IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

v. CASE NO. SC07-611

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

CASE SNAPSHOT..... 2

STATEMENT OF THE CASE AND FACTS..... 4

SUMMARY OF THE ARGUMENT..... 34

ARGUMENT..... 36

ISSUE I..... 36

WHETHER THE COLLATERAL COURT ERRED IN DENYING BATES' MOTION FOR DNA TESTING

ISSUE II..... 42

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING BATES' 1995 RESENTENCING PROCEEDINGS

ISSUE III..... 56

WHETHER THE TRIAL COURT ERRED IN DENYING SOME OF BATES' CLAIMS

ISSUE IV..... 68

WHETHER OTHER ERRORS DEPRIVED BATES OF A FAIR SENTENCING PROCEEDING

CONCLUSION..... 93

CERTIFICATE OF SERVICE..... 94

CERTIFICATE OF COMPLIANCE..... 94

TABLE OF AUTHORITIES

Cases

Allen v. State,
854 So. 2d 1255 (Fla. 2003) 74

Arbelaez v. State,
775 So. 2d 909 (Fla. 2000) 86

Atwater v. State,
788 So. 2d 223 (Fla. 2001) 92

Banks v. State,
700 So. 2d 363 (Fla. 1997) 86

Baptist Hospital of Miami v. Maler,
579 So. 2d 97 (Fla. 1991) 71

Bates v. State,
750 So. 2d 6 (Fla. 1999) 58, 59, 61, 63, 64, 79, 83

Baze v. Rees,
2008 U.S. LEXIS 3476 (April 16, 2008) 84

Belcher v. State,
851 So. 2d 678 (Fla. 2003) 80

Bowles v. State,
33 Fla. L. Weekly S 121 (Fla. Feb. 14, 2008) 83

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 50

Cole v. State,
841 So. 2d 409 (Fla. 2003) 49

Cole v. State,
895 So. 2d 398 (Fla. 2004) 42

Combs v. State,
525 So. 2d 853 (Fla. 1988) 75

Conde v. State,
860 So. 2d 930 (Fla. 2003) 80

Devoney v. State,
717 So. 2d 501 (Fla. 1998) 71

Doorbal v. State,
33 Fla. L. Weekly S 107 (Fla. Feb. 14, 2008) 68

Downs v. State,
740 So. 2d 506 (Fla. 1999) 92

Dugger v. Adams,
489 U.S. 401 (1989) 74

Evans v. State,
32 Fla. L. Weekly S 719 (Fla. Nov. 15, 2007) 77

Foster v. State,
614 So. 2d 455 (Fla. 1992) 67

Freeman v. State,
761 So. 2d 1055 (Fla. 2000) 86

Gorby v. State,
819 So. 2d 664 (Fla. 2002) 85

Gordon v. State,
863 So. 2d 1215 (Fla. 2003) 67

Griffin v. State,
866 So. 2d 1 (Fla. 2004) 76, 81, 83

Gudinas v. State,
816 So. 2d 1095 (Fla. 2002) 49

Hertz v. State,
803 So. 2d 629 (Fla. 2001) 80

Hitchcock v. State,
866 So. 2d 23 (Fla. 2004) 42

Hodges v. State,
885 So. 2d 338 (Fla. 2004) 74

Johnson v. Singletary,
695 So. 2d 263 (Fla. 1996) 92

Johnson v. State,
804 So. 2d 1218 (Fla. 2001) 71

Johnson v. State,
904 So. 2d 400 (Fla. 2005) 76

Johnson v. State,
921 So. 2d 490 (Fla. 2005) 55

Jones v. State,
928 So. 2d 1178 (Fla. 2006) 55

Kearse v. State,
770 So. 2d 1119 (Fla. 2000) 89

Lightbourne v. McCollum,
969 So. 2d 326 (Fla. 2007) 84

Lott v. State,
931 So. 2d 807 (Fla. 2006) 42

Lugo v. State,
845 So. 2d 74 (Fla. 2003) 86

Mansfield v. State,
911 So. 2d 1160 (Fla. 2005) 74

Marshall v. State,
854 So. 2d 1235 (Fla. 2003) 70, 71

McCaskill v. State,
344 So. 2d 1276 (Fla. 1977) 88

McCleskey v. Kemp,
481 U.S. 279, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987) 67

Meeks v. Moore,
216 F.3d 951 (11th Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001) 89

Mills v. Moore,
786 So. 2d 532 (Fla. 2001) 77

Porter v. Crosby,
840 So. 2d 981 (Fla. 2003) 77

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 89

Provenzano v. Singletary,
148 F.3d 1327 (11th Cir. 1998) 50

Ring v. Arizona,
536 U.S. 584, 122 S.Ct. 2428 (2002) 77, 78

Robinson v. State,
707 So. 2d 688 (Fla. 1998) 65, 66, 67

Robinson v. State,
865 So. 2d 1259 (Fla. 2004) 67

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 88

Romano v. Oklahoma,
512 U.S. 1 (1994) 75

Rose v. State,
774 So. 2d 629 (Fla. 2000) 69

Schriro v. Summerlin,
542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) 76

Smith v. State,
866 So. 2d 51 (Fla. 2004) 78

Sochor v. State,
619 So. 2d 285 (Fla. 1993) 74

Sochor v. State,
883 So. 2d 766 (Fla. 2004) 82, 85

Spenkelink v. State,
350 So. 2d 85 (Fla. 1977) 65

State v. Knight,
866 So. 2d 1195 (Fla. 2003) 88, 89

Suggs v. State,
923 So. 2d 419 (Fla. 2005) 69

Sweet v. Moore,
822 So. 2d 1269 (Fla. 2003) 76

Turner v. Dugger,
614 So. 2d 1075 (Fla. 1992) 74, 75

Vining v. State,
827 So. 2d 201 (Fla. 2002) 81, 82

Walton v. State,
847 So. 2d 438 (Fla. 2003) 86

Williams v. State,
500 So. 2d 501 (Fla. 1986) 58

Witt v. State,
387 So. 2d 922 (Fla. 1980) 76

Woods v. State,
531 So. 2d 79 (Fla. 1988) 57, 74

Other Authorities

R. Regulating Fla. Bar 4-3.5(d)(4) 70

Section 90.607(2)(b), Florida Rules of Evidence 72

PRELIMINARY STATEMENT

Appellant, KAYLE BARRINGTON BATES raises four claims, and numerous sub-claims within Issues III and IV, in this appeal from the denial of his motion for post-conviction relief. References to the appellant will be to “Bates” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The sixteen (16) volume record on appeal in the instant case will be referenced as “PCR” followed by the appropriate volume number and page number. The one (1) volume of exhibits in the instant appeal will be referred to as “PCR EXH” followed by the appropriate page number. References to the supplemental volume in the instant appeal will be to “PCR Supp” followed by the appropriate page number.

References to Bates’ 1995 resentencing proceedings will be referred to as “RS” followed by the appropriate volume and page number. References to Bates’ initial trial proceedings will be referred to as “TR” followed by the appropriate volume and page number. References to Bates’ initial brief will be to “IB” followed by the appropriate page number.

CASE SNAPSHOT

This is an appeal from the denial of a motion for post-conviction relief. Bates raises four claims, and numerous sub-claims within his last two issues, in this appeal. Bates' main claims, however, stem from the collateral court's denial of Bates' motion for DNA testing and the denial of Bates' claim that trial counsel was ineffective for failing to present the testimony of Dr. Barry Crown, who would have testified that Bates has organic brain damage.

The proceeding at issue is Bates' 1995 resentencing proceedings. There were actually two resentencing proceedings in 1995. In the first, held in late January and early February 1995, Bates presented nineteen witnesses, including two mental health experts. After the defense rested its case in mitigation, the state, in rebuttal, called one mental health expert, Dr. Harry McClaren.

During Dr. McClaren's testimony, a matter regarding the jury was brought to the attention of the court. A juror had neglected to inform the court that his first wife, years before, had been the victim of a violent crime while he was in the military. In addition to his failure to mention it during *voir dire*, the juror discussed the matter with other jurors at lunch. At Bates' request, the trial court granted a mistrial. (RS Vol. XXXII 615).

More than three months later, beginning on May 16, 1995, a second resentencing was conducted to its conclusion. This time, trial counsel called twenty-two mitigation witnesses, including the same two mental health experts who testified at the January 1995 resentencing proceedings.

Bates jury recommended he be sentenced to death by a vote of 9-3. The trial court found three aggravating factors, two statutory mitigators, and eight non-statutory mitigators. The trial court followed the jury's recommendation and sentenced Bates to death. On direct appeal, this Court affirmed Bates' death sentence.

Bates then filed a motion for post-conviction relief which he subsequently amended. Bates also filed a motion for DNA testing. The collateral court denied his motion for DNA testing. Bates did not file an immediate appeal.

The collateral court did, however, hold an evidentiary hearing on Bates' claim that trial counsel was ineffective for failing to present evidence of Bates' brain damage and to present evidence of Bates' ability to adapt to prison. During the evidentiary hearing, Bates called nine witnesses. After both parties were afforded an opportunity to present post-evidentiary hearing memoranda for the collateral court's consideration, the collateral court denied Bates' motion for post-conviction relief. This appeal follows.

STATMENT OF THE CASE AND FACTS

Bates has been sentenced to death three times for the murder of Janet Renee White. The facts of this case were outlined briefly by the Florida Supreme Court in its first review of this case on direct appeal, as follows:

> .... A four-count indictment charged Bates with first-degree murder, kidnapping, sexual battery, and armed robbery. Bates abducted a woman [Janet Renee White] from her office, took her into some woods behind the building, attempted to rape her, stabbed her to death, and tore a diamond ring from one of her fingers. The jury convicted Bates of first-degree premeditated murder, kidnapping, attempted sexual battery, and armed robbery and recommended the death sentence. The judge agreed and sentenced him to death for the homicide, to two terms of life imprisonment for the kidnapping and armed robbery, and to fifteen years for the attempted sexual battery.
>
> In sentencing Bates to death for the murder of Janet Renee White, the trial court found that the following aggravating circumstances had been established: 1) committed during the commission of three felonies; 2) committed for the purpose of avoiding or preventing arrest; 3) committed for pecuniary gain; 4) especially heinous, atrocious, or cruel; and 5) committed in a cold, calculated, and premeditated manner. In mitigation the court found that Bates had no significant history of prior criminal activity.

Bates v. State, 465 So. 2d 490, 492 (Fla. 1985).

On direct appeal, Bates raised three guilt phase issues and four sentencing issues. This Court rejected all of Bates' guilt phase claims and two of Bates' sentencing claims.

This Court agreed with Bates, however, that the trial judge erred in finding the murder was cold, calculated and premeditated (CCP) and committed to avoid arrest. After striking two of the five aggravators, this Court remanded Bates' case to the trial court for a re-weighing of the valid aggravating circumstances against the mitigating evidence presented at trial and for re-sentencing. Bates v. State, 465 So. 2d at 493.

On remand, rather than simply re-weighing the remaining aggravators against the mitigation evidence presented at trial, the trial judge allowed Bates to present additional evidence in mitigation. Bates called several witnesses, including Dr. McMahon, a psychologist who examined Bates for the purpose of re-sentencing. Bates v. State, 506 So. 2d 1033, 1034 (Fla. 1987).

Nonetheless, the trial court sentenced Bates to death. In re-sentencing Bates to death, the trial court found three aggravating factors: (1) the murder was committed during course of kidnapping, attempted sexual battery, and robbery; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel (HAC). The court found one mitigating factor (no significant history of prior criminal activity). Id.

On appeal, Bates argued the trial court neither considered nor properly weighed the newly presented evidence. This Court rejected Bates' claim and affirmed Bates' sentence to death. Bates v. State, 506 So. 2d 1033 (Fla. 1987).

Bates filed a petition for a writ of certiorari to the United States Supreme Court. The Court denied Bates' petition for review on October 5, 1987. Bates v. Florida, 484 U.S. 873 (1987).

The Governor signed Bates' death warrant in November 1989. In response, Bates filed a habeas petition with the Florida Supreme Court and a Rule 3.850 motion with the trial court. At Bates' request, the original trial judge recused himself, and a substitute judge stayed Bates' execution.

The collateral court held an evidentiary hearing on Bates' claim that trial counsel rendered ineffective assistance at the original sentencing proceeding. After the hearing, the collateral court granted Bates' motion for post-conviction relief, in part, and ordered a new sentencing hearing before a new jury. The collateral court found that Bates' trial counsel was ineffective during the penalty phase of Bates' capital trial. The court denied all of Bates' other collateral claims, holding these claims had been abandoned or were procedurally barred.

Bates appealed the denial of the remaining guilt and penalty phase issues and the State cross-appealed the trial court's order granting Bates a new penalty proceeding. This Court rejected each of Bates' claims. Bates v. State, 604 So. 2d 457 (Fla. 1992). This Court also denied the State's cross-appeal and remanded the case for new penalty proceedings. Finally, this Court denied Bates' petition for writ of habeas corpus. Bates v. State, 604 So. 2d 457, 458 (1992).

Bates, once again, petitioned the United States Supreme Court for certiorari review. His petition was denied on March 22, 1993. Bates v. Florida, 507 U.S. 992 (1993).

On May 16, 1995, a new jury was seated and Bates' second penalty phase proceeding commenced. Trial counsel called twenty-two (22) lay and expert witnesses to testify on Bates' behalf.[1] Among those twenty-two witnesses were two mental health experts, Dr. James Larson and Dr. Elizabeth McMahon, who trial counsel retained for the purpose of developing Bates' mitigation case.

Dr. Larson testified that Bates demonstrates levels of anxiety, depression and paranoia. (TR Vol. XIII 546). Bates'

[1] An initial resentencing proceeding before a new jury was commenced in late January 1995. A mistrial was declared, at Bates' request as a result of a juror's failure to disclose his wife had been the victim of a violent crime.

