

IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2023-1683
LOWER TRIBUNAL CASE NUMBER: 03-1982-CF-661

KAYLE BARRINGTON BATES,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE.

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

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Bates respectfully requests oral argument by counsel pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action may determine whether Mr. Bates lives or dies. This Court has granted oral argument in other capital cases in a similar procedural posture. A full opportunity to argue the issues at oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Bates.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of Mr. Bates' judgment of conviction and are of the form R.[page number]. References to the record from the Motion to Interview Juror are of the form MIJ[page number]. All other citations are self-explanatory or explained herein. There were no hearings on the motion presented below. Generally, Kayle Barrington Bates is referred to as "Mr. Bates" and the State of Florida is referred to as "the State."

STATEMENT OF THE CASE AND FACTS

Mr. Bates' case has had jury problems at each stage that a jury was required to meet the Constitution's requirement of a fair and impartial jury. Until recently, Mr. Bates was unaware that there was a relative of the victim on the jury that convicted him. Juror Hubert Donald Gilmore was the second cousin of the husband of the victim's sister. This was never disclosed in jury selection and Mr. Bates did not know this until many years after he was convicted.

Procedural History

In 1982, Mr. Bates was charged by indictment with first-degree murder, kidnapping, sexual battery and armed robbery. In 1983, the jury returned a verdict finding Mr. Bates guilty of first-degree murder, kidnapping, attempted sexual battery and armed robbery. The jury voted in favor of death. The trial court followed the jury's recommendation and sentenced Mr. Bates to death.

On direct appeal, this Court affirmed the conviction, but vacated the death sentence and remanded to the trial court for reconsideration of whether death should be imposed. *Bates v. State*, 465 So. 2d 490 (Fla. 1985). The trial court reimposed a death sentence which this Court affirmed on appeal. *Bates v. State*, 506 So.

2d 1033 (Fla. 1987). Mr. Bates sought a writ of certiorari from the United States Supreme Court, which was denied. *Bates v. Florida*, 108 S. Ct. 213 (1987).

Mr. Bates was granted a new penalty phase during his initial postconviction. This Court affirmed the new penalty phase in *Bates v. Dugger*, 604 So. 2d 457 (Fla. 1992). Initially, the penalty phase trial ended in a mistrial. Another penalty phase trial was held and on May 25, 1995 and the jury returned a recommendation for death by a vote of nine to three (9-3). The trial court sentenced Mr. Bates to death.

Mr. Bates appealed his death sentence. *Bates v. State*, 750 So. 2d 6 (Fla. 1999). This Court affirmed, *id.*, however three justices dissented on the issue of whether Mr. Bates should have been permitted to waive his right to parole.¹ *Id.* at 21-22. The United States

¹ In 1995, Mr. Bates had already served a significant portion of 25 years of any prospective minimum mandatory sentence after having been convicted in 1983. *Id.* at 8. During deliberations, the jury asked “[A]re we limited to the two recommendations of life with minimum 25 years or death penalty. Yes. No. Or can we recommend life without a possibility of parole. Yes. No.” *Id.* at 11. The penalty phase court had refused Mr. Bates attempt to waive his right to parole. A majority of this Court upheld the denial of the waiver and the penalty phase court’s instruction to only consider the two possible sentences in making a recommendation. *Id.* at 10-11. It should be noted that: On June 30, 2021, there were 3,789 inmates who were eligible for parole and 400 releasees on parole supervision.

Supreme Court denied certiorari on October 1, 2000. *Bates v. Florida*, 531 U.S. 835 (2000).

Mr. Bates again sought postconviction relief in state court and filed a motion under Florida Rule of Criminal Procedure 3.851 and a motion for DNA testing under Rule 3.853. He was denied by the trial court on both motions and this Court affirmed the denials and denied his habeas petition. *Bates v. State*, 3 So. 3d 1091 (Fla. 2009).

Mr. Bates fared no better in federal court. The Federal District Court denied Mr. Bates habeas relief and the Eleventh Circuit Court of Appeal affirmed. *Bates v. Sec'y, Fla. Dept. of Corr.*, 768 F.3d 1278 (11th Cir. 2014); cert denied, *Bates v. Jones*, 577 U.S. 839 (2015). Mr. Bates sought DNA testing again and was again denied an opportunity to show his innocence. *Bates v. State*, 218 So. 3d 426 (Fla. 2017). After the United States Supreme Court decided *Hurst v. Florida*, 577 U.S. 92 (2016). Mr. Bates sought relief based on the decision. Here too he was denied relief in state court and on his

In FY 2020–21, the Commission made 1,260 parole determinations and granted parole to 22 inmates. See *Fla. Comm'n on Offender Review 2021 Annual Report (2021) at Page 6*: <https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202021.pdf>

petition for writ of certiorari filed in the United States Supreme Court. *Bates v. State*, 238 So. 3d 98 (Fla. 2018); *Bates v. Florida*, 139 S. Ct. 124 (2018).

Mr. Bates has continually challenged his conviction and death sentence at each possible opportunity and has maintained that he is innocent, even after his trial. While he has received some relief, he remains convicted and sentenced to death.

Recently, Mr. Bates learned from a fellow inmate from Bay County that there was talk in the Bay County community about the Black man convicted by a family member of the victim on the jury. Mr. Bates informed his attorneys and, after investigation, he filed a motion to interview juror Hubert Donald Gilmore, whom had never disclosed that his second cousin's wife was the sister of the victim. This motion was filed on May 31, 2023. MIJ41. The State filed a reply and Mr. Bates a response. MIJ49, 72. On November 6, 2023, the Circuit Court denied the motion. MIJ83. Mr. Bates filed a Motion for Rehearing within 15 days on November 20, 2023. MIJ91.

After Mr. Bates filed his Motion for Rehearing, through counsel, he filed a Notice of Appeal. This was done as a precaution to vest his appellate rights if the circuit court ruled that his Motion for

Rehearing was somehow unauthorized or untimely, despite the provisions of Florida Rule of Criminal Procedure 3.851(a) and (f)(7). The court denied the Motion for Rehearing on December 21, 2023 and this Court lifted the stay and allowed Mr. Bates to proceed on this appeal.

Jury Selection in Mr. Bates' Case

The jury selection at Mr. Bates' trial took place on January 17, 1983. It was hardly adequate to ensure that Mr. Bates received the fair trial from an unbiased jury that the Sixth Amendment guarantees.

Reverend Langford of the First Baptist Church, where the victim's funeral was held, opened Court with a prayer over the panel. R.1211. At least one member of the panel was a member of the First Baptist Church. R.1357.

The Court and the attorneys for both sides made every attempt to uncover all potential relationships between the panel and any witnesses to the case. There were a number of potential jurors that informed the court and the attorneys about their relationships to the case and/or to the potential witnesses. The witnesses included the

victim's husband Randy White, who was also mentioned several times. R.1243, R.1327.

