

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

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY ARGUMENT I..... 1

Timeliness 2

Merits..... 4

Response to the State’s argument to further limit juror claims. 7

REPLY ARGUMENT II 13

CONCLUSION AND RELIEF SOUGHT 19

CERTIFICATE OF SERVICE..... 20

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

Cases

Bates v. State, 3 So. 3d 1091 (Fla. 2009) 14

Boyd v. State, 200 So. 3d 685 (Fla. 2015) 9, 10

Boyd v. State, 324 So. 3d 908 (Fla. 2021) 8, 10, 11, 13

Chambers v. Mississippi, 410 U.S. 284 (1973) 17

Feagin v. State, 307 So. 3d 988 (Fla. 2d DCA 2020)..... 6

Hall v. Florida, 572 U. S. 701 (2014)..... 8

Hojan v. State, 212 So. 3d 982 (Fla. 2017)..... 14

Martin v. State, 322 So. 3d 36 (Fla. 2021)..... 8, 9

Matarranz v. State, 133 So. 3d 473 (Fla. 2013)..... 8, 13

Nicholas v. State, 47 So. 3d 297 (Fla. 2d DCA 2010)..... 6

Pena-Rodriguez v. Colorado, 580 U.S. 206 (2017)..... 17

State v. Owen, 696 So. 2d 715 (Fla. 1997)..... 15

Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002) 14

Rules

Fla. R. Crim. P. 3.575..... 2, 3

Constitutional Provisions

Art. 1, § 16, Fla. Const. 7

U.S. Const. Amend VI..... 7

U.S. Const. Amend XIV 7

REPLY ARGUMENT I

Mr. Bates seeks to interview Mr. Gilmore as the first step of a two-step process. Mr. Bates must first obtain the facts from a juror interview and then, second, litigate a postconviction motion. The State's brief conflates the two steps and attempts to deny Mr. Bates the facts necessary to remedy the violation of his right to an unbiased jury.

Mr. Bates' Motion to Interview Juror was timely, meritorious and should have been granted. No fair-minded person would believe that a relative of the victim should sit on a jury and determine guilt and whether the death penalty should be imposed. Thinking about this, a fair-minded person would know that even if Mr. Gilmore never met his cousin-in-law, how could he ever face his family when his family, extended or otherwise would know that he voted to allow the person the State said committed the crime to walk free? The shame that he would feel in voting not guilty, whether as part of a unanimous verdict, or in causing hung jury, should never have been part of a decision. Moreover, as an interactive body, Mr. Gilmore's influence on the other jurors cannot be discounted. While Mr. Bates must conduct a juror interview to prove his claim of actual juror bias,

he certainly has shown that he has reason to believe that his verdict is subject to challenge. See Florida Rule of Criminal Procedure 3.575.

Timeliness

The most important time for this Court's consideration is whether Mr. Bates is too late for justice. Mr. Bates needed time to prove that he was denied the essential right to a fair and unbiased jury that he is guaranteed under the Sixth Amendment to the U.S. Constitution. Mr. Bates acknowledges that the interview of a juror is a sensitive matter. Based on this understanding, he proceeded with the utmost caution in verifying the relationship of the juror.

Mr. Bates was exceptionally conscientious in making sure that the juror in question was indeed related, which is undisputed. The very nature of this type of claim requires time for it to emerge. Mr. Bates did not know that a relative of the victim sat on the jury that convicted him. He did not know this because Mr. Gilmore did not answer the question affirmatively. No one double-checks the relationship of the jurors to the victim because it is assumed that jurors tell the truth when asked if they are related or know anyone involved in the case. Here, Mr. Gilmore and the panel were specifically asked questions that should have led Mr. Gilmore to

disclose his relationship to the victim. No one suspected that any juror purposely withheld critical relationships during jury selection.

Mr. Bates did not go into court immediately after hearing about the “black guy that got convicted by a relative in Bay County”; that would have been irresponsible. Mr. Bates through counsel was not going to accuse anyone of failing to disclose a relationship without proof. Additionally, counsel needed to obtain all the proof that they could find for Mr. Bates’ Motion to Interview Juror. Counsel needed to search every available source to find evidence of the relationship.

Florida Rule of Criminal Procedure 3.575 states: “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.” Mr. Bates could not file the motion in 10 days, as stated in Fla. R. Crim. P. 3.575, from the verdict because he did not know of the related juror until many years later. This showed “good cause . . . for the failure to make the motion within that time.” The proper reading of this Rule is that there is no other time limit once good cause is shown and certainly not 10-day requirement. There is simply not a second 10-day restart date in the Rule. Once good cause is shown, the motion is timely. Mr. Bates showed good cause.

Merits

The relationship has been established and the question now is whether Mr. Gilmore admits that he knew of the relationship at trial, which can only be answered by Mr. Gilmore.