IQ is 88. (TR Vol. XIII 570). Bates' IQ puts him in the low-average range of intellectual functioning. (TR Vol. XIII 546). Academically, he was functioning as a nine or ten year old. (TR Vol XIII 551). Bates is not very bright. (TR Vol. XIII 555). Despite his low academic abilities and his low intellect, Bates graduated from high school. (TR Vol. XIII 555).

In terms of significant social history, Bates was viewed very positively by a lot of people he grew up with. (TR Vol. XIII 556). Dr. Larson told the jury there were never any complaints about Bates' ability to function in society. He fits in. He married, had children, went into the military, had a job, and was a productive member of society. (TR Vol. XIII 556). Dr. Larson testified that Bates had no significant criminal history. (TR Vol. XIII 557).

Dr. Larson diagnosed Bates with an anxiety disorder. A person with such a disorder may be tense, nervous, and high-strung and have anxiety or panic attacks. (TR Vol. XIII 558).

Dr. Larson viewed Bates as a person who was not well-wrapped. (TR Vol. XIII 560). Such a person holds themselves together pretty well most of the time, but sometimes they kind of lose it. A person who is not well-wrapped is someone who would come unglued easily or fall apart during stress. (TR Vol. XIII 561).

Dr. Larson explained that in a situation where the victim surprised Bates in the course of a burglary, a struggle ensued and the victim sprayed Bates with mace, Bates could have come "unwrapped," and "lose it". Dr. Larson explained that under such circumstances, Bates could become very frightened and "freak out." Under these circumstances, Bates could engage in the most basic kind of behavior, resort to a very primitive level of functioning, and engage in aggressive behavior. (TR Vol. XIII 565).

Dr. Larson told the jury that assuming Mrs. White surprised Bates in the course of a burglary, a struggle ensued, and Mrs. White sprayed Bates with mace, Bates' capacity to conform his conduct to the requirements of the law was substantially impaired. Dr. Larson testified that under duress, in the spur of the moment, Bates is likely to act inappropriately. Dr. Larson attributed this to Bates' anxiety disorder and to his rigid thinking. (TR Vol. XIII 567).

Dr. Larson testified that, at the time of the murder, there would have been a lot of panic and confusion. Dr. Larson told the jury Bates was under a severe mental or emotional disturbance at the time of the murder. (TR Vol. XIII 574).

Dr. Larson opined that the mace combined with some sort of confrontation with Mrs. White would have aroused Bates' emotions. Dr. Larson testified that Bates recounted a bad

experience he had in the Army when he went through the gas chamber. (TR Vol. XIII 580).

Dr. Elizabeth McMahon testified that she evaluated Bates prior to trial. In conducting her evaluation, Dr. McMahon reviewed affidavits from people who grew up with Bates, his school records, affidavits regarding his job performance, his military service in the National Guard, affidavits from people he knew later in life, his personnel records from his employer, the police case file, the investigative reports, Bates' statements to the police, some of the previous trial testimony, and jail records. (TR Vol. XIII 601).

Dr. McMahon opined that Bates does not suffer from any major mental illness. He presented, psychologically, the same in 1985 and 1995. (TR Vol. XIII 604).

Dr. McMahon told the jury that Bates' cognitive testing revealed Bates to be on the borderline between low average and below average. (TR Vol. XIII 605). In testing, there were things he could do well and things he did quite poorly on.

Dr. McMahon found Dr. Larson's results of cognitive testing consistent with her own. (TR Vol. XIII 607). Dr. McMahon testified that Bates is a person who is tense, anxious, depressed and somewhat agitated. There are indications of chronic tension. Additionally, she described Bates as someone

who is somewhat suspicious. At times, he is more energized, more impulsive, and more over-reactive. (TR Vol. XIII 610).

Dr. McMahon told the jury that Bates suffers from a significant disruption in his dynamic functioning as a result of his idiosyncratic thought processing. He distorts about fifty percent (50%) of reality. According to Dr. McMahon, what Bates takes in, and how he processes it, is different from the way the rest of us do it. (TR Vol. XIII 611). Dr. McMahon testified that Bates distorts his perceptions and he distorts his interpretation of what is going on. (TR Vol. XIII 611).

Bates is "emotionally over-reactive." (TR Vol. XIII 611). One way this may manifest itself is that someone might make an off-the-cuff comment with no underlying evil motive but Bates may perceive it as a personal attack on him. In such a case, Bates may perceive the speaker is hostile toward him or bears him ill will. (TR Vol. XIII 614).

A person like Bates does not have a lot of insight into his own dynamics and it takes virtually all his energy to just get along on a day-to-day basis. (TR Vol. XIII 615). When asked about Bates' seeming ability to do well throughout his life, for example, hold a job, start a family, graduate from high school and join the military and be honorably discharged, Dr. McMahon explained that these situations have a lot of structure. It is open-ended decision making that Bates has difficulty with.

Bates does well in repetitive tasks such as driving a route for his employer.

In Dr. McMahon's view, Bates also has a very rigid super ego. This manifests himself in his tendency not to forgive himself for mistakes or cut himself any slack. (TR Vol. XIII 618). His value system is very rigid. (TR Vol. XIII 618). However, Bates does not have a criminal value system. (TR Vol. XIII 619).

Dr. McMahon told the jury that Bates' emotional controls would tend to break down in a stressful situation. (TR Vol. XIII 620). Stressors in Bates' life at the time of the murder, included the fact that he and his wife were buying a home and a second child was soon to be born. (TR Vol. XIII 620). He had also not been promoted in the National Guard. (TR Vol. XIII 621).

Dr. McMahon testified that presuming Bates was engaged in a burglary, Mrs. White came back from lunch, confronted him, then sprayed him with mace, Bates would have an emotional over-reaction. (TR Vol. XIII 621). He would also react in a disorganized fashion.

She would see Bates in this situation as extremely anxious, and probably angry. Bates would be feeling threatened, just striking out, and doing whatever he felt he needed to do to just end the situation. (TR Vol. XIII 622). Dr. McMahon thought

under such a situation, Bates would act impulsively. (TR Vol. XIII 622).

Dr. McMahon told the jury that in her opinion, given the stressors he encountered, Bates' ability to do something other than what his emotions were driving him to do at the moment, which was to get out of the situation he found himself in, would be virtually nonexistent. (TR Vol. XIII 624). Bates would be acting emotionally, not thinking. (TR Vol. XIII 625). Dr. McMahon opined that both statutory mental mitigators applied to this case. (TR Vol. XIII 623-625).

At the conclusion of the May 1995 resentencing proceedings, Bates' jury recommended death by a vote of nine to three (9-3). Bates v. State, 750 So. 2d 6 (Fla. 1999). The trial court found three aggravating circumstances: capital murder committed during an enumerated felony (kidnapping and attempted sexual battery); capital murder committed for pecuniary gain; and HAC. Bates v. State, 750 So. 2d 6, 9 (Fla. 1999).

The court found two statutory mitigating circumstances: no significant history of prior criminal history (significant weight); and Bates' age of twenty-four at the time he committed the murder (little weight). The trial court also found eight non-statutory mitigating circumstances: Bates was under some emotional distress at the time of the murder (significant weight); Bates' ability to conform his conduct to the

requirements of the law was impaired to some degree (significant weight); Bates' family background (some weight); Bates' national guard service (little weight); Bates was a dedicated soldier and patriot (little weight); Bates' low-average IQ (little weight); Bates' love for his wife and children and being a supportive father (some weight); and Bates was a good employee (little weight). After weighing the relevant factors, the trial court determined the aggravators outweighed the mitigators and sentenced Bates to death. Bates v. State, 750 So. 2d 6, 9 (Fla. 1999).

On appeal from his third sentencing proceedings, Bates raised nine issues, alleging: (1) the trial court erred in refusing to instruct the sentencing jury that life without the possibility of parole was a sentencing alternative to death (Bates alleged this denied him due process and a fundamentally fair capital sentencing proceeding); (2) the sentencing jury rendered a death verdict contrary to Florida statutory law and the trial court's jury instructions; (3) the trial court erred by excluding certain mitigation evidence; (4) the death sentence is disproportionate; (5) the trial court erred by failing to consider or evaluate relevant non-statutory mitigation; (6) the trial court improperly qualified the jury pool in appellant's absence; (7) the trial court erred by not appointing additional medical experts to assist the defense in developing mitigation;

(8) the trial court erred in finding each of the three aggravating circumstances; (9) the trial court erred by failing to allow appellant to introduce evidence of his innocence (lingering doubt).

The Florida Supreme Court rejected each of Bates' claims and affirmed his third sentence to death. Bates v. State, 750 So. 2d 6, 18 (Fla. 1999). Bates' petition for review to the United States Supreme Court was denied on October 2, 2000. Bates v. Florida, 531 U.S. 835 (2000).

On September 10, 2001, Bates filed a motion to vacate his judgments of conviction and sentence with special request for leave to amend. (PCR Vol. I 68-149). On September 30, 2003, Bates filed a motion pursuant to Rule 3.853 requesting DNA testing on several items of evidence. (PCR Vol. II 325-330). The State filed a response opposing the motion. (PCR Vol. III 357-373). On March 18, 2004, the collateral court denied Bates' motion for DNA testing. (PCR Vol. III 451-457). Though authorized by the rule, Bates did not file an immediate appeal. *Rule 3.853(f), Florida Rules of Criminal Procedure*.

On September 24, 2004, Bates filed an amended motion to vacate judgments of conviction and sentence, raising eighteen (18) claims. (PCR Vol. IV 528-612). On October 26, 2004, the State filed a comprehensive response to each of Bates' claims. (PCR Vol. IV 616-682).

Subsequently, the collateral court held a Huff hearing on the defendant's motion. On July 29, 2005, the collateral court entered an order granting an evidentiary hearing on Bates' claim that trial counsel was ineffective for failing to adequately investigate and present available mental mitigation evidence and to present evidence of Bates' ability to adapt to prison. The court summarily denied the remainder of Bates' claims except for his claim of cumulative error. (PCR Vol. IV 688-696). On October 16 - 17, 2006, the collateral court held an evidentiary hearing on Bates' motion for post-conviction relief.

Bates called nine witnesses at the evidentiary hearing; (1) former sheriff's investigator Guy Tunnell, (2) former trial counsel Hal Richmond, (3) former counsel, Anthony Bajockzy, (4) lay witness Gary Scott, (5) lay witness Jackie Bates, (6) lay witness Joseph Johnson, (7) former trial counsel Thomas Dunn, (8) Dr. Barry Crown, and (9) CCRC investigator Stacy Brown. (PCR Vol. XVI 1156-1302).[2]

Guy Tunnell testified that he was the initial investigator on scene. (PCR Vol. XVI 1161). When he saw Mr. Bates, he appeared to be winded, wet, and a bit disheveled. Mr. Tunnell told the collateral court it appeared Bates had been struggling

[2] Ms. Brown testified that she unsuccessfully, but diligently, attempted to get Bates' wife to appear to testify at the evidentiary hearing. None of Ms. Brown's testimony about what Mrs. Bates told her was considered by the collateral court.

to get through the heavy growth of woods. (PCR Vol. XVI 1162-1163). Bates was responsive to his questions and gave rapid responses. He gave timely answers and was able to respond to questions that were posed to him. (PCR Vol. XVI 1164). In Mr. Tunnell's view, Bates' demeanor was normal under the circumstances. Bates was not confused. (PCR Vol. XVI 1165). He was not disoriented. (PCR Vol. XVI 1167).

Hal Richmond testified that he was appointed for the resentencing hearing in 1995. Mr. Dunn made himself known to Mr. Richmond as Mr. Dunn did work on the appeal that won Bates' a resentencing hearing.

Mr. Richmond used an investigator, a retired FBI agent, to find mitigation. Mr. Dunn had also developed a lot of mitigation evidence over the years in dealing with Bates and his family. Eventually, Mr. Dunn essentially took over the case. Mr. Richmond asked to withdraw but he was asked to remain on the case. (PCR Vol. XVI 1174).

Mr. Richmond did not talk to Dr. Crown. (PCR Vol. XVI 1176). He had no input on the decision not to call Dr. Crown. (PCR Vol. XVI 1176). In his opinion, mental mitigation was the linchpin of Bates' case. (PCR Vol. XVI 1176).[3]

Bates was always "with him". Bates also cooperated with Mr. Richmond's investigator. (PCR Vol. XVI 1177).

[3] Mr. Richmond died while this appeal has been pending.

Mr. Richmond felt that Bates' military service was a very positive part of Bates' life as far as the jury would have been concerned. (PCR Vol. XVI 1177). He believed there might be some retired military on the jury. As such, in his view, Bates' military service was important. (PCR Vol. XVI 1178). [4]

Mr. Richmond thought Mr. Dunn believed that Bates' reaction to stress was something important to Bates' case. Mr. Dunn wanted to show that a stressful event occurred, Bates just totally lost it and Mrs. White unfortunately died. (PCR Vol. XVI 1179).

Anthony Bajockzy testified that the Bates family called him in June 1982 after Bates was arrested. They wanted Mr. Bajockzy to go and meet with Mr. Bates. He did so. (PCR Vol. XVI 1184).

During the interview, Bates was emotionally unstable, sporadically shaking, trembling and occasionally crying. (PCR Vol. XVI 1185). When this occurred, Mr. Bajockzy would allow Bates to compose himself. He would then continue the interview. (PCR Vol. XVI 1185).

Bates gave Mr. Bajockzy different scenarios of what happened. (PCR Vol. XVI 1186). Bates told him at one point that during the crime, he felt as if he had left his body. Mr.

[4] It is generally known that Panama City has a large military population, active and retired.

Bajockzy felt this claim was unbelievable and inconsistent. (PCR Vol. XVI 1186).