The entire panel remained in the court room, and could hear all the questions and answers from the prospective jurors. After the first panel of prospective jurors was sworn in, the trial judge instructed the prospective jurors seated in the courtroom to listen stating, "I want you to listen, both if you're on the jury and if you're sitting in the courtroom, I want you to listen carefully to the questions that are asked these jurors, it will help us appreciably." R.1214. Fourteen times either trial counsel, State Attorney Appleman, or Judge Turner asked whether any of the prospective jurors knew the victim, Janet Renee White. R.1217, 1222, 1225, 1258, 1261, 1264, 1289, 1311, 1314, 1338, 1345, 1346, 1367, 1372. The State Attorney even went further and asked the panel if they knew the victim by her maiden name of Floyd. R.1264. Juror Hubert Gilmore never disclosed their familial connection.

During the initial questioning of the panel, it became apparent that relationships were very important to the voir dire process as seen in this exchange with a potential juror's wife being related to the victim's husband, Randy White:

MR. APPLEMAN: I believe, Your Honor, the Clerk during the lunch break noted that one of the jurors did call the office and said there's a possible relationship. Mr. Millett, is that correct?

MR. MILLETT: My wife's first cousin.

MR. APPLEMAN: Who would that be now?

MR. MILLETT: Randy White.

MR. APPLEMAN: Is your wife's first cousin. Do you know Mr. White at all?

MR. MILLETT: Just by name.

MR. APPLEMAN: Do y'all socialize together at all?

MR. MILLETT: No.

MR. APPLEMAN: Do you feel that the fact that there is a relationship there that it would prejudice you in any way against the State or against the Defendant in this case?

MR. MILLETT: No.

MR. APPLEMAN: Could you be fair and impartial?

MR. MILLETT: Yes sir.

MR. APPLEMAN: Let's assume, like I asked one of the other jurors earlier, the Court is going to instruct you and say that the burden of proof is upon the State to establish every reasonable, beyond a reasonable doubt the Defendant's guilt and establish the elements of the crime. If we fail to do so, would you feel that you had an obligation to that relationship to find the Defendant guilty none the less?

MR. MILLETT: Be kind of hard.

MR. APPLEMAN: Would you have a problem on it, going home to your wife and saying the State didn't do their job?

MR. MILLETT: I think I would.

MR. APPLEMAN: Do you feel that you could then weigh the evidence, base your decision solely upon the evidence and set those outside factors and leave them outside this courtroom, set them aside totally, that relationship as well?

MR. MILLETT: Yes sir.

MR. APPLEMAN: Let me explain one other thing to you---

THE COURT: Mr. Appleman, excuse me just a moment. Mr. Millett, I think it would probably be embarrassing for you to sit on this jury one way or two, so without objection by the Defendant, I'll excuse Mr. Millett.

R.1287-88.

After the Judge interceded to remove Mr. Millett, it would have been readily apparent to anyone listening as instructed to, that a relationship of a cousin even through marriage should have been brought to the attention of the court and attorneys. The Court, in fact, removed 16 potential jurors for cause in front of Juror Gilmore.

Early on in voir dire, the state attorney while questioning an in-law relationship stated: "If you're related within the third degree, by law you may be excused, but I don't think an in-law relationship of that type is within the third degree" R.1238.

Prior to the court conferring with the attorneys at the bench, the court announced “and I want to tell you that the rules of the Court permit each side to relieve or excuse a certain number of jurors without giving reason for it. So if you are relieved from serving on this panel, don’t think it’s an attack upon your integrity, your good name or upon your honor, or anything. []. The attorney’s task is to pick a fair and impartial jury and in doing that, they may think that some of the jurors might be better suited for service on this jury than you are” R.1306-1307.

Mr. Gilmore also had the benefit of hearing who the defense used their preemptory challenges on, as the Court had the attorneys approach the bench to exercise challenges, and then announced in open court who the defense struck in front of the entire panel. R.1309, 1343. Mr. Gilmore was called up to be questioned as a potential juror after the second round of preemptory challenges had been used, 14 in total by the defense. R.134.

Prospective juror Johnny Johnson knew the husband of the victim, William Randy White, as well as Dr. Joseph Sapala who performed the autopsy of the victim, and Dr. William Sybers who took

over Dr. Sapala's office after his departure (R.1327-1328) and was removed by the Court (R.1359).

Additionally, prospective juror Mary Miller worked at Margaret Fashions at the time of the crime, and was colleagues with the victim's sister (R.1222), the wife of Robert Benefield who was listed as a witness for the State but not called (R.1244-45), and Betty Griffeth, the wife of prospective juror Billy Griffeth (R.1288). Mary Miller and Robert Benefield were also neighbors. R.1244. Ms. Miller was removed by the Court before the defense could exercise a pre-emptory. R.1277. Prospective juror Unni Dover lived three houses down from State witness Geraldine Gilchrist R.1243 and was removed by the Court. R.1249. Ms. Gilchrest, who was also summoned to serve on Mr. Bates' jury, but was unable to serve as she was already set to testify (Juror Questionnaire). Finally, alternate juror Robert Lee Exley and Judge Turner were former neighbors. R.1363. All of this information came from the jurors disclosing their relationships to the court.

Juror Gilmore was sworn in for voir dire after the court released a juror who appeared able to serve but was released by the court in an abundance of caution:

THE COURT: I think out of an abundance of caution, we'll let him go home, his wife is confined to bed and he has three teenagers there. Even if his wife wasn't there, the teenagers would drive him crazy or he'd go crazy thinking about who's feeding them and this sort of thing.

MR. SMITH: Actually I was looking forward to being sequestered.

THE COURT: Well, I think you would be worrying about it, so I'm going to excuse him. That's Mr. Smith, Mr. Smith, I'm going to excuse you, sir. All right, now, that leaves us with seven. We need another seven jurors, Mr. Clerk.

THE CLERK: All right. Juror number 95, Charles Carver. Juror number 98, Mutsuko Frost. Juror number 102, Hubert Gilmore.

R.1344-45.

The court repeatedly asked each new member of panel standard questions concerning pretrial publicity and whether the prospective jurors knew any of the attorneys or Mr. Bates. The court asked the prospective jurors if they knew “anything about the facts or what purport to be the facts concerning the death of Janet Renee White? Does anybody know anything about the incident itself? Have you heard it discussed in television, radio, I take it, newspaper accounts, you've all heard about that, right.” R.1345-46. The prospective jurors answered that they all had heard pre-trial information about the

case; not one prospective juror had not heard about the case. R.1346.

Before asking if the jurors could impose death the court specifically asked the jurors:

Do you know of any reason why you couldn't sit as a fair and impartial jury, fair to the State and fair to the Defendant and render your verdict solely on the evidence that you hear and see and the charge of the Court as to the law, those are the only two things you have to worry about, the evidence and the law. Is there anybody that can't do that?

R.1347-48. The prospective jurors, including Mr. Gilmore, all affirmed their ability to impose death and indicated that there was no reason they could not “sit as a fair and impartial jury, fair to the State and fair to the Defendant.” R.1348.

Mr. Gilmore was asked to give some background, which he stated: “My name is Hubert Gilmore, I'm with RCA out at Tyndall. My wife works at Sears, and I have three children, and I have no law enforcement experience.” R.1348. He did not mention his relationship to the victim. Furthermore, on his juror questionnaire, Juror Gilmore answered the question of whether he or a family member had ever been a victim of a crime in the negative.

