IN THE SUPREME COURT OF FLORIDA

Case No. SC 07-611

KAYLE BARRINGTON BATES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

TERRI L. BACKHUS
Assistant CCRC
Florida Bar No. 0946427

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL
101 N.E. 3rd Ave., Ste.
400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Bates's motion for post-conviction relief after an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court; however, because many of the stamped record numbering is illegible, the transcript of the trial is denoted by "T" and references the transcript page number.

"PC-R" -- record on instant 3.850 appeal to this Court

"Supp. PC-R." -- supplemental record on instant 3.850 appeal to this Court.

INTRODUCTION

Mr. Bates submits this Reply to the State's Answer Brief. Mr. Bates will not reply to every argument raised by the State. However, Mr. Bates neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Bates expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....i

INTRODUCTION.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

ARGUMENT II

MR. BATES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING H
.....12

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. BATES'S CLAIMS.
.....21

I. Ineffective Assistance of Counsel–Exclusion of Jurors.
.....21

II. The State Failed to Disclose Police and Prosecutorial Misconduct.....23

CONCLUSION.....28

CERTIFICATE OF SERVICE.....28

CERTIFICATE OF COMPLIANCE.....29

TABLE OF AUTHORITIES

Cases

Gluck v. State, 62 So. 2d 71, 73 (Fla. 1952).....25

Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995).....20

Kyles v. Whitley, 514 U.S. 419 (1995).....27

Oglesby v. State, 23 So. 2d 558 (Fla. 1945).....25

Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951).....25

Strickland v. Washington, 466 U.S. 668 (1984).....passim

Wiggins v. State, 539 U.S. 510 (2003).....17

Miscellaneous Authority

Fla. R. Crim. P. 3.853 1

Fla. R. Crim. P. Rule 3.203 11

Fla. Stat.§ 923.11.....1

www.innocenceproject.org.....10

www.law.northwestern.edu. 10

ARGUMENT IN REPLY

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. BATES'S MOTION FOR DNA TESTING PURSUANT TO FLA. R. CRIM. P. 3.853 AND FLORIDA STATUTES § 923.11.

> I submit to you that the defendant unzipped his pants, had sexual intercourse with his penis with her […] and when he got finished he wiped himself off on her panties and threw them over to the side […].

(T. 632).

The evidence is undisputed that prosecutors argued at trial that Mr. Bates's semen or some biological material existed on multiple items collected at the crime scene. The only explanation the State offered to the jury for how that evidence got there was that Mr. Bates deposited it on the victim's underwear. The State repeatedly argued to Mr. Bates's jury that he had "raped" the victim (T. 849, 865, 868-869).

The trial court and the State seem to have forgotten that prosecutor Jim Appleman made this argument because now the trial court suggested in its order that the absence of Mr. Bates's DNA from the victim's panties would not exonerate him of murder or attempted sexual battery. It is not clear which record the trial judge and the State are reading because the transcript clearly shows otherwise.

Even though the jury found attempted sexual battery and no vaginal penetration of the victim, that does not end the discussion. The State argued that "when [Mr. Bates] got finished" presumably with the rape of the victim, he wiped himself with her panties and discarded them. (T. 632). Mr. Bates's semen is supposedly on the victim's panties and that was the basis for the jury's finding of an "attempted" sexual battery and the murder.

According to the State's own theory of prosecution, whether penetration occurred or not would not preclude DNA testing from reaching a result as to who attempted to sexually assault and murder the victim. If DNA testing reveals that Mr. Bates's semen is not on the victim's panties, then it casts doubt on whether he also committed the murder. The murder, the State said, happened within minutes of the attempted rape. The events were not separated in time. Geraldine Gilchrist testified that she called the victim shortly after 1 p.m. on June 14, 1982 and that the victim answered in an excited voice and then screamed (T. 305). Jim Dickerson testified that he arrived at the State Farm office at 1:07 p.m. and the victim was already dead (T. 311-12). In the seven minutes it took for the crimes to occur, the State did not suggest that the rape occurred after the

victim's death or in a separate episode.

Now, the State and the trial court attempt to re-write history by saying the same evidence that convicted Mr. Bates is irrelevant to the murder case (Answer Brief at 39). But the entire theory of prosecution at the time of trial was that the rape and murder of the victim was one continuous episode and the underlying crimes for the felony-murder charges.[1]

The jury, in finding attempted sexual battery, believed that Mr. Bates deposited semen or some biological material on the victim or her clothing shortly before murdering her. The State argued that this entire event occurred within minutes of the victim's interrupted phone call, which prompted an immediate police response. The State has never suggested any other theory until now, and it has never argued that there were any other accomplices.

---

[1]On direct appeal, the State argued in its brief that there was sufficient evidence to prove attempted sexual battery because the jury "rationally concluded" that the defendant did not complete penetration of the victim due to his own "physiological dysfunction" (i.e. premature ejaculation on the panties and the victim). See, Bates v. State, SC No. 63,594 Appellee's brief at pg. 18.