Mr. Bajockzy decided not to take the case. It appeared complicated and the Bates' family was limited on money. Mr. Bakockzy did not want to get in a death penalty case with limited resources where he would have to travel back and forth to Panama City at his own expense. (PCR Vol. XVI 1186-1187).

Mr. Bajockzy told the court that Bates had a limited and tangential contact with reality during the interview. By this he meant that Bates was inconsistent in his statements, that he was bizarre, and many of the things that Bates was telling him were not realistic. (PCR Vol. XVI 1187).

Mr. Bajockzy told the collateral court that he and Bates had a pretty normal conversation except that many of the things Bates said were bizarre and quite unrealistic. Mr. Bajockzy told the collateral court that when he said that Bates' behavior was bizarre, he means that "some of the things he said, the fact that they conflicted, the fact that they were not credible, that at times he seemed very sincere with scenario number one, then very sincere with scenario number three. They were the same facts but twisted a little bit differently and all in the same conversation. So I consider that to not be believable and I consider that to be a little bizarre that you can't tell me the same thing." (PCR Vol. XVI 1190).

Bates' statements were contrary to each other and not believable. (PCR Vol. XVI 1187). Mr. Bajockzy found Bates not credible. Bates understood he was facing a possible death sentence. (PCR Vol. XVI 1189).

Gary Scott testified for Bates at the evidentiary hearing. He told the collateral court that he testified during Bates' resentencing in 1995. (PCR Vol. XVI 1200).

Mr. Scott and Bates were in the National Guard together. They had drill one weekend each month. The unit also trained for two weeks each year (annual training). (PCR Vol. XVI 1193).

He also knows Bates off-duty. They worked across the street from each other. He saw him daily or every other day. (PCR Vol. XVI 1193).

Mr. Scott told the collateral court about two missions that his unit participated in. The first was a jungle training exercise in the Panama Canal Zone. The soldiers in his unit received training in how to survive in the jungle in either 1979 or 1980. Before they left for the training, Bates asked a lot of questions. He was nervous and anxious about the training. (PCR Vol. XVI 1195-1196).

The second mission was a deployment in 1981 to Miami during a race riot. The mission was dangerous. Bates was nervous and apprehensive but he acted no differently than anyone else. (PCR Vol. XVI 1198). Bates was familiar with the Miami area where

they would deployed and told others in the unit that it was a dangerous place. (PCR Vol. XVI 1199). Bates was concerned about his safety. He wanted to make it back to his family. Everyone else in the same unit felt the same way. (PCR Vol. XVI 1204).

Mr. Scott received tear gas training in basic training and AIT. His National Guard unit also receives gas training during their annual training. Mr. Bates would have received this same training. (PCR Vol. XVI 1200). Mr. Scott told the collateral court that, in his view, a person who had gas training would be better suited to move to mission if he were subsequently exposed to gas, than one who had received no such training. (PCR Vol. XVI 1206).

Off-duty, Mr. Scott talked often to Bates over coffee at work. He had normal conversations with Bates. Just for fun, he would often try to push Bates to the limits during their conversations. Bates would never lose his temper. (PCR Vol. XVI 1202). Mr. Scott intentionally put Bates under stress during their conversations. Bates was cool despite Mr. Scott's deliberate baiting. That same coolness makes someone a good soldier. (PCR Vol. XVI 1203).

Jackie Bates is Bates' father. He testified that he saw and talked to his son 5-6 hours after his arrest. Bates was going out of his mind. He was babbling and babbling. (PCR Vol.

XVI 1211). His hands were shaking and his whole body was trembling. (PCR Vol. XVI 1211). He had never seen his son so overwhelmed. (PCR Vol. XVI 1211).

He and Bates mother split up when Bates was a child. Bates went to live with his mother. Bates graduated from high school, got a job, went into the National Guard, got married, and started a family. (PCR Vol. XVI 1213). Mr. Bates had never seen his son in trouble. (PCR Vol. XVI 1214). The situation that he saw his son in after his arrest was a different situation than any other situation he ever saw his son in before. (PCR Vol. XVI 1214). He had never seen his son in a jail cell before. (PCR Vol. XVI 1214).

Joseph Johnson testified that he works for UPS. (PCR Vol. XVI 1215). He testified for Bates during his May 1995 resentencing proceedings. He was in the National Guard with Bates. He told the collateral court the unit went to Panama to train in the jungle. They did not have live ammunition during the training. The jungle is very unforgiving if you make a mistake. (PCR Vol. XVI 1218).

His unit deployed to Miami after a African-American man was killed in an altercation with police. His unit deployed to Miami. It was a hostile situation. Before the unit deployed, the soldiers read that people were getting hurt and there was shooting in the area. Everyone in the unit was apprehensive.

(PCR Vol. XVI 1220). Everyone was aware they could be hurt. (PCR Vol. XVI 1220).

When they got to Miami, the soldiers were issued live ammunition. (PCR Vol. XVI 1221). The soldiers were surprised to find that the people in Miami's neighborhoods were very nice. It was actually law enforcement that caused the hostility in the neighborhoods and the people were glad to see the National Guard. (PCR Vol. XVI 1222). The neighborhood people brought the soldiers food and drinks. (PCR Vol. XVI 1222).

The soldiers in his unit saw the police yelling at a pregnant woman for being out after curfew. The Guardsmen came to her aid and walked her home. (PCR Vol. XVI 1223-1224). Another time they came across a young black man out after curfew and he begged them to walk him home because he was afraid of the police. (PCR Vol. XVI 1224). Bates was present. (PCR Vol. XVI 1226).

The soldiers were sometimes afraid of the police. (PCR Vol. XVI 1224). They thought the police treated black people differently than white people. (PCR Vol. XVI 1224). No one came away unaffected by their experience in Miami. (PCR Vol. XVI 1225).

Even under the stress of the Miami situation, Bates did not fire his weapon at anyone, did not beat up anyone, or confront anyone in an aggressive manner. He did not notice anything

unusual about Bates' behavior in Miami. (PCR Vol. XVI 1230). He thought Miami was very stressful. (PCR Vol. XVI 1230-1231).

Mr. Johnson received gas training in the National Guard. He never saw Bates' training. He was not aware of any reaction Bates' had to gas chamber training. (PCR Vol. XVI 1225). One purpose of gas chamber training is to train soldiers not to panic under the stress of being exposed to gas. (PCR Vol. XVI 1230).

Bates got along well with white soldiers in his unit. Mr. Johnson never saw Bates have any difficulty in getting along with members of his unit that were not African-American. (PCR Vol. XVI 1227). Bates appeared to understand orders that he was given. (PCR Vol. XVI 1223).

Thomas Dunn testified that he began representing Bates in the Fall of 1989 when he was at the Capital Resource Center. (PCR Vol. XVI 1233). Once resentencing was ordered, he was contacted by Hal Richmond who had been appointed to represent Bates. He and Mr. Richmond were co-counsel at the February 1995 resentencing. They worked together. Mr. Dunn took more responsibility at the May 1995 resentencing proceedings. Mr. Dunn took the lead because he was not totally happy with the February proceedings. Mr. Dunn represented Bates *pro bono* in both resentencing proceedings. (PCR Vol. XVI 1235). Up to the time that the court denied Mr. Dunn's request for additional

experts, the court granted all of Mr. Dunn's requests for funds for experts and investigators. (PCR Vol. XVI 1235).

Prior to the May resentencing, Mr. Dunn filed a motion for a change of venue. (PCR Vol. XVI 1235). He filed the motion because the mistrial in February 1995 caused quite a bit of publicity. The motion was denied. (PCR Vol. XVI 1236).

He also made efforts to settle the case for a life sentence. He spoke with Mrs. White's husband who was amenable to settling the case. The prosecutor said no. (PCR Vol. XVI 1236).

Mr. Dunn was very concerned that Bates had served a good part of the 25 year minimum sentence. He attempted, with Bates' consent, to waive the possibility of parole to settle the case. (PCR Vol. XVI 1236).

At the time of resentencing, Mr. Dunn was running a not-for-profit law firm representing everyone on death row in Georgia. He was "pretty overwhelmed" at the time. He was on leave when they started the first resentencing in January 1995 and as a result of the mistrial, he had to turn around and do it again four months later. (PCR Vol. XVI 1237). It put a lot of strain on his office.

About three weeks before the May 1995 re-sentencing was to begin, a death warrant was signed on one of his Georgia clients.

That added a tremendous strain on him and his office. (PCR Vol. XVI 1238).

His theory of the case was that up to the time of the murder, Bates had been a model citizen, had worked hard, came from a decent family and tried to do everything right. Mr. Dunn testified the defense proceeded on the theory that Bates really struggled academically and despite his cognitive and intellectual deficiencies, he stuck with it, graduated, got a job, was working, got married, was in the National Guard serving his country, and really trying to do the right thing. (PCR Vol. XVI 1238).

Mr. Dunn told the collateral court the defense theory about the murder itself was that Bates just snapped and the murder was totally out of character. He wanted to show that Bates was a model citizen both before the murder and for the almost 15 years Bates had been in prison. (PCR Vol. XVI 1239).

Mental mitigation was critical to Bates' case. The defense wanted mental mitigation testimony to explain how someone who had lived what was, in essence, a model life could suddenly do something so out of character. It was impossible for anyone that knew him to believe Bates could do something like this. (PCR Vol. XVI 1239).

Bates was very cooperative with his lawyer. Bates family was also very cooperative and eager to help. In capital cases,

dealing with family is often difficult because they are often dysfunctional. This was not the case with the Bates family. (PCR Vol. XVI 1239).

Mr. Dunn obtained Bates' military records. In his view, Bates military service was very important. Trial counsel wanted to present evidence of Bates' military service, not only for the positive aspect of military service alone but also to show that Bates kind of decompensates in stressful situations. (PCR Vol. XVI 1240).

In support of his theory, Mr. Dunn called Dr. Larson and Dr. McMahon to testify before the jury. (PCR Vol. XVI 1240). Dr. Larson's testimony came from Dr. Larson's testing and Bates' self-report. (PCR Vol. XVI 1241). Anything that would corroborate Dr. Larson's opinion was something he would want to know or use at trial. (PCR Vol. XVI 1241).

Mr. Dunn was aware that Ms. White had two canisters of tear gas. Mr. Dunn asked Dr. Larson to look at the tear gas exposure. He thought it was significant. (PCR Vol. XVI 1242).

Mr. Dunn also called military witnesses. Their purpose was to show that Bates had done well in the military but had not been promoted. Mr. Dunn wanted to show this fact caused Bates great stress. (PCR Vol. XVI 1243).

The defense team did not do much new investigation prior to the resentencing. They had done investigation leading up to the

post-conviction proceedings and they re-contacted the people they had talked to before. (PCR Vol. XVI 91). This procedure was done due to time constraints. (PCR Vol. XVI 1243).

Mr. Dunn was aware that Dr. Larson found evidence of brain damage prior to the January 1995 resentencing. He hired Dr. Crown prior to the May resentencing because of Dr. Larson's finding of brain damage. He hired Dr. Crown on May 10, 1995. (PCR Vol. XVI 1246).

Mr. Dunn asked Dr. Crown to review the testing by Dr. Larson and do whatever additional testing he thought might be helpful in trying to explain Bates' behavior in terms of organic brain damage. (PCR Vol. XVI 1247). Prior to trial, Mr. Dunn failed to do a supplemental witness list, listing Dr. Crown as a defense witness.

The State was on notice, however, that he had hired Dr. Crown. Mr. Dunn told the trial court he intended to call Dr. Crown. The State asked to depose Dr. Crown. After the deposition, the State moved to have an MRI done on Bates. The motion caught Mr. Dunn by surprise. (PCR Vol. XVI 1248).

The State provided Mr. Dunn a copy of the MRI. It was normal with no indications of problems with the structure of Bates' brain. He had never really dealt with MRIs or CAT scans. He was not prepared to deal with a neurologist on the witness stand. (PCR Vol. XVI 1249).

Mr. Dunn was very concerned that the state intended to seek to call the neurologist as a "neutral" court witness as opposed to a state rebuttal witness. He thought this was a very big deal. (PCR Vol. XVI 1250).

The State's presentation of the MRI caused Mr. Dunn not to call Dr. Crown. He told the collateral court that he is a very meticulous litigator. He wants to be able to show the jury he knows what he is doing. He wants the jury to believe in what he is putting on. (PCR Vol. XVI 1250). He did not feel that without someone to assist him, he could put on Dr. Crown. (PCR Vol. XVI 1250).

Dr. Crown was not an expert in imagery and radiology from his perspective and he really wanted an expert to do that. If he had gotten a neurologist, then he could have put on Dr. Crown without hurting his case. He had Dr. Larson and Dr. McMahon who did not talk about organicity and he did not put Dr. Crown on. (PCR Vol. XVI 1251). When deciding not to call Dr. Crown, he did consider the fact that he told the jury that he would call him as a witness. (PCR Vol. XVI 1251).

Even though he decided not to call Dr. Crown, Mr. Dunn felt that organic brain deficit was a significant mental health mitigator. That belief caused him to ask for Dr. Crown in the first place. (PCR Vol. XVI 1252).

He could have questioned Dr. Larson and Dr. McMahon about brain damage. He does not know why he did not. He explained that, at that point in time, he was focused on the neurologist and how to deal with him. That clouded his judgment. (PCR Vol. XVI 1253). If he had information of the organic brain damage that would have rebutted the neurologist, he would have presented it. He realizes now that he actually had this evidence. If he would have realized it then, he would have used it. (PCR Vol. XVI 1254). Not putting on any evidence of brain damage made the State's normal MRI irrelevant. (PCR Vol. XVI 1257).

He did not talk with Ms. Bates or Bates' father about Bates past reactions to stress or past occurrences of becoming unwrapped. Nor did he ask Dr. Larson to talk to Ms. Bates. There was no tactical reason for him not to do that. He was focusing on explaining the crime itself. (PCR Vol. XVI 1255).