As for the speculation engaged in by the State and the lower court, that Mr. Gilmore did not understand what the trial court and attorneys were asking, this was unreasonable. Mr. Gilmore sat in the courtroom when Juror Millet informed the court that his wife was the first cousin of the victim's husband. R.1287-88. Mr. Gilmore witnessed that Mr. Millett was struck based on almost exactly his same relationship to the victim. Mr. Millett was struck despite his never having met the relative. R.1288. In fact, Mr. Gilmore sat through and heard why every potential juror was struck by the Court or the defense before he was questioned.

Continuing with the speculation, the State assumed that somehow telling the truth now would be traumatic for Mr. Gilmore. While there may be some stress involved going to court or acknowledging previous wrongs, it can also be cathartic and produce peace. For all the State knows, Mr. Gilmore may have lived with a dark secret for many years and would welcome the opportunity to tell

the truth. This view is certainly as plausible as the State's theory. This Court is again encouraged to see the good that a juror telling the truth can enable. See IB-52, fn, 4.

Mr. Bates has reason to believe that his verdict may be subject to challenge based on actual bias. A related juror seeking vengeance would not be fair and impartial and would certainly be extrinsic to the verdict.

As far as whether Mr. Gilmore actually knew that he was related, the State and the lower court's speculation proves lacking. First, Mr. Gilmore is uniquely the person to answer this question. Second, following logic and reason, it makes no sense that Mr. Bates could become aware of the relationship if Mr. Gilmore did not know about it and more importantly, talk about it. Mr. Bates became aware of the relationship when someone told him about the black man convicted by a relative in Bay, County. If Mr. Gilmore did not know that he was related, how did someone become aware of the relationship? It is not as if random members of the community just start doing genealogical research on random jurors in a Bay County death case. This would be an absurd series of events, but whether

such a freak occurrence happened would be definitively answered by a juror interview of Mr. Gilmore.

As far as actual bias is concerned, being angry over the loss of a related family member and seeking to ensure that he is convicted so that the State can execute him is about as actually biased of a juror as there can be. See *Feagin v. State*, 307 So. 3d 988 (Fla. 2d DCA 2020) and *Nicholas v. State*, 47 So. 3d 297 (Fla. 2d DCA 2010).

Family is one of the deepest connections that one can have. For Mr. Gilmore, his decisions would be impacted by his concern that a guilty man who killed a family member would go free because of reasonable doubt. Even if he could tolerate that, it is also unlikely that he would want to risk the consternation of his family for “following the law.”

Mr. Bates has showed much more than a “reason to believe that his verdict may be subject to challenge based on actual bias.” Reason and logic support the proposition that Mr. Gilmore knew of the relationship and that this rendered him a biased juror. He should be willing to tell the truth at an interview. Certainly, as officers of the court, counsel does not intend to require anything more from Mr. Gilmore than the truth. Mr. Gilmore should tell it now and allow

justice to be done.

Response to the State's argument to further limit juror claims.

After attempting to justify the lower court's denial of Mr. Bates' rights under the U.S. and Florida Constitution, the State's brief attempts to further limit the available remedies by requiring "extreme" violations. Going forward, the State would have this Court create a limitation on the rights of Florida defendants to seek a remedy for a biased juror.

The State's brief fails to give the respect that the right to a fair impartial jury is entitled to receive. The State's brief failed to acknowledge the primacy of this right, enshrined article 1, section 16, of the Florida Constitution and the Sixth and Fourteenth Amendments to the U.S. 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). Nor does the State’s brief acknowledge, “[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).

The State’s brief’s limitation of juror misconduct to racism, or other “extreme” types of prejudice fails to account for the importance of the right to a fair and impartial jury and would allow other egregious violations. There are many ways in which a juror can be biased, and none of them are constitutional.

Additionally, the State’s brief is a solution in search of a problem. There has not been widespread juror harassment. The cases in which a juror interview is granted are few. The State relies on *Martin v. State*, 322 So. 3d 36 (Fla. 2021), and *Boyd v. State*, 324 So. 3d 908 (Fla. 2021)(AB-17, 20-21, 37, 38). As far as the actual prejudice requirement, Mr. Bates pleaded that he was actually prejudiced and would do so again in a properly filed motion seeking to vacate his sentence. He needs the interview to plead that this is confirmed.

What the State’s brief fails to acknowledge was that in *Martin* the lower court granted a juror interview. *Martin* at 31. The lower

court in *Martin* granted what the lower court denied Mr. Bates. *Martin* was not an appeal of the denial of a jury interview but, rather, an appeal from the denial of Martin's second and third successive postconviction motion. *Id.* at 21. What began as an ineffective assistance claim later became a juror misconduct claim. Martin was given the opportunity to investigate the actual bias he pleaded. The lower court and later this Court found his proof of actual bias was lacking because of what the juror in *Martin* said in the interview. This Court did not find fault with the juror interview and did not state it was improper.