The prosecutor then asked the prospective jurors: “Do each of you -- there was a list of witnesses who are potential witnesses and

may be called in this case, do any of you know any of those possible witnesses or are related in any way?” R.1350. The list of potential witnesses was provided for the potential jurors earlier. R.1242-1244. The victim’s husband was on the list read to the jury. R.1243. Mr. Gilmore did not inform the prosecutor of his relationship with the victim in response to this specific question or indicate that he knew the victim’s husband.

Despite having asked the specific question above, the prosecutor gave the new prospective jurors one more chance to disclose any biased relationship, asking:

Do any of you know of any question that was asked earlier or some other time that you feel should be brought to your attention and the Court? In response to one of those questions or some other thing that you feel is important to direct to the Court? Do each of you feel you could be fair and impartial, both to the State and to the Defense? Any pressing problems, **family members** or anything of this nature?

R.1352 (emphasis added). A few prospective jurors brought to the court’s attention some scheduling issues, but Mr. Gilmore remained silent.

Finally, defense counsel made one more attempt to determine any relationships:

MR. BOWERS: [] Now, it's always the possibility that the attorneys don't ask you a question and if they had asked you, you would have them to, do any of you have anything that you feel that should be told us? Just something in a relationship or anything that might in some far stretch of the imagination have a bearing later on, even if we haven't asked the question, anything that you feel that you should disclose that we haven't asked? I know that's a catch-all question, but can you think of anything either the State or I that you wished I had asked or the State had asked that we haven't? Someone said they hadn't read or heard anything or has everyone heard or have heard or read something about this case -- that was you that hadn't heard or read anything - - -

MR. FRANCK: No, I work, I said I knew the people.

R.1357-58. Mr. Gilmore again remained silent. Before the jury was seated, defense counsel used one last strike to remove Mr. Hubbard.

R.1358-59. Defense counsel struck Mr. Hubbard based on an Assistant State Attorney having drafted his will 10 years ago (R.1347-47) and his having worked with potential witness Robert Benefield in pest control, "for a couple of months." R.1350-51. Mr. Hubbard did not socialize with Mr. Benefield. R.1351. When it came time to exercise strikes, the court was able to anticipate that defense counsel was going to strike Mr. Hubbard. Then the jury was sworn without disclosure from Mr. Gilmore therefore depriving Mr. Bates of a fair

and impartial jury despite the best efforts of counsel, the court, and the State Attorney. R.1359.

Mr. Bates' Awareness of the Juror

Mr. Bates was told by a fellow inmate from Bay County, Florida that there was a Black man convicted in Bay County by a jury that had a family member of the victim on the jury. Apparently, this is well known in the Bay County and is still talked about today. The local community seemed to have known this for a number of years but Mr. Bates was not aware of this. Mr. Bates was not from Bay County and does not have family in the area that would have heard of this shocking revelation. He also did not know whether it was his case in which the biased juror sat.

Mr. Bates initially informed his federal counsel of the possibility that he was convicted by a biased related juror. Such a possibility would be insufficient for any attorney or Mr. Bates to file a motion for relief or to interview the juror. Much investigation needed to be done, considering the protection that the legal system provides jurors once a case has been determined. Instead, Mr. Bates diligently pursued the truth. First, he was able to determine that one juror was actually related to the victim. Juror Hubert Donald Gilmore was the second

cousin of the husband of the victim's sister. *See Florida Marriage Index, 1927-2001.*

The presence of a relative of the victim was, as can be imagined, an Earth-shattering revelation. Mr. Bates, of course, has found grievous injustices in his conviction and death sentence from arrest through his collateral challenges. From the opening prayer by a local minister that excluded him, to the striking of potential jurors while his attorney drove to Bay County, Mr. Bates has sat in prison watching all sorts of injustices that stand apart from the constitutional failings seen in the most challenged case.

The relationship of the juror was beyond what Mr. Bates has seen before. It is easy to see that Mr. Bates having faced improper aggravating circumstances and originally being sentenced to death by order prepared by the prosecution would have been overwhelmed by the extreme malfunction of the jury in his case. Mr. Bates and counsel, however, proceeded with caution and rather than simply accuse the juror of misconduct, attempted to get the facts so that the issues could properly be decided.

Rather than file a motion for relief, Mr. Bates availed himself of the procedures that Florida law provides to resolve issues with the

jury. Following Florida Rule of Criminal Procedure 3.575, Mr. Bates filed a motion to interview the related juror. While it was nearly impossible that in a small community that this juror did not know of the relation to the victim or that, somehow, he failed to mention it during voir dire, rather than just accuse the juror, Mr. Bates sought to develop the facts necessary and assumed the burden of proof.

Mr. Bates, following the proper procedures under Florida law, showing a respect for the process, even though it would be hard to imagine a scenario under which a related juror could sit in judgment of the person alleged to have committed the murder of a related victim. While the jury system in Florida and throughout the country had to overcome a number of issues of whom may serve on a jury, it has never been acceptable to have jurors related to the victim. Indeed, even the most ardent supporter of prosecution would balk at the suggestion.

Mr. Bates' Trial and His Testimony

The State presented evidence at trial to convince the jury that it had met its burden of proof beyond and to the exclusion of every reasonable doubt. The jury could have believed all, some, or none of the evidence against Mr. Bates. Mr. Bates had no burden of proof but

nevertheless took the stand and testified that he did not kill the victim. R.802. At the heart of the jury's decision, the jury had to weigh two different version of the events. If the jury believed that Mr. Bates testimony did not create a reasonable doubt, the question was whether the State's evidence otherwise convinced them that the State proved the case beyond a reasonable doubt.

Mr. Bates' testimony certainly could have created a reasonable doubt with at least one unbiased juror. Mr. Bates took the witness stand and testified, under oath, to the events that occurred before and after his arrest. R.776. Mr. Bates was a truck driver from Tallahassee sent to Bay County as part of his delivery route. R.77-778. Mr. Bates stopped at the business where the crime took place to see if he could find the location of a carpet dealer nearby. R.780-83. Mr. Bates found out there was no carpet dealer, he asked if he could take his lunch break and park in the complex. R.783. Mr. Bates pulled his work truck in the back of the building to take lunch and was reviewing his paperwork before he took a nap. R.784-85.

After a quick nap, Mr. Bates walked up to the insurance business, intending to use the phone to call the carpet place. R.785-86. Mr. Bates saw that the door was open and that a curtain was

swaying in the wind. R.786. He looked inside and saw no one and nothing suspicious so he closed the door. R.786-787. He walked to another warehouse and looked in tinted windows and saw a car in the warehouse. R.787. While Mr. Bates walked around he saw some change and a ring which he picked up. R.789.

Mr. Bates went back to the insurance business and this time he went in after first asking if anyone was there. R.790. He looked around and saw an open pocketbook and shoe. R.790. Mr. Bates left the office after he saw that no one was in the building. R.790-91. He walked around the back of the building where he heard a noise. R.792. Mr. Bates called out, "Hey, is anybody, you know, who is that?" R.792. After Mr. Bates spoke, the noises ended and Mr. Bates walked towards the noise. R.792. The source of the noise appeared to run off. R.792. As Mr. Bates approached the victim he at first thought that it was a stump or a pile of clothes. R.792.