Dr. Crown was the eighth witness presented at the evidentiary hearing. Dr. Crown testified that he was a psychologist. He limits his practice to clinical and forensic psychology and neuropsychology. (PCR Vol. XVI 1272).

Dr. Crown saw Bates in May 1995. He was asked by trial counsel to conduct a neuropsychological assessment. He only did a partial assessment because another psychologist (Dr. Larson) had administered a number of tests within a six month window of

Dr. Crown's evaluation. (PCR Vol. XVI 1277). His purpose was to determine whether Bates had any form of neuropsychological impairment or organic brain damage.

Dr. Crown testified that Bates has impairments in problem solving, particularly related to language based critical thinking, which means Bates has difficulty understanding if-then relationships. Bates had difficulties with memory and retrieval of information, storage of information and then retrieval of that information. He also has some specific problems with auditory selective attention. This means that when there are distractions in the background or environment, Bates has difficulty focusing in and listening to what is important. Dr. Crown's findings were consistent with Dr. Larson's. (PCR Vol. XVI 1279).

In terms of Bates' behavior, Bates will have a lower stress threshold. He would have difficulties processing information. This means that like a computer program, or someone operating a computer, information would be typed in accurately but it would be "gobbly gook" on Bates' screen. Bates had problems with programming. (PCR Vol. XVI 1279).

On the day of the murder, Bates would have a low threshold for stress. He would also have been distraction prone. He was aware that Bates may have been sprayed with mace. Dr. Crown testified that this was significant in terms of "to the extent

that chemicals have a different effect on a person who has a lower brain threshold it might have created disinhibition, meaning that rather than backing off, he would have moved forward. Dr. Crown testified the mace may very well have had a disinhibitory effect. (PCR Vol. XVI 1280).

Dr. Crown was scheduled to testify at the 1995 resentencing proceedings. He was aware there was a normal MRI. A normal MRI would not have been inconsistent with his testimony. It is not unusual for persons with some forms of brain damage to have normal MRIs. (PCR Vol. XVI 1280-1281).

During the course of his evaluation, he reviewed Dr. Larson's findings. He had no disagreement with what Dr. Larson said. In fact, it was at Dr. Larson's suggestion that trial counsel consulted with Dr. Crown. (PCR Vol. XVI 1283). He could not opine that Bates acted the way he did on the day of the murder because he walked into Ms. White's office and was sprayed with mace. (PCR Vol. XVI 1287). Dr. Crown explained that on the day of the murder, Bates had a breakdown in his cortical function. The stress of the situation caused disinhibition in Bates. (PCR Vol. XVI 1290).

As far as he knows the only time that stress has caused this disinhibition in Bates was the day of the murder. (PCR Vol. XVI 1291). Attacking a young woman at work would create a stressful situation. (PCR Vol. XVI 1287). There may have been

other situations in which this disinhibition occurred, but he was not aware of any. (PCR Vol. XVI 1292).

Dr. Crown offered no opinion that at the time of the murder, Bates was acting under an extreme emotional disturbance. Dr. Crown offered no opinion that at the time of the murder, Bates' ability to conform his conduct to the requirements of the law was substantially impaired. Dr. Crown did not diagnose Bates with any major mental illness.

After the evidentiary hearing, the collateral court denied Bates' motion. (PCR Vol. V 889-900). Bates appealed. This is the state's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: The collateral court correctly denied Bates' motion for DNA testing because Bates failed to show that DNA testing probably would have resulted in an acquittal or life sentence. The evidence supporting Bates' guilt, including his capture at the murder scene minutes after the murder, his possession of the victim's ring that was ripped from her finger during the murder, his clothing stained with the victim's blood and his admissions to the police that Mrs. White was stabbed, twice, when he and Mrs. White struggled over the scissors she pulled from her desk drawer, was overwhelming. Moreover, given the fact that Bates told the police that he tried to have sex with Mrs. White but only ejaculated on her body, coupled with the jury's verdict finding Bates guilty of attempted sexual battery made the presence of semen in Mrs. White's panties and vagina irrelevant to Bates' guilt of the crimes for which he was convicted.

ISSUE II: The trial court properly denied, after an evidentiary hearing, Bates' claim that trial counsel was ineffective for failing to present testimony from Dr. Barry Crown that Bates has organic brain damage. The record supports the trial court's conclusion that trial counsel fully investigated mental health mitigation and put on the testimony of two mental health experts, both of whom testified that both statutory mitigators applied at the time of the murder. Additionally, both the

defense experts testified that Bates psychological make-up, low tolerance for stress, and cognitive impairments caused him to "lose it" at the time of the murder. At its core, this is the same testimony that Dr. Crown offered at the evidentiary hearing. Moreover, trial counsel made a reasonable tactical decision not to put on Dr. Crown because this decision precluded the State from introducing evidence that Bates' MRI showed no brain damage. Finally, Bates can show no prejudice because given the testimony of Drs. Larson and McMahon, Bates cannot show calling that Dr. Crown probably would have resulted in a life sentence.

ISSUE III: The collateral court properly denied this claim and its sub-claims. All of Bates' claims were either procedurally barred or insufficiently pled.

ISSUE IV: The collateral court properly denied this claim and its sub-claims. All of Bates' claims were either procedurally barred, insufficiently pled, refuted by the record, or contrary to well-established case law.

ARGUMENT

ISSUE I

WHETHER THE COLLATERAL COURT ERRED IN DENYING BATES' MOTION FOR DNA TESTING

Bates alleges the collateral court erred in denying Bates' request for DNA testing of certain evidence in this case. Bates alleges the presence of semen in the victim's panties and vagina is highly relevant to his guilt or innocence.

Bates claims the prosecutor's argument, that Bates raped Mrs. White, was clearly believed by the jury. (IB 24). Bates makes this argument even though Bates was not convicted of sexual battery but instead convicted of attempted sexual battery likely because the jury believed that Bates did not sexually batter Mrs. White because he prematurely ejaculated on Mrs. White's body. (TR Vol. IV 664).

Bates also claims that, because it is obvious that the person who sexually assaulted her also killed her, DNA evidence could exonerate him of both the murder and the sexual battery. Bates alleges that if the semen found on the victim's panties and vaginal samples does not match Mr. Bates, then he is not the perpetrator of the crime. (IB 31).

Bates is mistaken. Bates cannot show that DNA testing of the victims' panties and vaginal swabs, even if Bates' semen was

not detected, would exonerate him of the murder or attempted sexual battery for which he was convicted.

In his motion for DNA testing submitted to the collateral court, Bates requested DNA testing of several items of evidence, including the victims' panties, and the vaginal swabs taken from the victim.[5] The state responded in opposition to the motion alleging both that the motion was legally insufficient and that DNA testing, even if Bates' semen was not detected, would not likely produce an acquittal upon re-trial.

The collateral court denied Bates' motion. The Court ruled there is no reasonable probability that DNA testing would have resulted in an acquittal or lesser sentence if admitted at trial. (PCR Vol. III 452). The court also found that Bates failed to explain, with reference to the specific facts of this crime and the items he wishes tested, how the DNA testing would exonerate him or mitigate his sentence in light of his various statements to the police. (PCR Vol. IV 457).

Insofar as the panties, the court noted that the State's expert at trial testified that while there were indications of

[5] Bates requested testing of the rape kit which would have included the vaginal swabs, the victim's purple skirt, shirt, pantyhose, and blue panties, the defendant's blue shirt, white brief underwear, and green pants, a piece of blue cord found at the scene, hairs recovered from Mrs. White's pubic area or in the debris collected from Mrs. White's and Mr. Bates' clothing. Except for the vaginal swabs and the victim's panties, Bates does not seem to contest the denial of DNA testing on the other items of evidence for which he originally requested testing.

semen on Mrs. White's panties, no sperm could be detected. The Court also noted that while sperm was detected in the victim's vagina, the blood grouping could not be determined. The Court observed that the victim's husband testified at trial he had sexual intercourse with his wife two days prior to her death. (PCR Vol. III 452).

The Court also noted that Bates gave two taped interviews in which he admitted being at the murder scene. Contrary to Bates' assertions that these statements were coerced, the collateral court found the statements were freely and voluntarily made. (PCR Vol. III 452). The court observed that in his first statement, Bates claimed he came upon the victim's dead body. Bates accounted for her blood on his clothing by claiming Mr. White's hand fell on him.

When Bates was confronted with the fact his watch pin was found in the victim's office, he gave another untaped statement in which he claimed that he came upon a white man wrestling with the victim in her office and when he entered to help, the man hit him in the mouth. Subsequently, Bates gave another taped statement in which he admitted to being present when the victim was stabbed and carrying her body to the woods. (PCR Vol. III 453). Bates also admitted taking his penis out of his pants and ejaculating on top of Mrs. White's body after she had been stabbed. (PCR Vol. III 454).

The court concluded that, given Bates' statements and the jury's verdict of attempted sexual battery, the presence of semen in Mrs. White's vagina and panties became irrelevant to the finding of guilt for premeditated murder or to invalidate any claim of self-defense. The court noted this absence of a link between the presence of Bates' semen in these particular items of evidence and his conviction is consistent with the jury's finding of guilt as to attempted sexual battery and consistent with Bates' second taped statement to the police. (PCR Vol III 455).

The collateral court also pointed to evidence that Bates was found in possession of the victim's wedding ring which was ripped from her finger during the murder. (PCR Vol. III 456). The court concluded that, given the evidence adduced at trial, there is no reasonable probability that DNA evidence would either exonerate Bates or mitigate his sentence. (PCR Vol. III 456).

This Court should affirm because Bates cannot show that DNA testing of the victims' panties or vaginal swabs would probably produce an acquittal or lesser sentence at trial. First, the evidence of Bates' guilt was overwhelming. Bates was arrested at the scene of the crime, minutes after the murder, with the victim's wedding ring in his pocket. (TR Vol. I 350; IV 573). Bates' shirt and pants were bloody. The state's expert, Ms.

Suzanne Harang, testified the blood found on Bates' blue shirt was type "A" blood, could not have come from Mr. Bates, and was consistent with Mrs. White's blood type. (TR Vol. III 545). Ms. Harang testified the blood found on Bates' green pants was blood type "A", could not have come from Bates, and was consistent with Mrs. White's blood. (TR Vol. III 545). An expert in forensic microanalysis testified at trial that he found one olive green polyester fiber on the victim's skirt which was like the olive green polyester that composed the fabric of Bates' green pants. (TR Vol. III 508-509).

Likewise, a stain consistent with semen was found on the fly portion of Bates' briefs. Ms. Harang could not positively establish that it was semen because she could not find any intact sperm. Ms. Harang was able to determine that the stain contained the same PGM factor (PGM Type 1) that is present in Bates' blood. (TR Vol. III 544). This finding is consistent with Bates' statement to police that he removed his penis from his underwear and ejaculated on Mrs. White's body.

Bates admitted to the police, in a taped statement played to the jury, he was struggling with Mrs. White when she essentially stabbed herself, twice in the chest, with scissors that she had pulled from her desk drawer. (TR Vol. IV 635). Bates carried her to the woods. After he carried her to the wood line, Bates pulled the scissors from her chest and threw

them away. (TR Vol. IV 639-644). [6] Bates told the police that when Mrs. White was outside, he took his penis from his pants and ejaculated on top of her. (TR Vol. IV 639). A watch pin consistent with one from Bates' broken watch was found in the State Farm office where Bates initially confronted Mrs. White. (TR Vol. III 245).[7] Bates thought his watch was broken in the scuffle with Mrs. White. (TR Vol. IV 641).

In short, all of the evidence in this case points to Bates as the lone killer. In light of the overwhelming evidence pointing to Bates as the person who murdered and attempted to

---

[6] Bates' claim that Mrs. White was stabbed with scissors was consistent with his story that he and Mrs. White were struggling over scissors that she introduced into their confrontation. It was inconsistent with the forensic evidence, however. The medical examiner testified that Mrs. White's wounds were inconsistent with scissors. Mrs. White's boss found Mrs. White's scissors in her desk drawer. (TR Vol. I 330, Vol. III 464). An empty knife sheath was found at the murder scene. The sheath was similar to one that Bates carried before the murder. The murder weapon was never recovered.

[7] The broken watch was found in Bates' pocket. (TR Vol. IV 572). Bates first told Deputy McKiethan his watch had been broken unloading supplies. He told the officers he had enlisted someone's help in locating the pin where he lost it. (TR Vol. IV 606). When Deputy McKeithan confronted Bates with the fact the watch pin had been found in Mrs. White's office by crime scene technicians, Bates told the police that he would tell them what happened. Bates then changed his story from one of finding Mrs. White's dead body in the woods to seeing a white man attacking Mrs. White in the State Farm Office. He told police that in his struggle with the white man, he probably lost his watch pin. (TR Vol. IV 609). Eventually, he told police he thought he lost his watch pin when struggling with Mrs. White. (TR Vol. IV 641). Bates also initially lied about Mrs. White's ring. He initially told the Deputy McKeithan the ring belonged to his wife. (TR Vol. IV 574).

sexually batter Mrs. White, there is no reasonable probability the absence of Bates' semen on Mrs. White's underwear and vaginal swabs would exonerate him of the murder.

This Court has repeatedly cautioned that Rule 3.853 is not intended to be used as a fishing expedition. Lott v. State, 931 So. 2d 807, 821 (Fla. 2006). *See also* Cole v. State, 895 So. 2d 398, 403 (Fla. 2004); Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004).[8] The collateral court refused Bates to go on a fishing trip and its' ruling is supported by competent substantial evidence. This Court should affirm.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING BATES' 1995 RESENTENCING PROCEEDINGS[9]

In this claim, Bates alleges trial counsel was ineffective for failing to present the testimony of Dr. Barry Crown. Bates' claim is somewhat atypical. Normally, defendants in collateral proceedings find an expert who trial counsel did not consult with, or call as a witness at trial, and then allege trial counsel was ineffective because he

[8] Like Hitchcock, Bates, at trial, repudiated his statement to the police that he participated in the events leading to Mrs. White's stabbing death. Bates testified at trial that he found Mrs. White's dead body. (TR Vol. VI 793).