The *Boyd* cases were no more helpful to the State than *Martin*. In the first *Boyd* case, *Boyd v. State*, 200 So. 3d 685 (Fla. 2015) there was no jury interview. Boyd pleaded his claim of juror misconduct and the postconviction court considered the criminal records of two jurors. *Id.* at 695. The court denied relief and this Court affirmed. *Id.* at 698. This Court reasoned that, "Here, Boyd has not alleged actual bias, nor has he pointed to any evidence in this record indicating that [two jurors] likely did not deliberate the question of his guilt fairly and impartially." *Id.* at 698. Mr. Bates did precisely that in his motion. The information from Boyd was ascertainable by looking at

records. This was not so in Mr. Bates' case - - the bias was stored in Mr. Gilmore's memory.

The other Boyd case was *Boyd v. State*, 324 So. 3d 908 (Fla. 2021)(*Boyd II*). That case developed from the evidence that emerged at a federal evidentiary hearing. *Id.* at 911. Like in *Martin*, Mr. Boyd at least got to ask the juror that was the subject of the motion questions in an attempt get at the truth. Mr. Bates had no such opportunity.

This Court's decisions on the subclaims in *Boyd II* were based on a procedural bar and partially on the merits of new evidence obtained at the federal evidentiary hearing. *Boyd II* is not dispositive of the merits of Mr. Bates' juror interview, or any prospective postconviction motion, because Mr. Gilmore has yet to provide the facts for an individualized merits review that the Constitution requires. However, looking to *Boyd* and *Martin*, it should be apparent that the juror interviews resulted in no apparent harm to the former jurors and actually facilitated the courts' full adjudication of the issue. Each juror came to Court, took an oath and answered counsels' questions. While certainly the outcome of both cases could be debated, this Court was at least able to decide the case based on

the testimony of the jurors and not the speculation of the State or courts.

Both cases showed that the jurors given the opportunity to speak told greater details of their jury service and arguable bias than counsel was able to find looking through the records that could be accessed. Indeed, in *Boyd II*, this Court found that through the federal evidentiary hearing Boyd has additional claims that were not procedurally barred and decided them on the merits. *Boyd II* at 913.

In addition to showing that juror interviews gave rise to claims that would have gone unraised and undecided, both cases show the order of progression of such claims: First comes the facts; then comes the postconviction motion. Mr. Bates sought the juror interview to obtain the facts necessary to vacate his sentence. Unlike in *Boyd II* and *Martin*, he was stymied in this effort when the lower court denied him access to the source from which the truth and the basis for a Motion to Vacate would come - - Mr. Gilmore.

The outcomes of *Boyd II* and *Martin* are irrelevant. Mr. Bates is entitled to due process under the State and U.S. Constitution, which the lower court's denial surely denied him. Both documents require an individual determination of Mr. Bates' claims based on the facts

that are unique to his case. Only upon consideration of those facts would the issues in Mr. Bates' case be properly and fully adjudicated. While there is never a guarantee of outcome, and relief is seldom granted, access to the court means that a person sentenced to death is allowed to raise good faith claims and have the courts decide them.

Lastly, *Boyd II* shows the very good cause that is at issue in Mr. Bates' case. In *Boyd II*, despite hearing confirmatory testimony from the juror, this Court found part of the claims were procedurally barred, stating:

The procedural requirements outlined in *Martin* are satisfied in this case for the portions of Boyd's claim that are based on information first discovered at the federal evidentiary hearing, as Boyd discovered that information within the year preceding the filing of his motion. *Martin*, at 33–34 (citing *Diaz v. State*, 132 So. 3d 93, 104-05 (Fla. 2013), and Fla. R. Crim. P. 3.851(d)(2)(A)). However, the State argues, and we agree, that Boyd's claim is procedurally barred to the extent it seeks to relitigate his prior claims concerning juror Striggles's failure to reveal her criminal history and the allegation of juror misconduct that arose during Boyd's penalty phase involving unnamed jurors who allegedly discussed extra-record information in the restroom during the guilt phase of the trial. [] To the extent Boyd's present claim points to the record created with respect to those prior claims as information that a factfinder could consider in assessing whether juror Striggles engaged in misconduct when she failed to reveal her familial connection to Boyd and her pretrial knowledge of the case, we recognize the argument and address it below.

Boyd II at 913–14. With procedural bars so frequently applied to claims in this State, especially when the claims can be seen as relitigation, it is no wonder that both State and Federal counsel were extra diligent in thoroughly searching for every bit of evidence that could show Mr. Gilmore’s relationship in the Motion to Interview and any subsequent Motion to Vacate.