When Mr. Bates was close enough, he recognized that it was the lady he seen inside the insurance business earlier. R.792-93. He saw the victim with her dress hiked up and bleeding. R.793. He checked for a pulse and found none. R.793-94. After seeing that the victim was dead, Mr. Bates panicked as thoughts raced through his head.

R.794. Mr. Bates was scared because he knew he was a Black man in the vicinity of a dead white woman. R.795. Despite his fears, he decided to call the police and walked to a nearby house to use the phone, but no one was home. R.795.

As Mr. Bates walked back to the insurance office, he saw that the police were already there. R.796. Before he could tell the police what he had seen, one officer pointed a shotgun at his head. R.796. After the shotgun was pulled, Mr. Bates provided identification and said that he had not seen anybody after being questioned. R.797. Mr. Bates explained that he said that he had not seen anyone, even though he intended to tell the police because he was scared after having a shotgun drawn on him. R.787. There were no Black officers there (R.797) and it can be ascertained that he was the only person at the scene who was Black.

Trial counsel asked Mr. Bates about the knife sheath found at the crime scene. R.797. Mr. Bates agreed that he had a knife like the one previously admitted as an example and that the sheath was like the one he had. R. 798. Mr. Bates explained that his knife was at home and left in his or his wife's car and the sheath may have been in his truck or in his pocket, but Mr. Bates was unsure. R. 799. When

asked about a blue cord introduced into evidence, Mr. Bates was certain that he did not have that blue cord or any blue cord on him. R.800 If there were any blue cord in the truck it would have come from one of the other drivers that use the truck. R.800. Mr. Bates explained that the type of cord at issue was common on sheaths that hold similar knives. R.801. Mr. Bates also disputed whether the watch pin found was his. R.802.

Counsel asked Mr. Bates directly whether he had killed Renee White and Mr. Bates answered, "No, I didn't." R.802. Mr. Bates did not remember allegedly confessing. R.803. Mr. Bates asked for water from law enforcement and was given an unknown orange drink from an unknown officer. R.804. The orange drink appeared to have been tampered with because Mr. Bates observed small bubbles or a sort of film. R.805. Mr. Bates questioned the officer who gave him the drink and asked that the officer try it first. R.805. After the officer tried a small amount of the drink Mr. Bates consumed it.

After Mr. Bates consumed the drink, law enforcement started to interrogate Mr. Bates. R.805. While this was going on, Mr. Bates started feeling bad and his head began hurting. R.805. He began feeling emotional and crying uncontrollably. R.806. Mr. Bates did not

remember any questions, and did not recall making a confession. R.806. Mr. Bates agreed that the first taped confession sounded like him but the second one did not. R.807-08. Mr. Bates told the jury that if he had made the statements on the recording, he did not know he was doing so and that “something must have been wrong with [him].” R.808. Mr. Bates told the jury that he told law enforcement that he found the ring and that he never told law enforcement that the ring was his wife’s. R.808-09. Mr. Bates, in contrast to the recollection of law enforcement, testified that he told his wife that “They say I killed a woman.” R.809. Mr. Bates made clear to the jury that he just said what he had been told and this was not a confession. R.809.

When asked about the blood on his shirt, Mr. Bates explained that he had taken his shirt off when he was in the woods because the stress had caused a flare up of his pyorrhea, so it was possible that was how his blood got on his shirt. R.810-11. Mr. Bates also believed that it was possible that the victim’s blood may have gotten on him when he checked the victim’s pulse. R.811. Mr. Bates explained that the scratches he had may have come from when he was running through the woods. R.812.

Mr. Bates' testimony offered an alternative to the State's theory of prosecution. The jury was never required to determine which side was the most accurate; the jury was required to consider whether hearing Mr. Bates' testimony, there was a reasonable doubt as to whether the State proved the case. Mr. Bates should have been presumed innocent when this decision was made.

The Lower Court's Order

The lower court denied the motion to interview juror on November 6, 2023. MIJ83-88. Mr. Bates filed a motion for rehearing which the lower court denied on December 21, 2023. MIJ131.

The lower court's order found that the motion could be dismissed as facially insufficient. The lower court found that there was an affidavit/oath requirement (MIJ85) despite the absence of such a requirement in Florida Rule of Criminal Procedure 3.575. Mr. Bates denied that there was such a requirement in his motion for rehearing² but in the alternative requested 20 days to provide affidavit or swear to the motion to correct any perceived pleading

² While the lower court correctly quoted from this Court's case law, the argument in the Motion for Rehearing points out that the language quoted was merely vestigial. See MIJ92-97.

deficiency. MIJ. 92-93. The lower court denied the motion for rehearing without mentioning Mr. Bates' request to provide an affidavit or swear to the motion, if such was determinative. See MIJ131.

The lower court found "that the present Motion is due to be denied as untimely." MIJ85. The court found "Rule 3.575 requires that a motion seeking to interview a juror '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.'" Obviously, the 10 days had passed in Mr. Bates' case, however, the lower court found that good cause was not shown. The court seemed to have failed to consider the problem with obtaining information necessary for this claim. Mr. Bates had no way of knowing that there was a related juror on the jury that convicted him. After this information became known, Mr. Bates filed his motion within one year of counsel obtaining the certainty necessary to file the motion.

The lower court's order took time limits out of context to rule that the motion was untimely and stated:

Even assuming such a claim were sufficient to constitute "good cause," the almost year-long delay between counsel's discovery of the juror's relation to the victim and

the filing of the claim certainly renders the present Motion untimely under Rule 3.575. *See Belcher v. State*, 9 So. 3d 665 (Fla. 1st DCA 2009) (holding that a motion was time barred because defense counsel waited more than a month after learning of potential misconduct to raise the issue with the court); Order Denying Defendant's Motion to Interview Jurors at 2, *State v. Dailey*. No. 521985CF00708XXXXNO (Fla. 6th Cir. Ct. Oct. 14, 2019), 2019 WL 8195120 at *1 (ruling that defendant could not wait until after his death warrant was signed to seek to interview jurors where basis for request had been known to defense counsel for over two years). Furthermore, to the extent that the claim could be construed as one of newly discovered evidence and the filing construed as a Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851, the Motion would remain untimely because it was not filed within one year of the Defendant's discovery of the alleged relationship between the victim and one of his jurors. *See Byrd v. State*, 14 So. 3d 921, 924 (Fla. 2009) ("Claims of newly discovered evidence must be brought within a year of the date the evidence was or could have been discovered through due diligence.").

MIJ86 (footnote omitted). The court ignored the need for Mr. Bates to verify that the Juror was indeed related, however, the court acknowledged that “[t]he Motion was filed *within* one year of federal postconviction counsel's discovery of the distant familial relationship between the victim and Juror Gilmore.” MIJ86 fn. 1. Accordingly, if the one-year time limit for newly discovered evidence applied, the motion was timely. Mr. Bates argued on rehearing that the lower court’s rationale for determining that the motion was untimely failed

to contemplate the exigencies of Mr. Bates' case and was therefore incorrect.

