Phone: (954) 713-1284, email: cohenj@ccsr.state.fl.us this 11th day of March, 2024.

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