The right to a fair and impartial jury is far too important to deny Mr. Bates his right to show that he was denied this essential right at trial. This Court, long having recognized the importance of this right as both a State and Federal right, should reverse and remand. *Matarranz v. State*, 133 So. 3d 473, 476–77 (Fla. 2013).

REPLY ARGUMENT II

For the postconviction attorney, juror claims often turn into dead ends but it is a path they must travel. Zealous representation requires it. The postconviction process invigorates the confidence that society can place in a death sentence and conviction and ensures that the Constitution remains the authority that it must. Florida, however, denies those condemned to death access to the greater truth that would come from speaking with jurors

Mr. Bates certainly understands the concern expressed over jurors' privacy that the prohibition is directed. However, these concerns can be overcome through the rules of professional responsibility and the management of the courts. This would allow for hidden constitutional violations to be uncovered and justice to be done.

Preservation and Law of the Case

Mr. Bates presented the prohibition on jury interviews in his postconviction motion following his being resentenced to death and then on appeal. *Bates v. State*, 3 So. 3d 1091, 1105, n.13 (Fla. 2009). This Court has repeatedly held that there is no right to interview jurors without meeting the arduous requirements of Rule 3.575. See *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)).

Mr. Bates discussed this Court's prior decision on his juror interview claim for a few different reasons. This however was not a recasting of the same argument from his postconviction appeal. This

Court did not decide the issue of whether Mr. Bates had a right to interview jurors in postconviction. Mr. Bates specifically argued that:

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-79 footnote 6. He could not raise this issue on direct appeal because failures in the prospective postconviction process are not the subject of a direct appeal. Moreover, Mr. Bates could not raise a harm that had not yet occurred.

Certainly, the law of the case would not apply, because there certainly was a manifest injustice, and the Court would certainly be justified in invoking it.¹ It should, however, be considered that Mr. Bates suffered a second harm when he was denied a jury interview in the court below. Mr. Bates was the victim of the denial of his right

¹ See *State v. Owen*, 696 So. 2d 715 (Fla. 1997)(This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.) *Preston v. State*, 444 So. 2d 939 (Fla. 1984)).” *Id.* at 720.

to interview juror under the extant procedures that Florida does allow because the lower court unconstitutionally denied the right to interview Mr. Gilmore without those procedures. This did not occur until the lower court denied his motion, but it is a harm for which he may appeal.

Based on the nature of this case, the prior raising of the issue defeats the State's refrain of lack of diligence. While he had no specifics to point to, he did show that he has been asking for the ability to investigate bias on his jury for a long time.

The State acknowledged that Mr. Bates raised 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 [Florida] constitution." AB-57. The State then argues that this was not raised below. As far as Issue I, the State footnoted away Mr. Bates' similar argument under these provisions stating: "But it is the Sixth Amendment that governs claims relating to the jury, not the Fourteenth Amendment or the Eighth Amendment 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.” AB-63, fn 14.

The State’s brief ignores that the Eighth Amendment is always an issue when the death penalty is at issue. The lower court’s order also denied Mr. Bates’ due process under the United States Constitution and the Florida Constitution. *See Chambers v. Mississippi*, 410 U.S. 284, 285 (1973) (holding that a state rule violated due process when used to deny a substantive federal constitutional right).

The State’s reliance on *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) misses the mark. *Pena-Rodriguez* involved impeaching the verdict based on the conduct of a juror during deliberations and whether there was exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.” *Id.* at 209. The Court considered whether the Constitution mandates an exception for “extreme” cases. What the State’s brief disregards is that the no impeachment rule applies to the actual deliberations, not juror non-disclosure and misconduct like that at issue in this case.

It is also a bar on using the statements during jury deliberations of one juror against another. Mr. Bates seeks to do no such thing. The point is that Mr. Gilmore could not deliberate at all and never should have done so. What he said during jury deliberations themselves would be irrelevant, although any statements outside of jury deliberations would be clearly extrinsic and the no-impeachment rule would have no application. Additionally, while there is no doubt that racial animus is certainly extreme and worthy of condemnation, so too is not disclosing a relationship that surely denied Mr. Bates a fair and unbiased jury.

The State's brief argued, "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." AB-54. What was actually argued was:

Counsel maintains the obligation to investigate the circumstances of Mr. Bates' trials notwithstanding the outcome of the initial motion, and this includes investigating the potential relations of jurors to relevant parties of this case.

MIJ-79. First, while postconviction counsel do not have the right to interview jurors at-will, counsel has both an obligation and a right to access whatever public information is available by lawful computer

search regardless of whether a motion to interview juror will ever be filed. Second, what the State expresses great concern about is hardly harassment when counsel uses readily accessible public searches.

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 March 21, 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 3,984 words of the allotted 4,000 and uses Bookman Old Style 14-point font.

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