Lastly, the lower court found the motion was insufficient on the merits. MIJ86. The court addressed two bases for denial: 1) Mr. Bates did not establish that the juror was dishonest. The court found that the juror may have misunderstood the questions asked to the potential jurors and may not have been dishonest; 2) There was no evidence that the juror was biased. MIJ86-87. The court concluded the order by questioning whether the juror was even alive and finding that the juror should be protected from "needless prying and harassment' requested by the Defendant." MIJ88.³

SUMMARY OF ARGUMENT

Mr. Bates learned a shocking revelation--he was tried by a juror, Hubert Donald Gilmore, whose second cousin's wife was the sister of the victim. Mr. Bates learned of this far later than the 10 days which

³ Mr. Bates informed the court in his motion for rehearing that the juror was still alive. MIJ102 If the juror were to pass away before a hearing, certainly Mr. Bates would be able to question other family members, under oath. Mr. Bates has not done this as of yet out of respect for the law and the protection it provides. He would certainly have options at an evidentiary hearing or hearing on the motion to interview the juror.

Florida Rule of Criminal Procedure provides. That rule does allow the motion to be brought if “good cause is shown.” While there is no exact limit on when good cause was shown, Mr. Bates proceeded within one year from when his federal counsel confirmed the relationship. After that his state counsel investigated and filed a Motion to Interview Juror in the Circuit Court within a year of the confirmation by his federal counsel.

The lower court should have granted the motion. The lower court denied the motion. The court found that it was untimely and without merit. Mr. Bates explained why this was incorrect in a motion for rehearing. This motion would have supplied the basis for a newly discovered evidence claim but could only come after Mr. Bates had the opportunity to interview the juror and confirm the juror’s relationship.

The lower court’s denial of the Motion to Interview Juror denied Mr. Bates due process under the Fifth and Fourteenth Amendment, access to the courts, his right to a fair and impartial jury under the Sixth and Fourteenth Amendments, his right to seek habeas relief under the United States and the Florida Constitutions and to be free from cruel and unusual punishment, under the Eighth and

Fourteenth Amendments. This Court should not let the lower court's error stand.

As far as merits are concerned, Mr. Bates' motion was certainly meritorious. He had the right to a fair and unbiased juror, under which a related juror was entirely contrary. He should have the right to show that this most important right was violated through a juror interview.

Finally, as a means of showing timeliness and a right to speak with jurors, Mr. Bates argues that this Court should reconsider Florida's prohibition on juror interviews.

STANDARD OF REVIEW

"[A] court's decision on whether to allow an interview of jurors after trial is subject to review for an abuse of discretion." *Marshall v. State*, 976 So. 2d 1071, 1076 (Fla. 2007). Mr. Bates, however, has presented more than a challenge to lower court's denial of the juror interview. Mr. Bates has alleged that the denial by the lower court violated his constitutional rights under the United States Constitution and the Florida Constitution, which amounts to a mixed question of law and fact or a pure question of law and requires de novo review. *Cromartie v. State*, 70 So. 3d 559 (Fla. 2011); *see also*,

Stephens v. State, 748 So. 2d 1028, 1030 (Fla. 1999). He also challenges the bar on juror interviews under Florida law as unconstitutional, in Argument II. *Id.*

ARGUMENT

I. MR. BATES HAS A RIGHT TO INTERVIEW THE JUROR BASED ON HIS GOOD FAITH INVESTIGATION. THE LOWER COURT'S DENIAL OF HIS MOTION WAS CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THE HABEAS CLAUSE OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A relative of the victim seated on the jury is a denial of the fair and impartial jury that the Florida Constitution and United States Constitution guarantee. Upon learning of this serious malfunction of the jury system in this case, Mr. Bates sought to develop the facts necessary to obtain a remedy from the court by filing a motion to interview juror. The lower court denied him the right to show that relief was necessary under the law. This Court should reverse and allow the truth to be known.

A. The right to a fair and impartial jury is at the apex of the rights guaranteed by the Constitution and is highly valued by all fair-minded people.

The right to a jury trial means a right to a fair and unbiased jury. The Sixth Amendment, provides in part: “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. . . .” *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

The United States Supreme Court established that the right to a jury trial contained in the Sixth Amendment applies to the States in *Duncan v. State of La.*, 391 U.S. 145 (1968) holding that, :

In determining whether the rights guaranteed by the Fifth and Sixth Amendments, through the Fourteenth Amendment . . . [t]he question has been asked whether a right is among those “ 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' ” *Powell v. State of Alabama*, 287 U.S. 45, 67, [] (1932); whether it is “basic in our system of jurisprudence,” *In re Oliver*, 333 U.S. 257, 273, [](1948); and whether it is “a fundamental right, essential to a fair trial,” *Gideon v. Wainwright*, 372 U.S. 335, 343—344, [] (1963); *Malloy v. Hogan*, 378 U.S. 1, 6, [] (1964); *Pointer v. State of Texas*, 380 U.S. 400, 403, [] (1965). . . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a

federal court—would come within the Sixth Amendment's guarantee.

Id. at 148–50. However, the right to a jury trial in the individual states, and even before the Constitution, was paramount to any criminal trial in the United States judicial legacy. The United States Supreme Court affirmed this in *Duncan*, explaining that:

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

‘Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that * * * the truth of every

accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state 'the most essential rights and liberties of the colonists'—was the declaration:

'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

'That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'

The Declaration of Independence stated solemn objections to the King's making 'judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries,' to his 'depriving us in many cases, of the benefits of Trial by Jury,' and to his 'transporting us beyond Seas to be tried for pretended offenses.' The Constitution itself, in Art. III, s 2, commanded:

‘The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.’

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

‘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.’

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court. For example, the Court has said:

‘Those who emigrated to this country from England brought with them this great privilege ‘as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’ . . .

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against

unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Id. at 151–56. The history and importance of trial by a fair and unbiased jury was summed up in an earlier case:

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal

standards of due process. *In re Oliver*, 333 U.S. 257, []; *Tumey v. State of Ohio*, 273 U.S. 510 [.] ‘A fair trial in a fair tribunal is a basic requirement of due process.’ *In re Murchison*, 349 U.S. 133, 136, []. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’ Co.Litt. 155b.[]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in *1 Burr's Trial* 416(1807).

Irvin v. Dowd, 366 U.S. 717, 721–22 (1961).

This Court, too, has been an ever-vigilant guardian of the right to a fair and impartial jury right to a fair and impartial jury as guaranteed by article 1, section 16, of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution:

Maintaining the sanctity of the jury trial is both critical and integral to the preservation of a fair and honest judicial system. It is also significant to the trust and confidence our citizens place in the judicial system. “The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence.” *Sinclair v. U.S.*, 279 U.S. 749, 765, [](1929). Without the “[e]xercise of calm and informed judgment” by the jury, we cannot expect “proper enforcement of law.” *Id.* Consequently, a failure to ensure that our jury panels are comprised of only fair and impartial members renders suspect any verdict reached.

Matarranz v. State, 133 So. 3d 473, 476–77 (Fla. 2013).