[9] Trial counsel put on some 20 lay character witnesses during the penalty phase of Bates' capital trial. Bates does not find fault with trial counsel in putting these 20 witnesses on for the defense during Bates' May 1995 re-sentencing proceedings.

failed to find that particular mental health expert or one with a like opinion.

In this case, however, trial counsel consulted with the same expert who Bates now claims trial counsel should have called to testify at his 1995 resentencing. Indeed, at trial counsel's behest, Dr. Crown evaluated Bates and was standing by to testify at Bates' May 1995 re-sentencing proceedings.

On appeal, Bates alleges that trial counsel should have called Dr. Crown to put the following evidence before the jury:

(1) Bates has some organic brain damage.

(2) Bates' neuropsychological impairments cause him to "lose it" during stressful situations.

(3) Bates has a lower stress threshold than others and is distraction-prone due to auditory selective attention details.

(4) Mrs. White's actions in spraying Bates with mace may have created "disinhibition", meaning that rather than backing off, Bates would move forward (fight not flight).

(5) There were certain micro-situations that trial counsel failed to explore which were relevant to Bates' behavior on the day of the murder.

(6) Bates' normal MRI did not mean he did not have brain damage. (IB 39-45).

Bates raised this same claim below. The collateral court granted an evidentiary hearing on the claim.

After the evidentiary hearing, the collateral court denied the claim in an extensive twelve page order. (PCR Vol. V 889-900). The collateral court found that counsel was not ineffective for failing to call Dr. Crown on two grounds.

First, the court found that trial counsel both investigated available mental mitigators and presented extensive testimony through mental health experts, Dr. James Larson and Dr. Elizabeth McMahon. (PCR Vol. V 893). The collateral court noted that, in addition to their explanation as to "why" this murder occurred, Dr. Larson and Dr. McMahon testified that both statutory mental mitigators applied. (PCR Vol. V 892-893).

The collateral court also found that trial counsel's decision not to call Dr. Crown was a reasonable trial strategy. (PCR Vol. V 894). The Court noted that Dr. Crown's testimony could be considered cumulative except for the additional element of "organic brain impairment" and its relationship to "stress". (PCR Vol. V 894). The Court pointed to the fact that, in addition to the mental health experts, trial counsel presented extensive testimony as to aspects of the defendant's life experiences and to how he was reacting immediately after the crime had occurred. The

collateral court found this testimony not only was mitigating in itself but provided additional support for the mental health experts' opinions as to "why" this crime occurred. (PCR Vol. V. 894).

The Court observed that trial counsel's strategy was to portray Bates as a productive member of society who had served honorably in the military, who had been subjected to stressful situations, who supported and led his family, and who had reacted totally out of character to a very stressful situation by becoming "unwrapped" and "losing it." (PCR Vol. V 891). The Court outlined Dr. Larson and Dr. McMahon's testimony that fit trial counsel's strategy before the jury. (PCR Vol. V 891-893).

The Court also found that had trial counsel called Dr. Crown, trial counsel would have had to negate the testimony of State rebuttal expert, Dr. Gary Presser, a neurologist, who had administered an MRI which showed that Bates had no organic brain damage. (PCR Vol. V 895). The Court noted that trial counsel was fully aware of the normal MRI results when he decided not to call Dr. Crown. The Court also pointed out that trial counsel specifically avoided questioning Dr. Larson about organic brain damage even though counsel was aware that Dr. Larson had opined, during Bates' first trial, that Bates had some organic brain damage. (PCR Vol. V 895, 898).

The collateral court found that trial counsel's decision not to question Dr. Larson about his finding of organic brain damage and his decision not to call Dr. Crown stemmed directly from his concern that the normal MRI would either cause confusion about "why" this murder occurred or adversely impact the weight the jury would give to the testimony of Drs. Larson and McMahon. (PCR Vol. V 898). Moreover, the court found that as a result of trial counsel's decision not to call Dr. Crown, the jury never heard testimony that Bates' MRI showed no sign of brain damage. (PCR Vol. V 898).

This Court should affirm the collateral court's order for three reasons. First, the record demonstrates that trial counsel thoroughly investigated available mental health mitigation and then presented mental health mitigation testimony during the May 1995 penalty phase of Bates' capital trial.

While Bates claims that Dr. Crown could have explained how Bates had a lower stress threshold than others and is distraction prone, both Dr. Larson and Dr. McMahon told the jury that Bates had a lower threshold for stress which would manifest in overreaction and aggression. (TR Vol. XIII 560-561, XIII 620). Dr. Larson told the jury that Bates was not "well-wrapped" and would come unglued easily. (TR Vol. XIII 560).

Although Bates contends that Dr. Crown could have explained that Mrs. White's actions in spraying Bates with mace caused him

to become aggressive rather than backing off, Dr. McMahon told the jury at trial that if Bates were confronted by Mrs. White and sprayed with mace, Bates would act impulsively, and overreact in a disorganized fashion. Dr. McMahon opined that Bates would feel threatened and strike out in order to just end the situation. (TR Vol. XIII 621-622).

Dr. Larson testified that in such a stressful situation, Bates would become very frightened and “freak out” and “lose it”. According to Dr. Larson, at the time of the murder, Bates could have resorted to a very primitive level of functioning and engaged in aggressive behavior. (TR Vol. XIII 565).

While Bates claims that Dr. Crown could testify that Bates did not process information the way normal people do, Dr. McMahon testified Bates suffers from a significant disruption in his dynamic functioning as a result of his idiosyncratic thought processing. Dr. McMahon told the jury that Bates distorts about 50% of reality and takes in and processes information differently than the rest of us do it. (TR Vol. XIII 611).

While Bates avers that Dr. Crown could have talked about certain “microsituations” that were relevant to Bates’ behavior, trial counsel presented evidence of stressors in Bates life, such as buying a house, having another child, jungle training and deployment to Miami while in the National Guard, and not getting promoted despite his good duty performance.

Like Dr. Crown at the evidentiary hearing, both Drs. Larson and McMahon painted a picture to the jury of a person whose psychological makeup and low IQ caused him to overreact to a stressful situation and act impulsively and emotionally. Unlike Drs. Larson and McMahon, however, Dr. Crown provided no opinion that either of the two statutory mental mitigators applied at the time of the murder.

Finally, while Dr. Crown talked about Bates' deficits in language based critical thinking, storage of information, memory, retrieval of information, and auditory selective attention, Dr. Crown failed to relate any of these impairments to the murder. (PCR 126).[10] In fact the only "impairments" that Dr. Crown could link to the murder was Bates' low threshold for stress and his disinhibition in a stressful situation including a situation where he was maced. Both Drs. Larson and McMahon testified, at length, about Bates' low threshold for stress and his propensity to act emotionally and/or aggressively (fight not

[10] The State does not mean to imply that evidence of brain damage itself cannot be mitigating evidence. A link between the brain damage and the murder, or a lack thereof, is relevant to a determination of whether Bates has demonstrated prejudice from trial counsel's failure to call Dr. Crown. It is reasonable to conclude that a jury would find mitigation evidence that helped explain the murder more compelling than mitigation evidence with no nexus to the murder.

flee) when placed under stress, including the stress of being sprayed with mace.[11]

The record supports a conclusion that Dr. Crown's testimony was largely cumulative to the testimony of Drs. Larson and McMahon. Through Drs. Larson and McMahon, the jury heard the essence of the testimony Bates now claims that trial counsel should have presented. Counsel is not ineffective for failing to present evidence that is cumulative to evidence already presented. Cole v. State, 841 So. 2d 409, 425 (Fla. 2003) (holding that additional witnesses were not needed to corroborate the defendant's drug abuse problems because counsel had already introduced sufficient evidence of drug use); Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in

[11] Contrary to Bates' implication that Mrs. White's act in spraying him with mace caused him to lose it, there is NO evidence Bates was sprayed in the face or eyes with mace. Moreover, there is no evidence that any of this alleged mace even came into contact with any area of his body that would cause him any discomfort. After his arrest, Bates told police that some of the spray got on his arm (or sleeve). (TR Vol. IV 635). While Bates presented some evidence at the evidentiary hearing (through other soldiers) that exposure to tear gas in an Army training gas chamber is an unpleasant experience, Bates failed to present any evidence this training was in any way analogous to being sprayed on the arm with mace/pepper spray. Moreover, Bates failed to produce any evidence at the evidentiary hearing that he had previously "lost it" during the gas chamber exercise or any other military training exercise. In failing to do so, Bates failed to establish any nexus between this stressor and his behavior on the day of the murder.

mitigation). For this reason alone, this Court should affirm the collateral court's order.

This Court may also deny the claim, because trial counsel, though he refused to admit it at the evidentiary hearing, clearly had a strategic reason for not putting Dr. Crown on the witness stand once the trial court denied his motion for the appointment of additional experts to assist him to interpret, and then confront, the state's normal MRI test results. Trial counsel cannot be ineffective if, based on the circumstances that existed at the time of trial; he makes a reasonable strategic decision not to call a particular witness. A strategic decision is reasonable unless no other trial counsel, under the same circumstances, would have made the same decision. Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000)(noting that for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice").

The facts supporting a conclusion that trial counsel made a reasonable strategic decision may be found in the record. On May 3, 1995, trial counsel requested that Dr. Crown, a

neuropsychologist, examine Bates. The basis for the motion was that Dr. Larson had informed trial counsel that neuropsychological testing indicated a high probability of neuropsychological impairment. Trial counsel assured the court the evaluation would not delay the start of trial. (TR Vol. III 433-434). The Court granted the motion.

Prior to trial, however, trial counsel inadvertently neglected to place Dr. Crown on the defendant's witness list. This omission, however, did not prompt the trial court to preclude the use of the witness at trial.

Instead, the State requested, and the trial court granted, an opportunity to depose Dr. Crown. Telephonic arrangements were made with Dr. Crown to depose him on Sunday, May 21, 1995.

In his deposition, Dr. Crown opined that appellant suffered from organic brain damage. (TR Supp R. 621, *et seq.*). Subsequent to his deposition, the State moved for further diagnostic testing in order to rebut Dr. Crown's testimony. Trial counsel objected. (TR Vol. XI 332). Trial counsel noted that:

> ... the nature of the organic brain damage that Dr. Larson testified to, and that Dr. Crown will testify to, is not structural, it is functional. Basically he is talking about functional deficits or impairments dealing with problem solving, memory and auditory attention deficits. None of those types of functional deficits are impairments [that] will likely show up on an MRI or a CAT Scan and, in fact, we would contend that either of those test results would basically serve no purpose for this jury or the court.

Nonetheless, over trial counsel's objection, the Court granted the State's motion for an MRI. (TR Vol. XI 329). During the lunch recess on May 22, 1995, Bates was administered a Magnetic Resonance Imaging (MRI) test. Dr. Gregory Presser, M.D., issued a report which the State produced to trial counsel. The report indicated Bates' MRI did not reveal the presence of organic brain damage. (TR Supp Vol. 747).

Before testimony began on May 23, 1995, trial counsel moved the court to appoint a neuroradiologist, a radiologist, and a behavioral neurologist, claiming that these experts were needed to better understand the MRI results. Trial counsel also moved for the administration of a "spec. scan with Ceretec, . . . preferably using a double or triple-headed camera and a quantitative E.E.G. to include evoked potential studies. (TR Vol. XIII 506).

The trial court denied both motions. Subsequently, trial counsel announced he would not be calling Dr. Crown or presenting evidence on organic brain damage. (TR Vol. XIII 531). Trial counsel noted for the record that organic brain damage is a mitigating factor. (TR Vol. XIII 529-530). Trial counsel told the court that based on his inability to have experts to help him rebut the results of the MRI; he would not proffer any evidence of organic brain damage. (TR Vol. XIII 531). According

to trial counsel, he was abandoning that line of defense. (TR Vol. XIII 531).

Trial counsel's strategy not to present evidence of brain damage was evident in his examination of his own mental health witnesses. Not only did counsel not call Dr. Crown, he did not elicit from Dr. Larson his findings of brain damage.

During the evidentiary hearing, trial counsel testified consistently with his representations to the trial court during the May 1995 penalty proceedings. Trial counsel testified it was the trial court's denial of his requests for expert witnesses, coupled with the State's "normal" MRI that caused him not to put on Dr. Crown. (PCR Vol. XVI 1250, 1271).

When asked why he made such a choice, trial counsel testified that "I am a very meticulous litigator and I want to be able to show the jury that I know what I am doing and they can believe what I am putting on." (PCR Vol. XVI 1250). Mr. Dunn told the collateral court that "I had no idea how to deal with this neurologist and without someone to assist me I just did not think I could do it, so I did not put Dr. Crown on." (PCR Vol. XVI 1250). Mr. Dunn testified that if he would have gotten a neurologist to assist the defense, he could have intelligently cross-examined the State's witness and could have, with a clear mind, put Dr. Crown on without the risk of hurting

his case. (PCR Vol. XVI 1251).[12] His theory at trial was that Bates had become unwrapped as a result of his cognitive deficits, his intellectual function and psychological problems. (PCR Vol. XVI 1262). Mr. Dunn also wanted to show that up to the time of the murder, Bates had been a model citizen. (PCR Vol. XVI 1263).

The collateral court's conclusion that Mr. Dunn's decision not to present evidence of brain damage was a reasonable tactical decision is supported by the record. Bates argues that Dr. Crown should have been called anyway because Dr. Crown could have explained away this normal MRI result, as he did at the evidentiary hearing. This assertion, made with the clarity of 20/20 hindsight, does not entitle Bates to relief.