Therefore, if the perpetrator raped, attempted to rape or murdered the victim, and Mr. Bates was the sole perpetrator, then the absence of his biological material in her panties, vagina or on her person would eliminate him as the murderer. There is no other possible interpretation.

The State, like the court below, points out that while semen was detected on the victim's panties at the time of trial, no sperm could be detected. FDLE analysts found blood-type grouping of sperm in the victim's vagina, but it was inconclusive. But that testing was the outdated technology available in 1982-83.

FDLE Crime Lab Analyst Suzanne Harang's testimony as a forensic serology expert at Mr. Bates' trial does not preclude DNA testing now because her testimony was far from instructive. The ABO blood typing tests of 1982 produced many inconclusive results and more questions than answers. For example:

a. The victim's saliva standard was unsuitable for testing at that time (T. 539).

b. The victim's vaginal swab was positive for semen but the grouping tests were inconclusive (T. 551);

c. Semen smear slides indicated the presence of semen but it could not be typed (T. 540);

d. State's exhibit #17, the victim's purple skirt and pantyhose, tested positive for the victim's blood type but other blood on the skirt was inconclusive (T. 541);

e. State's exhibit #20, blue panties of the victim, tested positive for semen, but not for blood. Enzyme tests of that sample were inconclusive (T. 542). In addition, she only tested a semen stain on the inside of the panties and did not test a stain on outside of the panties (T. 554).

f. State's exhibit #22, a blue shirt, tested positive for blood type A, but was not identified conclusively as DNA testing can now accomplish (T. 543).

g. State's exhibit #21, white briefs, tested positive for semen stain, but could not be typed for ABO antigens (T. 544);

h. State's exhibit #19, green pants, tested positive for type A blood, but was not identified conclusively as the victims as DNA testing can now accomplish (T. 544);

i. State's exhibit #26, an acid phosphotase test, which Ms. Harang was not able to examine because it was wet (T. 546);

j. State's Exhibit #28, a vaginal washing of the victim, tested positive for non-motile intact sperm. It could not be grouped with ABO typing and the PGM analysis was inconclusive. Ms. Harang testified that it was possible that this was consistent with a non-secretor (T. 546-547, 555).

k. State's Exhibit #29, a piece of blue cord, tested positive for blood type A, but could not identify source (T. 547-548).

Ms. Harang could not say where the semen came from that she found in the panties, vaginal swabs and washings or on the white briefs (T. 556). Prosecutor Appleman argued to the jury that there was "sperm in the vaginal smears, and there was sperm possibly on the inside of the defendant's briefs and the vaginal wash taken by Mr. Nowell had sperm in it" (R. 866-867). He argued that Mr. Bates had "raped" the victim and urged them to

find him guilty based on those facts (R. 849, 865, 868-869).

Physical evidence was collected at the crime scene and elsewhere containing biological material, including the victim's clothing, debris from the victim and Mr. Bates' clothing, and a blue cord. Cotton fibers were tested and linked to the green pants collected by Dr. Sapala and tested for blood by Ms. Harang. These fibers can now be conclusively tested with new technology. During closing argument, Assistant State Attorney Appleman argued that the fibers found on the body and the presence of semen that could not be typed had come from a non-scretor and argued that Mr. Bates had committed the murder and rape of Ms. White (T. 866).

The whole point of this Court granting a new opportunity for DNA testing was to correct the flaws that were common in old testing methods. With new DNA testing, sperm is not the only biological material that can be analyzed. Skin cells and epithelials from other bodily fluids can now reveal DNA profiles. Even hair can be tested with mitochondrial DNA testing in degraded and extremely old samples. Analysts can now determine the causes of death on bodies going back to the 1860s. With the new "touch DNA" technique, profiles can be obtained from scrapings of genetic material that cannot be seen with the

naked eye and obtain profiles where the perpetrator may have merely touched a piece of evidence. For the State to argue at this late date that further testing could not render a result is disingenuous and not based on any legal or scientific authority.

The State also suggests that there could be potential problems if this evidence is tested. Prognosticating about events that have not occurred is not the standard by which this Court judges DNA issues. It does not matter whether the victim's husband's semen "might" be found in the victim,[2] as DNA testing is capable of detecting more than one DNA profile, if it exists, and distinguishing between the two. By the State's own argument at trial, this is an unlikely worry since Mr. Bates supposedly wiped himself on the victim's panties and threw them

[2]The victim's husband testified at trial that he had sex with the victim two days before the murder (T. 296). Medical testimony showed that "theoretically" semen could survive in a woman's vagina for three days after sex. But this "theory" presumes that the victim did not bathe or urinate for two days prior to the crime. Moreover, the technology now exists to make a distinction between the victim's husband's DNA profile and that of someone else. The State's dire predictions of "problems" with DNA testing ordered by this Court are unfounded.

aside.

It remains that DNA testing could provide exculpatory evidence that could show that Mr. Bates had not committed a rape or an attempted rape, and had not, in the minutes it took for these crimes to occur, killed the victim.