In *Matarranz*, this Court recognized the importance of juror impartiality and Florida law’s long-established and deep recognition of this right, stating:

In *O'Connor v. State*, this Court emphasized its commitment to juror impartiality when it noted that “jurors should if possible be not only impartial, but beyond even the suspicion of partiality.” 9 Fla. 215, 222 (Fla.1860). The goal sought is a jury composed of persons whose minds are free of any preconceived opinions of the guilt or innocence of an accused, persons who can in fact give to an accused the full benefit of the presumption of innocence, persons who can because of freedom from knowledge of the cause decide it solely on the evidence submitted and the law announced at the trial. *Singer [v. State]*, 109 So. 2d [7], 23 [1959].

Matarranz v. State, 133 So. 3d 473, 485 (Fla. 2013). The Court also recognized that some, “opinions and biases that arise from these circumstances as immutable.” *Id.* at 485. This Court has held that “if there is a reasonable basis to doubt a juror's impartiality, then that juror should be excused. []. Notwithstanding ‘tortured attempt [s] at rehabilitation,’ the totality of the Juror's responses in this case sufficiently placed in doubt her ability to be impartial.” *Id.* at 488.

Just like in *Matarranz*, Mr. Bates’ appeal concerns the “the great foundation and first principle and essence of a common law trial”—a jury trial. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 440,

[] (1830).” *Id.* at 491. Thus, “[t]rial by juries impartially selected is one of the components forming] the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages, and blood of our heroes have been devoted to [its] attainment.” *Id.*; citing, Thomas Jefferson, First Inaugural Address in Washington, D.C. (March 4, 1801). Indeed, “the most basic guarantees of the American justice system—such as due process, habeas corpus, and the presumption of innocence—fully turn upon the impartiality of our arbiters of justice[],” *id.*, which Mr. Bates was denied. A juror interview is the only way that Mr. Bates can have any assurance that these indisputable standards were met.

B. What Mr. Bates knows so far is both devastating and an affront to his dignity and the legitimacy of his conviction.

Mr. Bates has long contested his conviction and death sentence and has maintained his innocence since trial. His claims of unconstitutionality in different proceedings have been raised within the confines of extant claims of constitutional violation. As Mr. Bates litigated his claims throughout the years, he has inevitably felt that there was something deeply wrong with the proceedings against him.

This went deeper than his claims of innocence and the excess of his death sentence. It was something deeper and more insidious.

Holding such a deep-seated fear that something just wasn't right, this Court can only imagine what he thought when he heard that there was a Black man convicted and sentenced to death by a jury with a relative sitting in judgment, in Bay County, Florida. This was something that went well beyond a claim of ineffective assistance of counsel, or the like. Having a juror on the jury that was related to the victim showed him that his life and liberty were so disregarded, he was denied the most basic right at the heart of the Constitution, and fundamental to his dignity - - a fair and impartial jury. Where was his dignity which "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Florida*, 572 U. S. 701, 708 (2014). Indeed, something was terribly wrong.

After he initially heard the revelation he told his federal counsel. While he may have thought that this had confirmed what he sensed all along, he would have known that talk in visitation is hardly concrete evidence, and that he was probably not the only Black man sentenced to death in Bay County, Florida. This would all have to be

confirmed by his attorneys. But he would have had to think that if this was not something that was true, what benefit would there be for the teller of such a tale to lie.

It would make no sense for a person to say that there was Black man convicted and sentenced to death by a relative if it were not true, which also lends support to the theory that the juror knew and told others. Anyone who may have heard this and thought it could have been them, would inevitably check to find if any jurors were related to the victim in their own case. If no one was found to be related, this “gossip” would have died on the vine like much other prison gossip. Indeed, if this were not true, nothing would have ever been done.

Mr. Bates’ counsel, first federal, and then state, confirmed the information. Mr. Bates then looked to the courts to provide the certainty that he needs to obtain the remedy that the Constitution requires by filing the Motion to Interview Juror at issue.

C. Mr. Bates complied with the rule for interviewing jurors and did so as expediently as he could. The lower court’s order misapprehended the force of his arguments.

Florida Rule of Criminal Procedure 3.575 was hardly sufficient to vindicate Mr. Bates’ constitutional right to an unbiased jury, but

it was all that Mr. Bates has available to him to seek the information necessary to obtain a remedy. He could not, as someone incarcerated on death row, investigate the matter himself. Moreover, he is limited to the filing of the motion which is the subject to this appeal, because the rules regulating the raising of juror claims contained in both Rule 3.575 and the Rules of Professional responsibility limit his ability to investigate this matter further without judicial intervention. There should be no mistake, however—Mr. Bates knows he did not receive the fair and unbiased jury that he was promised in the Florida and United States Constitution.

After Mr. Bates' counsel confirmed his worst fears, counsel filed a proper Motion to Interview Juror in the circuit court. He scrupulously met each and every requirement for such a motion. Rule 3.575 states:

MOTION TO INTERVIEW JUROR

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.

Mr. Bates certainly had “reason to believe that the verdict may be subject to legal challenge.” Under any system of justice having a relative of the victim decide the case against the accused is unacceptable, let alone a system such as ours in which the right to a fair and unbiased jury is primary. The rule is explicit in requiring that the movant have “reason to believe” that the party challenge the verdict in the motion. It is apparent that this rule is meant to give the movant the ability to later challenge the verdict. The lower court seemed to conflate the two steps by mixing the reason to believe with whether relief should be granted.

The lower court supplied its own reasons for why relief should be denied that could only be known after an interview. The lower court speculated and found that the juror may not have known that he was related to the victim or that “Juror Gilmore would want to ensure that the person responsible for Ms. White's murder was properly convicted - - is equally plausible.” MIJ87. The court then

ruled that, “Therefore, because there is no evidence of actual bias, the Defendant is not entitled to the requested postconviction relief. Accordingly, the Motion could be denied as legally insufficient.” MIJ87.

The lower court’s decision is incorrect for a number of reasons. The order fails to consider that Mr. Bates was required to plead that he had “reason to believe” that there was actual juror bias. He needs an interview to prove that the juror was in fact biased. While it strains credulity that the juror conceivably did not know of the relationship or that he knew and insisted that he be on the jury to ensure that the state had the right person, Mr. Gilmore would need to testify to one of these scenarios to defeat the potential claim. Of course, following the procedure outlined in Rule 3.575, Mr. Gilmore after swearing an oath could answer as he wishes and then the courts would have to decide if he is telling the truth.

The lower court’s speculation is troubling because it fails to consider the mechanics of how the information manifested itself. If Mr. Gilmore did not know he was related to his cousin, he would not have answered any of the questions that he was related. This could

be Mr. Gilmore's answer--but no one knows since nobody was allowed to ask him at a jury interview or otherwise.

The above section, shows that Mr. Gilmore was in the courtroom sworn, when juror after juror told the judge and attorneys of far more remote relationships. This would refute the lower court's theory that Mr. Gilmore did not think his relationship mattered. Potential juror, after juror, informed the parties that they were neighbors or worked with witnesses. With the court and the attorneys pleading for disclosure, a number of jurors were forthcoming with relationships.