Any reasonable trial counsel may have made the same decision as trial counsel did in this case. Trial counsel's decision, not to risk his credibility with jury or to bet his client's life on the hope the jury would put more weight on Dr.

[12] At the evidentiary hearing, trial counsel attempted to fall on his sword to assist the defense team to prevail on its claim of ineffective assistance of counsel. The trial court found his testimony, which Bates relies on heavily in his initial brief (IB 47), to be self-serving and without merit. (PCR Vol V 899). Trial counsel's claim at the evidentiary hearing that he was not aware he had evidence to rebut the normal MRI is directly refuted by trial counsel statements to the trial court, at trial, objecting to the MRI. (PCR Vol. XVI 1254)(TR Vol. XI 332).

Crown's testimony than it would on a medical doctor's testimony that Bates' MRI did not reflect brain damage, was a matter of reasoned trial strategy. Because Bates cannot show that no reasonable trial counsel would not have made the same decision, Bates has not overcome the presumption that trial counsel was not ineffective when he decided not to call Dr. Crown.

Finally, this Court can deny this claim because Bates can show no prejudice from trial counsel's failure to put Dr. Crown on the witness stand. Through Dr. Larson and Dr. McMahon, trial counsel put on extensive mental health testimony including testimony that both statutory mental mitigators applied. As such, Bates has failed to show a reasonable probability that had trial counsel called Dr. Crown, he would have received a life sentence. Additionally, trial counsel's decision not to call Dr. Crown rendered Bates' normal MRI irrelevant and precluded the State from putting potentially damaging evidence of "normalcy" before the jury. Jones v. State, 928 So. 2d 1178, 1187 (Fla. 2006). Johnson v. State, 921 So. 2d 490, 505 (Fla. 2005)(trial counsel not ineffective for refusing to open the door to damaging evidence). Bates failed to show that calling Dr. Crown probably would have resulted in a life sentence. This Court should affirm.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING SOME OF BATES' CLAIMS

In this claim, Bates alleges the collateral court erred in denying some of Bates' claims. Bates alleges that the collateral court improperly denied his claims that (1) counsel was ineffective for failing to adequately argue waiver of parole, (2) counsel was ineffective for failing to ensure that pre-voir dire juror excusals were put on the record, (3) the prosecutor had a personal and financial interest in seeking the death penalty against Bates and the jury should have been told of his interests, (4) there was systematic discrimination in the selection of the jury, and (5) there is a pattern of discrimination on the basis of race.

A. Waiver of Parole

In this claim, Bates alleges that counsel was ineffective for failing to argue that the 1994 sentencing statute could be applied to him. Bates alleges the jury should have been instructed, with Bates' consent, that Bates could be sentenced to life without the possibility of parole. Bates also alleges the state took advantage of Bates' eligibility for parole to argue future dangerousness as a non-statutory aggravator. (IB 52).

This claim is without merit for two reasons. First, the record establishes that counsel vigorously argued that Bates should be allowed to waive the possibility of parole so that the jury could be instructed it could recommend a sentence of life without the possibility of parole. Trial counsel filed a motion requesting the trial judge instruct the jury that, as an alternative to death, it could recommend a sentence of life without the possibility of parole. (RS. Vol. II 277-278). The court heard argument of counsel but denied the motion. (RS. Vol. II. 335-338).

Counsel raised the issue again before the commencement of jury selection on May 16, 1995. Trial counsel requested the trial court to reconsider its ruling denying Bates' motion. Trial counsel argued that a failure to recognize Bates' waiver would violate his Sixth, Eighth and Fourteenth Amendment rights. Bates was placed under oath and testified he was willing to waive the possibility of parole so the jury could be instructed it could recommend life without the possibility of parole. (RS. Vol. IV 638-642).[13] The record refutes any claim that trial counsel failed to "adequately argue waiver of parole." (IB 51).

This claim may also be denied because the substance of the claim has already been fully adjudicated on the merits by this

[13] Trial counsel asked once again during *voir dire* to let the jury know that Bates requested he be allowed to waive the possibility of parole. (RS Vol. VII 1126).

Court. Accordingly, it is procedurally barred. Bates improperly seeks a second bite at the apple by raising this claim in the guise of an ineffective assistance of counsel claim. Woods v. State, 531 So. 2d 79, 82 (Fla. 1988) (ruling that raising a procedurally barred claim in terms of ineffective assistance of counsel will not revive it).

On direct appeal from the imposition of Bates' third death sentence, Bates claimed the trial court erred in refusing to instruct the sentencing jury that life without the possibility of parole was a sentencing alternative to death. Bates' alleged he was willing to waive the possibility of parole at trial and as such, the trial court's refusal to apply section 775.082(1), Florida Statutes (1995), retroactively denied him due process and a fundamentally fair capital sentencing proceeding. Bates v. State, 750 So. 2d 6, 11 (Fla. 1999).

This Court rejected Bates' arguments and ruled that at the time Bates committed the murder "the Legislature had not established life without the possibility of parole as punishment for this crime." Bates, 750 So. 2d at 11. Citing to Williams v. State, 500 So. 2d 501, 503 (Fla. 1986), this Court noted that "a defendant cannot by agreement confer on the court the authority to impose an illegal sentence." Id.

This Court also rejected Bates' claim the State took advantage of the trial court's failure to instruct the jury on a

sentence of life without the possibility of parole during cross-examination of Bates' witnesses and closing argument by making future dangerousness (a non-statutory aggravator) an issue for the jury. The Court found that neither the State's cross-examination of Bates' witnesses or its closing argument raised the specter of future dangerousness. Bates, 750 So. 2d at 11.

As this Court has already considered and rejected the same claim Bates raises again in these collateral proceedings, this claim should be denied.

B. Exclusion of jurors

In this claim, Bates alleges counsel was ineffective for failing to ensure that a record was made of pre-voir dire excusals of potential jurors for hardship reasons. Bates claims that trial counsel was ineffective for failing to insist that the court make and preserve a record of these pre-voir dire proceedings.

Bates' claim is factually inaccurate in three significant ways. First, Bates claims that "without the presence of defense counsel or Mr. Bates", the prosecutor allowed some jurors to be excused from the panel for hardship reasons. (IB 55). On direct appeal, the Florida Supreme Court found specifically that Bates' counsel, Mr. Hal Richmond, was present for the general qualification procedure. Bates v. State, 750 So. 2d 6, 15 (Fla.

1999). The record supports this finding. Accordingly, trial counsel was present. (RS Vol. IV 658, 669).

Second, Bates inaccurately claims the prosecutor excused potential jurors for hardship reasons. (IB 55). Instead, the record establishes that Judge Hess conducted the general jury qualification and personally excused potential jurors who, for hardship reasons, were not able to serve as a juror in this case. (RS Vol. IV. 634-635).[14] The record specifically refutes Bates' claim the prosecutor excused any potential jurors from service in this case.

Third, Bates claim that trial counsel failed to make a record of the exclusion of jurors is without factual support. The record establishes that trial counsel both protested the lack of a record as to potential jurors who were excused and requested the court to grant a mistrial. (RS Vol. IV 661-662).

In response, the State placed on the record a summary of what occurred during the general qualification proceeding conducted on May 15, 1995. The State noted that sixteen white males requested to be excused and six were actually excused. Two black males asked to be excused but neither request was granted. Twenty-eight white females asked to be excused and Judge Hess excused thirteen. Finally, four black females asked

[14] Judge Hess did not preside over Bates' 1995 resentencing proceedings.

to be excused and only one request was granted. The record establishes this potential juror (Juror 223) was excused because her daughter was graduating from the Air Force Academy Preparatory School and because she had already purchased airline tickets for the event. Any allegation that any potential juror was unconstitutionally excused is refuted by the record. (RS Vol. IV 663).

At the conclusion of jury selection, trial counsel once again vigorously protested the lack of a record. Trial counsel noted he had ordered a copy of the transcript of the proceedings and found it was not transcribed in detail. He renewed his motion for mistrial. Argument on the issue took eight pages of the transcript. (RS Vol. VII 1264-1271). Any assertion that counsel did not vigorously argue the motion or oppose Judge Hess' excusal of potential jurors is directly refuted by the record.

Aside from the lack of factual support for his allegations, this claim must fail because it was fully litigated on direct appeal and decided adversely against Bates on the merits. On direct appeal, the Florida Supreme Court rejected Bates' claim the trial court erred in conducting the general jury qualification in his absence. This Court found no abuse of discretion in the trial court denying appellant's motion for mistrial. This Court also found no error in proceeding with

jury pool qualification on May 15. Bates, 750 So. 2d 6, 15 (Fla. 1999). This claim should be denied.

C. Police and prosecutorial misconduct

In this claim, Bates alleges that the State Attorney had a personal and financial interest in Bates' conviction and death sentence. In support of this claim, Bates alleges that:

(1) The State Attorney improperly refused to allow Bates to waive his right to parole so that his jury could be instructed it could recommend a sentence of life without the possibility of parole or death.

(2) The State Attorney improperly argued a non-statutory aggravator in urging the jury to sentence Bates to death because he had already served a large portion of his minimum mandatory 25-year sentence.

(3) The State Attorney received campaign contributions from the victim's family and friends.

(4) The State Attorney used contributions for other than campaign expenses and it is "probable" that contributions for some of the funds given by family and friends of the victim were not used for campaign expenses.

(5) The State Attorney's Office was investigated for soliciting contributions from defendants in exchange for dropped or reduced charges.

(6) The State Attorney's Office was investigated for public records violations.

(IB 56-62).

Additionally, Bates claims that evidence of other "corruption" included:

(1) In 1988, Sheriff Pitts was indicted on charges of perjury by a grand jury for conduct during his tenure in office. According to Bates, the charges stemmed from allegations that Sheriff Pitts lied about sexual encounters with his employees.[15]

(2) In 1992, the County Medical Examiner (Dr. Sybers) was indicted and convicted for murder of his wife.[16]

(3) During Bates' initial trial, the trial judge engaged in *ex parte* communications by allowing the State to draft the court's sentencing order.[17]

(IB 66-70).

Bates raised this same claim below. The collateral court denied his claim. (PCR Vol. IV 689-690).

---

[15] Bates admits that Sheriff Pitts was never convicted of perjury. (IB 66-67).

[16] Dr. Sybers did not testify at Bates 1995 re-sentencing proceedings.

[17] This last claim of "corruption" is irrelevant as Bates makes no claim the trial judge at his 1995 sentencing allowed the State to draft the sentencing order. As any error in allowing the State to do so has been cured by Bates' two subsequent sentencing proceedings and one subsequent penalty phase proceeding, Bates cannot resurrect this claim in this motion.

Bates' claim that the prosecutor "improperly" opposed Bates' efforts to waive parole, because of his personal and financial interests in Bates' conviction and sentence to death, is completely undermined by this Court's decision on direct appeal. Indeed, this Court's ruling makes clear that the prosecutor's opposition was perfectly proper.

On appeal, this Court ruled that Bates could not "waive" parole because a defendant "cannot by agreement confer on the court the authority to impose an illegal sentence." Bates v. State, 750 So. 2d 6, 11 (Fla. 1999). This Court went on to note that, at the time Bates committed the murder, life without the possibility of parole was not a permissible punishment for this murder.

Bates' claim that the prosecutor's personal and financial interest caused him to argue future dangerousness as a non-statutory aggravator is also without merit. This Court found that neither the State's cross-examination of Bates' witnesses or its closing argument raised the specter of future dangerousness. Bates v. State, 750 So. 2d 6, 11 (Fla. 1999).

Insofar as the remainder of this claim, consisting entirely of innuendo and unsubstantiated implication, Bates fails to establish even the barest connection between campaign contributions to Mr. Appleman's campaign by members of the Bay County community (most of those apparently coming in 1996 after

resentencing) and Bates' prosecution and sentence. Likewise, Bates makes no connection, whatsoever, between the other allegations; specifically, allegations of campaign contribution irregularities, soliciting of contributions from defendants in returned for dropped charges, public records violations, and other "corruption" allegations and Bates' prosecution and sentence. Nor does Bates explain how any of this information would have been admissible at trial to impeach any witness actually presented at Bates' 1995 sentencing proceedings.

Rather that Bates' allegation of widespread corruption, the record supports a conclusion that the Office of the State Attorney sought the death penalty against Kayle Bates for one reason - on June 14, 1982, Bates kidnapped Janet Renee White from her State Farm Office, beat her, attempted to rape her, robbed her of her wedding ring by ripping it off of her finger, choked her, and brutally stabbed her to death. The jury agreed that death was appropriate based on the evidence admitted at resentencing voting 9-3 to recommend death. This Court should affirm the collateral court's order denying the claim.

D. Systematic Discrimination

In this claim, Bates alleges that systemic discrimination deprived him of a fair trial. Bates raised this claim below. The collateral court denied the claim finding the claim procedurally barred and insufficiently pled. (PCR Vol. IV 691).

This Court should affirm for two reasons. First, the claim is procedurally barred. Any constitutional attack on the jury selection process can and should be raised on direct appeal. Robinson v. State, 707 So. 2d 688, 698 (Fla. 1998); Spenkelink v. State, 350 So. 2d 85 (Fla. 1977).

This claim may also be denied on the merits. In order to establish this claim, Bates must demonstrate (1) the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Robinson v. State, 707 So. 2d 688, 698 (Fla. 1998).

Assuming, that Bates satisfies the first prong of this test, Bates failed to provide any support for the notion that the representation of African-Americans from venire panels in Bay County is not fair and reasonable in relation to the number of such persons in the community. Additionally, Bates fails to demonstrate that any under-representation of African-Americans from venire panels in Bay County, Florida, or even from his venire, was a result of systematic exclusion. In order to satisfy the third prong of a prima facie case of discrimination, Bates must identify some facts that support the notion African-

Americans were systematically excluded from venire panels in Bay County as a result of purposeful discrimination. He has failed to do so.

Further, Bates does not claim the jury actually seated was not fair and impartial nor does he even attempt to explain how a jury that he described as being comprised of six white females, four white males and two African-Americans is inherently unfair or prejudicial. The collateral court properly denied this claim. Gordon v. State, 863 So. 2d 1215, 1218 (Fla. 2003); Robinson v. State, 707 So. 2d 688, 698 (Fla. 1998).

E. Pattern of Discrimination

In this claim, Bates alleges that the death penalty is imposed in a discriminatory manner when the defendant is black and the victim is white. Bates relies on a 1991 report by University of Florida Sociologist Dr. Michael Radelet. (IB 76).

Bates raised this claim below. The collateral court denied the claim finding that Bates had failed to allege any evidence to support the notion that racial considerations played a part in his prosecution or sentence to death. (PCR Vol. IV 693).

To present a legally sufficient claim that the prosecutor in his case sought the death penalty because he was African-American, Bates had to allege some facts to support a finding by the trial court that the decisionmakers in his case acted with discriminatory purpose. Foster v. State, 614 So. 2d 455, 463

(Fla. 1992) (quoting McCleskey v. Kemp, 481 U.S. 279, 292, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)). Moreover, the burden on the defendant is high. The defendant must show by "exceptionally clear proof" that racial discrimination played a role in the prosecutor's decision to seek the death penalty. Robinson v. State, 865 So. 2d 1259, 1264 (Fla. 2004).

Bates points to no evidence to support a notion the prosecutor sought the death penalty in this case because he was African-American. His conclusory statement that the "decision to seek the death penalty in Mr. Bates' case and the sentence to death was a direct result of the inherent discrimination in Florida's death penalty statute," is insufficient to require an evidentiary hearing. (IB 78). Doorbal v. State, 33 Fla. L. Weekly S 107 (Fla. Feb. 14, 2008) (noting that conclusory, nonspecific allegations, devoid of specific facts and arguments, are insufficient to obtain an evidentiary hearing). This Court should affirm the collateral court's order summarily denying his claim.

ISSUE IV

WHETHER OTHER ERRORS DEPRIVED BATES OF A FAIR SENTENCING PROCEEDING

In his fourth issue, Bates raises numerous claims of constitutional error. These claims include a challenge to the Florida Bar rule governing juror interviews, a "burden

shifting" claim, a claim challenging the HAC aggravator, an allegation that Bates is "innocent of the death penalty", a claim that the penalty phase instructions were vague and overbroad, an allegation that execution by lethal injection constitutes cruel and unusual punishment, a claim that Florida's capital sentencing statute is unconstitutional, a claim that trial counsel was ineffective for failing to file a motion for a change of venue and a cumulative error claim. This Court should reject each of Bates' sub-claims.

A. Juror interviews

In this claim, Bates alleges that Rule 4-3.5(d) (4), Rules Regulating the Florida Bar is unconstitutional. Bates raised this claim below. The collateral court summarily denied the claim. The court found the claim to be procedurally barred. The collateral court also found the claim to be without merit. (PCR Vol. IV 692).

This Court should affirm the collateral court's order for two reasons. First, the claim is procedurally barred. A claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors can and should be raised on direct appeal. Because Bates failed to do so, this claim is procedurally barred. Suggs v. State, 923 So. 2d 419, 440 (Fla. 2005) (finding that post-conviction court was correct to find juror interview claim procedurally barred

because not raised on direct appeal); Rose v. State, 774 So. 2d 629, 637 n.7 (Fla. 2000) (holding that a post-conviction claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors is procedurally barred because Rose could have raised this issue on direct appeal).

This claim also fails on the merits. Bates' argument is premised on the notion that Rule 4-3.5(d) (4) of the Rules Regulating the Florida Bar prevents collateral counsel from interviewing jurors. This is not the case.

In reality, the rule prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule also provides that the lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist." *R. Regulating Fla. Bar 4-3.5(d)(4)*. The rule's foundation rests on strong public policy against allowing litigants to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it. Marshall v. State, 854 So. 2d 1235 (Fla. 2003).[18]

[18] Rule 3.575, Florida Rules of Criminal Procedure became effective in January 2005. This rule requires the party to file a motion to interview with the court and to set forth the names of the jurors to be interviewed and the reasons the party

In order to preclude "fishing expeditions", this Court has established a high threshold over which a defendant must cross. First, the moving party must bring forth, under oath, specific allegations, that if true, would require the trial court to order a new trial. Johnson v. State, 804 So. 2d 1218 (Fla. 2001); Baptist Hospital of Miami v. Maler, 579 So. 2d 97 (Fla. 1991)(ruling that in light of strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it, an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial).

Additionally, inquiry may be permitted only in the face of allegations which involve an overt prejudicial act or external influence (e.g., cases in which a juror related personal knowledge of non-record facts to other jurors, an assertion a juror received information outside the courtroom, a juror is improperly approached by a party, the jury votes by lot or game of chance, where jurors allegedly read newspapers contrary to

---

believes the verdict may be subject to legal challenge. If the judge makes a finding that the verdict may be subject to challenge, he or she enters an order permitting the interview, which is conducted in the presence of the court and the parties. If the court does not find a reason to challenge the verdict, the court denies permission to interview. The procedure outlined in rule 3.575 is consistent with rule 4-3.5(d)(4). Israel v. State, 2008 Fla. LEXIS 441 (Fla. Mar. 20, 2008).

the court's orders, or where jurors directed racial slurs against the defendant). Marshall v. State, 854 So. 2d 1235, 1241-1242 (Fla. 2003); Devoney v. State, 717 So. 2d 501 (Fla. 1998).

On the other hand, matters which inhere in the verdict or seek to invade the jury's deliberative process may not be the subject of juror interviews. For instance, inquiry into whether jurors understood the trial court's instructions, whether a juror did not understand a particular instruction, whether a juror attempted to discuss guilt prematurely, jurors' consideration of a defendant's failure to testify, or discussion of matters the trial judge instructed the jury to disregard are not permitted as these are matters which inheres in the verdict or relates to deliberation. *See also Section 90.607(2) (b), Florida Rules of Evidence* (noting that a juror is not competent to testify as to any matter which essentially inheres in the verdict).

Bates proffers no basis to believe that grounds for a legal challenge to his 1995 sentence to death will be illuminated by an interview of his jurors. Rather than pointing to specific evidence of juror misconduct or prejudicial outside influence, Bates claims only that "misconduct may have occurred that Mr. Bates can only discover by juror interviews." (IB 78). While Bates alleges generally that "evidence exists that the community

pressured judges and 'most likely jurors' to convict and sentence Mr. Bates to death", Bates does not allege what this evidence is. (IB 79).

At its core, Bates' complaint is that the rule impermissibly forbids him from conducting a fishing expedition in hopes of landing a keeper. Because Bates has not even made a threshold showing of an entitlement to interview his jurors, the collateral court properly denied this claim.

B. Burden Shifting Claim

In this sub-claim, Bates raises three distinct issues. Bates alleges that: (1) comments by the prosecutor and instructions provided by the trial judge impermissibly diluted the jury's sense of responsibility in sentencing contrary to the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985); (2) the standard jury instructions placed the burden on Bates to prove evidence in mitigation outweighed the evidence in aggravation; and (3) the State is required, pursuant to the United States Supreme Court's decision in Ring v. Arizona, 122 S.Ct. 2428 (2002), to prove beyond a reasonable doubt that sufficient aggravating circumstances exist to justify imposing the death penalty and that these aggravating factors outweigh mitigating factors.

Bates raised each of these claims in Claim Seven of his amended motion for post-conviction relief. (PCR Vol. IV, 583-

586). The collateral court denied these claims. (PCR Vol. IV 692-693.

(1) **Caldwell claim**

This claim is procedurally barred. A claim the jury instructions impermissibly diminishes the jury's sense of responsibility in sentencing can, and should be, raised on direct appeal. Hodges v. State, 885 So. 2d 338, 355 (Fla. Oct. 14, 2004) (ruling that Hodges' claim that comments by the prosecutor and trial court diminished the jury's sense of responsibility for the sentencing process was not cognizable on collateral review because Hodges could have, but did not, raise the argument on appeal); Allen v. State, 854 So. 2d 1255, 1258 n.4 (Fla. 2003) (noting that challenges to comments on the ground that they dilute the jury's sense of responsibility in sentencing should be raised on direct appeal). Moreover, Bates cannot revive these barred claims by couching it loosely in terms of an ineffectiveness of counsel claim. Allen v. State, 854 So. 2d 1255, 1258 n.4 (Fla. 2003). *See also* Woods v. State, 531 So. 2d 79, 82 (Fla. 1988) (ruling that raising a procedurally barred claim in terms of ineffective assistance of counsel will not revive it).

This claim is also without merit. This Court has repeatedly rejected claims that Florida's standard jury instructions violate the dictates of Caldwell v. Mississippi.

Mansfield v. State, 911 So. 2d 1160, 1180 (Fla. 2005); Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992). "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). *See also* Romano v. Oklahoma, 512 U.S. 1 (1994) (same). This Court has long recognized the jury's penalty phase decision is advisory and the judge does indeed make the final sentencing decision. Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988).

In this case, the trial court instructed the jury to recommend a sentence and the final decision on the penalty would be made by the trial court. The court informed the jury that the court was required to give its recommendation great weight and that only in rare circumstances could he impose a sentence other than the one the jury recommended. (RS Vol. XV 823). As these instructions properly characterized the jury's role under Florida's capital sentencing procedures, there can be no Caldwell violation.

(2) Burden Shifting

This Court may deny this claim for two reasons. First, the claim is procedurally barred. Bates could have, but did not, raise this claim on direct appeal. Because Bates did not raise this claim on direct appeal, the claim is barred in post-

conviction proceedings. Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992) (ruling that Turner's claim, that Florida's capital-sentencing scheme unconstitutionally shifted the burden to him to prove that life is the appropriate sentence, was procedurally barred because it should have been raised on direct appeal).

This Court may also deny this claim on the merits. This Court has repeatedly rejected claims that standard penalty phase instructions improperly shift the burden to the defendant to prove either that death is inappropriate or that the mitigating factors outweigh aggravating factors. See Griffin v. State, 866 So. 2d 1 (Fla. 2004)(noting that the Florida Supreme Court has repeatedly rejected claims the standard jury instructions impermissibly shifts the burden to the defense to prove that death is not an appropriate sentence); Sweet v. Moore, 822 So. 2d 1269 (Fla. 2003)(standard jury instruction on weighing mitigation and aggravation given by trial court in capital murder prosecution did not impermissibly shift burden to defense to prove that a life sentence was appropriate by suggesting that mitigators had to outweigh aggravators).

(3) Ring Claim

This Court may deny this claim for two reasons. First, the claim is procedurally barred. The United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), held that the decision in Ring is not

retroactive. A majority of this Court has also concluded that Ring does not apply retroactively in Florida to cases that are final, under the test of Witt v. State, 387 So. 2d 922 (Fla. 1980). Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005). Accordingly, Bates' claim is procedurally barred. Evans v. State, 32 Fla. L. Weekly S 719 (Fla. Nov. 15, 2007).

This claim is also without merit. The gravamen of Bates' argument is that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) creates two additional elements to the crime of first degree murder; (1) there are sufficient aggravating factors to justify a death sentence, and (2) the mitigating factors are insufficient to outweigh the aggravating circumstances. In arguing that Ring created these extra elements of capital murder, Bates presupposes the statutory maximum upon conviction for first degree murder is life in prison. He also assumes that death eligibility does not arise until sentencing.

Both of Bates' assumptions underlying his argument are misplaced. Both before and after the decision in Ring issued, the Florida Supreme Court has ruled that, in Florida, the statutory maximum upon conviction for first degree murder is death. *See e.g.*, Mills v. Moore, 786 So. 2d 532 (Fla. 2001), (ruling that death is the statutory maximum sentence upon conviction for murder); Porter v. Crosby, 840 So. 2d 981, 986

(Fla. 2003) (observing, in scrutinizing Porter's 1985 murder conviction, that "we have repeatedly held that the maximum penalty under the statute is death"). Thus, while Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury; once Bates was convicted of the first degree murder of Janet Renee White, Bates stood convicted of capital murder and was death eligible. Neither the sufficiency of the aggravators nor the weighing process increases the penalty beyond the statutory maximum.

Moreover, Ring is satisfied because Bates was convicted of kidnapping, attempted sexual battery, and armed robbery and the trial court found, in aggravation, that the murder was committed in the course of a felony. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying Ring claims. Smith v. State, 866 So. 2d 51, 68 (Fla. 2004). Bates' claim should be denied.

C. Heinous, Atrocious or Cruel

In this claim, Bates alleges the trial court erroneously found the HAC aggravator to exist because the State did not bear its burden to show that Mrs. White was conscious during Bates' attack. Bates points to the medical examiner's testimony that Mrs. White would have become unconscious within a minute or two. (IB 82). Bates also alleges the trial judge improperly found

the HAC aggravator because the State failed to prove that Bates intended to torture Mrs. White. (IB 82).

This Court may deny this claim for two reasons. First, this claim is procedurally barred because Bates raised this same claim on direct appeal. This Court rejected his claim finding the evidence sufficient to support the trial court's conclusion the murder was especially heinous, atrocious, or cruel. Bates v. State, 750 So. 2d 618 (Fla. 1999). As this issue was raised and decided on direct appeal, Bates is procedurally barred from again raising the issue in these proceedings.

This Court may also deny the claim on the merits, not only because this Court's decision on direct appeal is law of the case, but because the testimony adduced at trial clearly supports a finding the murder was especially heinous, atrocious or cruel. It almost shocks the conscience for Bates to argue that no rational fact finder could find this murder to be heinous, atrocious or cruel. (IB 83). What is closer to the truth is that no rational fact finder could not find this murder was heinous, atrocious and cruel.