Not Mr. Gilmore. However, it would have been readily apparent that his relationship, if known, needed to be disclosed. This Court need look no further than the striking of prospective juror Millett. Mr. Millett contacted the clerk during break to disclose a "possible relationship." R.1287-88. (Exchange reproduced above). Mr. Millett's wife was the first cousin of the victim's husband Randy White. At first it seemed like Mr. Millett claimed that he could be fair and impartial until he later admitted that "it would be hard" to find Mr. Bates not guilty. *Id.* Mr. Millett did not know Mr. White and did not socialize with him. *Id.* He probably never even met the man. The State tried to rehabilitate him but the trial court saw through this and found that

since the court thought “it would probably be embarrassing for [Mr. Millett] to sit on this jury one way or two, so without objection by the Defendant, [the court] excuse[d] Mr. Millett.” R.1288.

Mr. Gilmore sat through this very exchange. Mr. Millett, never having even met the victim or his wife’s cousin was removed from jury selection by the judge, in open court, because of his relationship. Mr. Gilmore certainly would not have proceeded through jury selection with the constrained view of relatives that the lower court’s order speculated he had. It would be impossible that having seen Mr. Millett be removed by the judge he would have continued under the mistaken belief that he was not required to disclose his relationship.

It was also speculative for the lower court to find that Mr. Gilmore may never have known of the relationship at all. Certainly, moving through different degrees of relationship someone may not know they are related to someone. Such a hypothesis fails for two reasons. First, the area was relatively small and insular. Mr. Gilmore the victim, and Mr. Gilmore’s cousin all lived in Bay County. At the time of trial, this was not a very large urban area, with a large population, where a cousin could get lost in the masses.

Second, and most importantly, this would have had to be known by Mr. Gilmore for it to become known to Mr. Bates. The story of the relative on the jury that convicted a “Black guy” and sentenced him to death somehow became known in Bay County. This could have come from Mr. Gilmore or someone else that knew of the relationship. Considering the infinitesimal possibility that someone would just make the story up and by coincidence there happened to be a relative is too far to speculate. Thus, in order for Mr. Bates to know and learn the story, such a person would have to have known of the relationship.

The only reasonable source of the Bay County community’s knowledge of the seating of a related juror in this case would have been Mr. Gilmore. It simply beyond belief that someone would have known that Mr. Gilmore was related to the victim if Mr. Gilmore did not know this and tell someone. Mr. Gilmore should answer this question, but it belies belief that someone would even know of his relations and begin disclosing this information unbeknownst to Mr. Gilmore. If Mr. Gilmore never knew of his cousin it is beyond speculative that someone else did and started telling people in Bay County.

If Mr. Gilmore never knew of the relationship he would have sat on the case and participated in the verdict and never said another word about it. If he somehow never knew that he was related until later, he would have contacted somebody. The most probable source was indeed Mr. Gilmore.

If Mr. Bates was tried by Mr. Gilmore and Mr. Gilmore knew of the relationship, Mr. Bates should receive relief. Mr. Bates was entitled to a fair and unbiased jury. Mr. Gilmore did not just render his vote biased and unfair, he would also have infected the entire deliberations. Individual jurors get one vote a piece but the system requires that the jury deliberate as a body. The source of the related juror information could have come from one of the other jurors if Mr. Gilmore told them of the relationship while deliberating or during sequestration. One or more jurors told of the relationship would have been more prone to convict if they knew Mr. Gilmore favored guilt. To borrow from the lower court, if Mr. Gilmore favored guilt he would have had an incentive to ensure that the state had the right person. In addition to tainting Mr. Gilmore's vote, other jurors would have been more convinced during deliberations if Mr. Gilmore was so convinced.

The State did have some evidence, so what relative would be willing to disregard the only suspect and allow the death to go unpunished? When deciding beyond a reasonable doubt whether the State proved its case it is possible that a juror could have truly believed that Mr. Bates committed the offenses but, because of reasonable doubt, still be required to vote not guilty. This is a daunting position for a juror like Mr. Gilmore and for the other jurors apprised of the relationship. Mr. Gilmore and the other jurors would be less likely to vote not guilty when there was some certainty but not proof beyond a reasonable doubt.

The lower court also denied the motion because the court found that Mr. Bates filed the motion too late. Rule 3.575 requires that a motion to interview juror “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.” MIJ85-86.

Mr. Bates could not have filed the motion within 10 days of the verdict because he did not know a relative sat on the jury that convicted him. Mr. Bates did not have even a notion that a related juror was on his jury until he heard about the “Black guy that convicted by a family member in Bay County and sentenced to

death.” He had no way of knowing this and no indication that this was an area that needed investigation. None of Mr. Bates’ attorneys or Mr. Bates even suspected that this would happen. If this was even imaginable, anybody considering the matter would have thought that it would have been disclosed in jury selection.

After the hint was given to Mr. Bates, Mr. Bates’ federal and then state counsel had to investigate. This was not an easy task because the victim’s sister did not have the same name as the victim because both were married. The motion was timely. It was filed within one year of the juror’s relationship to the victim being confirmed by Mr. Bates’ investigative team. Mr. Bates proceeded judiciously, considering the very serious nature of interviewing the juror. Because of the nature of the motion, Mr. Bates was required to be exceptionally diligent in confirming the relationship with the victim. This took time. Mr. Bates should not be penalized for seeking a level of certainty necessary for bringing such a claim. Mr. Bates showed good cause for not bringing his motion within 10 days from the verdict.

The one-year time limit for filing a newly discovered evidence claim would only begin after Mr. Bates’ interviews the juror. Only

when the juror admits he was aware of his relationship to the victim can Mr. Bates show that he was tried by a biased juror. Unless, and until, he is given this opportunity, Mr. Bates does not have the necessary newly developed evidence to plead such a claim. This Court should have no doubt that if Mr. Bates had sufficient evidence for a newly discovered evidence claim, without a juror interview, he would have filed the motion already. Mr. Bates has maintained his innocence since trial. There is no advantage to him needlessly delaying the issue and remaining in prison for a longer period of time.

Mr. Bates could have pursued this claim much earlier if he were allowed to speak to the jurors in his case like some states allow. Mr. Bates challenged the constitutionality of the prohibition at least as early as the first postconviction motion following the instant judgment and sentence both becoming final after he was resentenced to death in 1995. In his postconviction motion, Mr. Bates alleged:

Claim VI: The rules prohibiting Mr. Bates' lawyers from interviewing jurors to determine if Constitutional error was present violates equal protection principles, the first, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

In his postconviction motion, Mr. Bates alleged:

Claim VI: The rules prohibiting Mr. Bates' lawyers from interviewing jurors to determine if Constitutional error was present violates equal protection principles, the first, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

This claim was denied by the postconviction court and Mr. Bates appealed the denial to this Court arguing in Argument IV that the "Juror Interview Ban is Unconstitutional." This Court held on this issue, that "[t]his claim [wa]s procedurally barred because it could have been raised on direct appeal." *Bates v. State*, 3 So. 3d 1091, 1105, n.13 (Fla. 2009) (citations omitted). Mr. Bates would had any reason to interview the jurors on his case at the time of direct appeal because he has no indication that there was anything wrong with the jury that convicted him.