The record establishes that Bates beat Janet Renee White over the length of her body, attempted to strangle her, and then stabbed her twice in the chest causing her to bleed out from her wounds. At resentencing, the medical examiner, Dr. Lauridson, testified that Mrs. White suffered from 20-25 contusions

(bruises), seven abrasions, and two lacerations to the upper and lower lip all of which likely occurred before she was stabbed. (RS Vol. X 294-296). Dr. Lauridson told the jury these latter lacerations likely occurred as a result of Mrs. White being struck in the mouth with a fist or an object. (RS Vol. X 301). Dr. Lauridson indicated there were signs of strangulation. (RS Vol. X 301). While Dr. Lauridson testified that Mrs. White would have become unconscious within one or two minutes, these one to two minutes were literally a lifetime as Mrs. White lay bleeding, bruised, cut, strangled and undoubtedly aware this day would be the last day of her life. Reynolds v. State, 934 So. 2d 1128, 1156 (Fla. 2006)(noting that this Court has upheld the HAC aggravator in stabbing deaths even when victim was conscious for only seconds).

Simply ignoring the sheer brutality of his attack, Bates argues that HAC is inappropriate because he had no intent to torture Mrs. White. While the physical evidence points to a contrary conclusion, Bates' intent to torture is not the focus of any inquiry into whether a murder was HAC.

To qualify for the HAC circumstance, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. Hertz v. State, 803 So. 2d 629, 651 (Fla. 2001). This particular aggravator's focus is on the means and manner in which the death is inflicted and the immediate circumstances

surrounding the death, rather than the intent and motivation of a defendant. Conde v. State, 860 So. 2d 930, 955 (Fla. 2003). *See also* Belcher v. State, 851 So. 2d 678, 684 (Fla. 2003) (ruling that if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference). Because the evidence supported a finding the means and manner of Mrs. White's murder was especially heinous, atrocious or cruel, the collateral court's order must be affirmed.

D. Bates is innocent of the death penalty

In this sub-claim, Bates alleges he is innocent of the death penalty. Bates alleges, without elaboration, that his jury was given vague instructions on the aggravating circumstances relied upon by the judge to support the death sentence. Bates makes no effort to identify the allegedly vague penalty phase instructions nor does he provide any support for his claim the instructions were vague and overbroad. Bates also claims he is innocent of the death penalty because his death sentence is disproportionate. (IB 84).[19]

[19] Below, and once again before this Court, Bates mistakenly alleges the three aggravators found in his case were (1) the murder was committed in the course of a robbery (2) the murder was committed to avoid arrest and (3) the murder was CCP. (IB 84). In actuality, the three aggravators found to exist were: (1) capital murder was committed during an enumerated felony

In order to prevail on an "innocent of the death penalty" claim, a defendant must demonstrate constitutional error that invalidates all of the aggravating circumstances upon which the sentence was based. Griffin v. State, 866 So. 2d 1, 18 (Fla. 2004); Vining v. State, 827 So. 2d 201 (Fla. 2002). Bates has failed to show that any of the three aggravators found in his case were invalid.

On direct appeal, this Court rejected Bates' arguments attacking each of the three aggravators. This Court found that each of the three aggravators found in this case were supported by the evidence. Additionally, the Court conducted a proportionality review and found Bates' death sentence proportional.

Accordingly, Bates has failed to show he is innocent of the death penalty. Sochor v. State, 883 So. 2d 766 (Fla. 2004)(rejecting Sochor's claim of innocence of the death penalty when the Court found on direct appeal that the evidence supported the existence of three aggravating circumstances); Vining v. State, 827 So. 2d 201 (Fla. 2002) (rejecting Vining's claim he is innocent of the death penalty because his death sentence was proportionate and because three aggravating circumstances [committed during a robbery, under sentence of

---

(kidnapping and attempted sexual battery), (2) the capital murder was committed for pecuniary gain; (3) the murder was especially HAC.

imprisonment, and previous violent felony conviction] were supported by the record). This Court should reject this claim.

E. Aggravating Circumstances are Vague and Overbroad

Bates alleges his jury was not given adequate guidance as to what was necessary to establish the presence of the aggravator. Bates does not point to any particular instruction about which he takes issue or allege any particular infirmity in the instructions. Bates raised this claim below. (PCR Vol. IV 595-597). Like he does before this Court, Bates did not point to any particular instruction about which he takes issue or allege any particular infirmity in the instructions given to his jury. (PCR Vol. IV 595-597).

The collateral court summarily denied the claim. The court ruled the claim was both procedurally barred and insufficiently pled. (PCR Vol. IV 694).

This Court may affirm the trial court's order for two reasons. First, the claim is procedurally barred. On direct appeal, Bates alleged the aggravating circumstances found in this case and the instructions on those circumstances were facially vague and overbroad. This Court rejected his claim. Bates v. State, 750 So. 2d 6, 9 n.2 (Fla. 1999). Because Bates raised this claim on direct appeal, this claim is procedurally barred in post-conviction proceedings. Bowles v. State, 33 Fla. L. Weekly S 121 (Fla. Feb. 14, 2008) (ruling that because Bowles

raised a claim on direct appeal that the trial court failed to find the existence of two mental health mitigators, Bowles was barred from raising the same claim again in a motion for post-conviction relief).

This Court may also affirm the trial court's order because in failing to point to any particular instruction about which he takes issue or to allege any particular infirmity in the instructions, Bates failed to present a legally sufficient claim to the collateral court. Griffin v. State 866 So. 2d 1 (Fla. 2004) (ruling that because Griffin did not state how the standard instructions failed to channel the jury's sentencing discretion nor identify the aggravating circumstances upon which the jury was inadequately instructed, his conclusory allegations were facially insufficient to allow the trial court to examine specific allegations against the record). Because Bates failed to present a legally sufficient claim to the collateral court, the court properly denied his claim. This Court should affirm.

F. Execution by Lethal Injection

In this claim, Bates alleges that the trial court improperly denied an evidentiary hearing on this claim. The collateral court ruled the claim was procedurally barred because it could have and should have been raised on direct appeal. The collateral court also denied the claim on the merits. (PCR Vol. IV 694).

Below and before this Court, Bates cites to the execution of Bennie Demps. As this Court has recognized, the Department of Corrections has amended its protocols since Mr. Demps' execution. Israel v. State, 2008 Fla. LEXIS 441 (Fla. March 20, 2008). Moreover, this Court has found that DOC's current procedures do not violate the constitutional prohibition against cruel and unusual punishment. Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007). *See also* Baze v. Rees, 2008 U.S. LEXIS 3476 (April 16, 2008).

G. Florida's Capital Sentencing Scheme

In this claim, Bates alleges that Florida's capital sentencing scheme is unconstitutional. Bates alleges the statute is constitutionally infirm because it fails to prevent the arbitrary imposition of the death penalty or narrow application of the penalty to the worst offenders. (IB 87). Bates also complains that the statute fails to provide any standard of proof for the weighing process and creates a "presumption of death where a single aggravating circumstance applies". (IB 88).

Bates presented this claim below. (PCR Vol. IV 601-603). The collateral court denied the claim as procedurally barred. The Court also denied the claim on the merits. (PCR Vol. IV 695).

This Court may affirm the collateral court's order denying this claim for two reasons. First, the claim is procedurally barred. Claims that Florida's capital sentencing scheme is unconstitutional can be and should be raised on direct appeal. Failure to do so acts as a procedural bar to Bates' attempts to re-litigate these issues in a post conviction motion. Sochor v. State, 883 So. 2d 766 (Fla. 2004); Gorby v. State, 819 So. 2d 664, 687 (Fla. 2002) (Gorby's challenge to the constitutionality of Florida's death penalty statute procedurally barred because it could have been raised on direct appeal); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal).

This claim is also without merit. This Court has consistently rejected claims that Florida's death penalty statute is unconstitutionally arbitrary and capricious. This Court has also rejected claims that Florida law creates a presumption of death when the defendant is prosecuted under a theory of felony murder. Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003) (Court rejected Lugo's claim that Florida's death penalty statute is unconstitutionally arbitrary and capricious); Walton v. State, 847 So. 2d 438, 444 (Fla. 2003) ("Walton's claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the

burden to the capital defendant during the penalty phase, presumes that death is the appropriate punishment and imposes an unconstitutional 'automatic aggravator' when a defendant is prosecuted under a theory of felony murder--have been rejected by this Court numerous times and are entirely devoid of merit."); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000)(same); Banks v. State, 700 So. 2d 363, 367 (Fla. 1997).

H. Change of venue and pre-trial publicity

In this claim, Bates alleges that he was denied his right to a fair trial when his trial was held in Bay County despite extensive pre-trial publicity. Bates alleges publicity about his case saturated the community and was "so pervasive it prohibited empanelling an impartial and untainted jury." Bates alleges, without any record citation to support his claims, that numerous jurors reported knowledge of Bates' case due to media reports about the murder. While implicitly recognizing that trial counsel did make a motion for a change of venue, Bates complains that trial counsel was ineffective for failing to renew his motion after individual *voir dire* showed the jurors had prior knowledge of the case.

Bates raised this claim below. The collateral court denied the claim. The court ruled that trial counsel made a motion for a change of venue and renewed it immediately before jury selection began. (RS Vol. I 644; Vol. IV 644, 648, 656). The

collateral court found that Bates had failed to set forth any grounds upon which counsel should have renewed his motion after *voir dire*. Accordingly, the court found the claims to be conclusory and insufficiently pled. (PCR Vol. IV 695).

Before this Court Bates asserts that his trial counsel was ineffective for failing to move for change of venue. The State respectfully disagrees.

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. State v. Knight, 866 So. 2d 1195, 1209 (Fla. 2003); Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997) (quoting McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977)).

When a motion for change of venue is filed, a trial court should evaluate (1) the extent and nature of any pretrial publicity, and (2) the difficulty encountered in actually selecting a jury. The existence of pretrial publicity in a case does not necessarily lead to an inference of partiality or require a change of venue; rather, pretrial publicity must be examined with attention to a number of circumstances, including (1) when the publicity occurred in relation to the time of the

crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community exposed to the publicity; and (5) whether the defendant exhausted all of his peremptory challenges in seating the jury. Knight at 1209.

Should a trial judge deny a motion for change of venue, the standard of review on appeal is an abuse of discretion. Under this standard, this Court would not overturn the trial judge's ruling on a motion for change of venue absent a "palpable abuse of discretion." Kearse v. State, 770 So. 2d 1119, 1124 (Fla. 2000).

In collateral proceedings, however, where the defendant is claiming that trial counsel was ineffective for failing to renew a motion for a change of venue already made, the defendant must show there is a reasonable possibility a renewed motion for change of venue at the conclusion of *voir dire* would, or should, have been granted. State v. Knight, 866 So. 2d 1195 (Fla. 2003); Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001)(noting that to establish ineffective assistance in this regard, petitioner must show, at a minimum, that the trial court would have or should have granted a change of venue motion which, in turn, requires him to show actual or presumed prejudice on the part of jurors);

Provenzano v. Dugger, 561 So. 2d 541, 545 (Fla. 1990) (concluding that counsel was not ineffective for failing to renew the motion for change of venue because it was a tactical decision and because "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury"). It is here where Bates' claim falls short.

First, insofar as Bates claims that counsel was ineffective for failing to raise a motion for change of venue, Bates' claim must fail because trial counsel did file a written motion for a change of venue. Trial counsel then renewed the motion before jury selection began and requested the court to move the proceedings. (RS Vol. I 33-34; Vol. IV 656). The court reserved ruling on the motion until the end of *voir dire*. Trial counsel also asked and was granted individual *voir dire* on the issue of pre-trial publicity. (RS Vol. IV 644). Trial counsel asked the trial judge to sequester the jury to shield them from any publicity or outside influence that arose during the trial. The trial judge denied his request. (RS Vol. IV 648). It is clear that trial counsel fully raised and argued the issue of venue before the trial judge. Counsel cannot be ineffective for failing to do something that he actually did.

To the extent Bates claims only that trial counsel was ineffective for failing to renew the motion after individual

voir dire, Bates' claim must fail because he failed to set forth any factual basis upon which trial counsel could have renewed his motion to change venue. Twelve jurors and three alternates were selected to serve on Bates' jury; Ms. Willie, Ms. Ford, Mr. Taylor, Mr. Hayes, Mr. Patel, Ms. Tindle, Mr. Walker, Ms. Pierce, Mr. McCullough, Ms. Johnson, Ms. Heath, and Mr. Wenick. Alternate jurors were Mr. Harrington, Mr. Holley, and Ms. Parker. (RS Vol. VII 1263).

Only two jurors (Taylor and Heath) and one alternate juror (Parker) reported knowing anything about the case from the media. Ms. Parker was twelve years old at the time of the murder and knew about it only from her parents, who expressed no opinion about what should happen to Bates. (RS Vol. VI 1091-1092).

None of the three jurors knew Bates had previously been sentenced to death. Bates points to nothing to support the notion these jurors could not make a recommendation as to sentence in accord with the evidence and the instructions provided by the court.

While the record demonstrates there was some pre-trial publicity, the record does not demonstrate there was any difficulty in seating the jury. Because this is the case, Bates cannot show that any renewed motion for change of venue, more

vigorously argued, would have been granted. The collateral court properly denied this claim.

I. Cumulative error

Bates has failed to show any individual error that deprived him of a fundamentally fair trial. Where no individual errors occurred, a claim of cumulative error must necessarily fail. Atwater v. State, 788 So. 2d 223, 238 (Fla. 2001) (where no errors occurred, cumulative error claim is without merit); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999)(finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also fail); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless).

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the collateral court's order denying Bates' amended motion for post-conviction relief.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to Terri L. Backhus, and Suzanne Myers Keffer, Office of the Capital Collateral Regional Counsel-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 22nd day of April, 2008.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
MEREDITH CHARBULA
Assistant Attorney General