In the end, Mr. Bates' Motion to Interview Juror came years after his trial because, no one, especially Mr. Gilmore, disclosed to Mr. Bates that there was a related juror on the jury. After he investigated, through state and federal counsel, Mr. Bates filed his motion a reasonable time later and showed good cause in the timing of the motion. In the end, however, Mr. Bates' one year to file a motion

until the juror interview takes place and Mr. Bates confirms the answer to the questions at the heart of this matter.

D. Mr. Bates interviewing the juror is necessary to prevent a serious violation of the right to a fair and unbiased jury and is necessary to preserve the integrity of the jury verdict, confidence in his death sentence, and to protect the integrity of the courts in Bay County and Florida.

This Court can either grant Mr. Bates the jury interview or hold that it is perfectly acceptable to have a relative of the victim on a jury that convicts a person of capital murder. It is a clear choice between the two, and one which this Court should decide in favor of Mr. Bates being given the opportunity to interview Mr. Gilmore. Certainly, once Mr. Bates gets this information, unless the lower court's speculation is proven true, he will file a newly discovered evidence claim, forthwith. Only then will the one-year time limit begin, which Mr. Bates will certainly meet.

II. THE RULES PROHIBITING MR. BATES FROM INTERVIEWING JURORS, AS HE HAS RAISED SINCE HIS POSTCONVICTION FOR HIS 1995 DEATH SENTENCE, ARE UNCONSTITUTIONAL AND DEFEAT JUSTICE. MR. BATES HAS A RIGHT TO INTERVIEW JURORS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE PROCESS, THE RIGHT TO ACCESS THE COURTS AND THE RIGHT TO HABEAS CORPUS UNDER THE UNITED STATES CONSTITUTION AND FLORIDA CONSTITUTION.

Mr. Bates has long urged this Court to allow him to interview jurors, either based on the nature of his case and as a matter of constitutional right. In 2008 he raised on appeal from the denial of postconviction this argument.

ARGUMENT IV - OTHER ERRORS

A. Juror Interview ban is unconstitutional.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional. The rule prevents Mr. Bates from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict. Misconduct may have occurred that Mr. Bates can only discover by juror interviews. Cf. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Russ v. State*, 95 So. 2d 594 (Fla. 1957).⁶

Mr. Bates requests that this Court declare Rule 4-3.5(d)(4), Rules Regulating the Florida Bar invalid as being in conflict with the Eighth and Fourteenth Amendments to the United States Constitution and to allow Mr. Bates unfettered discretion to interview the jurors in this case. The failure to allow Mr. Bates the ability to freely interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Even if this Court does not find the rule unconstitutional, Mr. Bates is

still entitled to interview jurors on the basis of good cause. Evidence exists that the community pressured judges, and most likely jurors, to convict and sentence Mr. Bates to death. The files and records did not conclusively rebut this claim. An evidentiary hearing is required.

IB at 78-79. The brief went on to note:

In *Buenoano v. State*, 708 So. 2d 941 (Fla. 1998), this Court acknowledged that failure of a juror to answer truthfully can constitute grounds for relief. However, in *Buenoano*, the Court found the issue procedurally barred because collateral counsel failed to exercise due diligence in discovering that a juror had lied during voir dire. For this reason, it is essential that Mr. Bates be permitted to interview the jurors who convicted him and sentenced him to death

IB footnote 6, page 79. The reproduction and reassertion of this right is necessary for two reasons: First, it shows that Mr. Bates was raising the issue of a biased jury long before he knew that he was tried by one. Contrary to the lower court's view, he was not too late to raise a biased jury claim as he had been seeking to do so since his postconviction motion filed in 2001. Indeed, how can Mr. Bates be untimely if he sought to investigate juror bias only to be rebuffed by the courts of this State? Second, had this Court allowed juror interviews when Mr. Bates asked for them, inevitably the information that is critical to litigating his right to a fair and unbiased jury would have come to light as well as whatever other biases existed.

The words of Louis Brandeis speak to this: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis Brandeis (1914), “What Publicity Can Do”, in *Other People's Money and How the Bankers Use It*. Mr. Bates’ conviction and death sentence are only legitimate as far as they can withstand the sunlight of juror interviews. While a juror interview of Mr. Gilmore would help to resolve the issues before this Court, juror interviews will also have the benefit of ensuring that those who face execution will do so with the certainty that the jury that convicted and recommended death, did so in a constitutional manner.

All manner of events can occur that deny the accused the right to a fair and impartial jury.⁴ This was obvious in *Wellons v. Hall*, 558 U.S. 220 (2010). In *Wellons* the United States Supreme Court stated 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.” *Id.* In sum, there was some

⁴ See Michael Hall, *The Juror Who Found Herself Guilty*, Tex. Monthly Feb. 2024 ed. https://www.texasmonthly.com/news-politics/the-juror-who-found-herself-guilty/?utm_source=texasmonthly.com&utm_medium=referral&utm_campaign=sharebutton

rather inappropriate contact between the bailiffs, the court, and the jury, that was not reported to the defense. *Id.* at 220-21.

Mr. Wellons, like Mr. Bates, faced significant hurdles to obtain relief, as the Court observed,

Wellons has repeatedly tried, in both state and federal court, to find out what occurred, but he has found himself caught in a procedural morass: He raised the issue on direct appeal but was constrained by the nonexistent record, and the State Supreme Court affirmed his conviction and sentence. [] He sought state habeas relief and moved to develop evidence. But the court held that the matter had been decided on appeal and thus was *res judicata*. []. He raised the issue again in his federal habeas petition, seeking discovery and an evidentiary hearing. But the District Court “concluded that Wellons's claims ... were procedurally barred, and accordingly denied his motion for an evidentiary hearing on these claims.” []. Before the Eleventh Circuit, Wellons “argue[d] that the district court erred in denying his motions for discovery and an evidentiary hearing to develop his judge, juror, and bailiff misconduct claims because they are not procedurally barred.” [] The court disagreed, holding that Wellons' claims were procedurally barred.

Id. at 221–22 (2010) (internal cites omitted). Much like Mr. Bates’ and Mr. Wellons’ cases, this type of error will not be manifest at the time of appeal. Because condemned individuals have no means of obtaining information to file such claims, unless some sort of information becomes known outside of the case. In other words, Florida death sentenced individuals must wait for someone to

mention the misconduct in the visiting room, or other such fortuitous occurrence. The rights protected by the Constitution should not depend on serendipity. Mr. Bates and all individuals sentenced to death should be able to present claims that show a trial failed “[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death [was] conducted with dignity and respect.” *Id.* at 220.

Mr. Bates, like anyone facing execution after a trial, has a right to interview jurors to protect his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and the right to seek habeas corpus and access to the courts under the Florida and United States Constitutions. This Court should hold that juror interviews are permitted without a motion.

CONCLUSION AND RELIEF SOUGHT

This Court should reverse.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to opposing counsel by e-filing through the portal on February 20, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word count and font requirements contained Florida Rule of Appellate Procedure Rule 9.045. The brief contains 12809 words of the allotted 13,000 and uses Bookman Old Style 14-point font.

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