Testing the rape kit, the victim's clothing, the blue cord and Mr. Bates's clothing can establish the presence at the crime scene of DNA profiles that are not Mr. Bates. If the State is confident in its case, then it should not block finally resolving the issue. Moreover, if money were the issue, Mr. Bates will find the funds to pay for his own testing as the rule allows.

But, money is not the issue. The State fears that they were wrong because there were many inconsistencies in the State's evidence that their witnesses could not explain.

For example, Officer Dan Cioeta testified at the 1983 trial and at resentencing that Mr. Bates was arrested at 1:20 p.m. on June 14, 1982 (RS. Vol. X, p. 93-96). Mr. Dunn questioned Mr. McKeithen as to whether any officer had ever said or showed that Mr. Bates was arrested at any time other than 1:20 p.m. Mr. McKeithen said no. (RS. Vol. X, p. 96). The medical examiner's autopsy report, however, showed that the victim's time of death

was 2:10 p.m. No explanation was given by the State for this significant discrepancy. Nor could Mr. McKeithen explain it at resentencing. This information also rebuts the State's argument that Mr. Bates was arrested "minutes" after the murder. Appellee's Brief at pg. 39.

The ring purportedly found on Mr. Bates's person at the time of his arrest was described by Mr. McKeithen and Mr. Tunnell "white gold." The ring purportedly identified by the victim's husband as having been her ring was "yellow gold." (T. 632). Moreover, at resentencing, Mr. Dunn established that there was no damage to the victim's ring finger, which is contrary to the State's argument here (PC-R. 282).

The watch pin purportedly found at the crime scene could never be conclusively established as having come from a watch owned by Mr. Bates.

The one green fiber that was supposedly found on the victim's dress could not be conclusively identified, and no fibers from the victim's clothing were found on Mr. Bates's clothing.

Mr. Bates repeatedly denied confessing to these crimes. At a motion to suppress statements hearing on December 29, 1983, Mr. Bates testified that he believed he had been drugged by Mr.

McKeithen during his interrogation (T. 1680-81). He repeatedly denied confessing to the crimes (T. 1681).

The evidence was far from overwhelming. Mr. Bates's proximity to the crime scene was the State's only direct evidence. Even Mr. Bates's purported statements did not ring true and were not consistent with the evidence found at the crime scene.[3] His statements do not obviate the need for testing.

Mr. Bates had no criminal record. Shortly after giving the statements to police, Mr. Bates said he had been coerced into confessing to the crime by being drugged with an orange drink. Mr. Bates repeatedly denied confessing to the crime.

Evidence presented at the evidentiary hearing from Jackie Bates, Mr. Bates's father, and from Kayle Bates's first attorney, Anthony Bajocsky, who were the first people to see and speak with Mr. Bates after his arrest showed that Kayle was confused and made no sense. They described his behavior as

---

[3]The State argues that Mr. Bates confessed to stabbing the victim with scissors, but Mr. Dickerson testified that scissors were found in the victim's desk drawer (T. 329-30). The medical examiner found that the victim's wounds were inconsistent with a scissors.

bizarre, babbling and talking fast. At no time did Mr. Bates confess to the crimes.

But, even if Mr. Bates did confess to the crimes, it does not preclude DNA testing. On August 26, 2002 in Detroit, Michigan, Eddie Joe Lloyd was exonerated and released from prison after DNA testing showed he was innocent of murder after he had confessed to officers. www.innocenceproject.org. In January, 2003 in Illinois, Franklin Thompson was pardoned based on his innocence after he had signed a statement confessing to murder. www.law.northwestern.edu. On December 19, 2002 in New York, the convictions of Anton McCray, Kharey Wise, Kevin Richardson, Yusef Salaam and Raymond Santana were vacated after DNA corroborated the confession of a violent sex offender for the rape of a jogger in Central Park in New York City. Each of the defendants had confessed to the crime. Aside from the dubious confessions, the only evidence linking the defendants to the crime was three hairs recovered from one defendant's clothing. The hairs were described by the State's forensic expert witness as consistent with the victim's hair. www.law.northwestern.edu.

Thus, DNA testing in the circumstances of Mr. Bates's case is not a "fishing expedition," but a logical solution to the

problems the State introduced in 1983 when it presented the inconclusive evidence to the jury that proved nothing but innuendo and speculation. To argue now that the same inconclusive evidence it used to convict Mr. Bates is irrelevant to the murder is simply wrong.

The time is now for the State to put up or shut up. Either explain the inconsistencies in its evidence or allow Mr. Bates the opportunity to finally decide the issues with Rule 3.203 DNA testing. This case should be remanded for DNA testing.

ARGUMENT II

MR. BATES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS 1995 RESENTENCING, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State argues that Mr. Bates's claim was properly denied because 1) trial counsel actually presented mental health mitigation; 2) Dr. Crown's testimony was cumulative; 3) trial

counsel's decision not to present Dr. Crown was strategy; and 4) Mr. Bates has shown no prejudice.

The State asserts that trial counsel actually presented mental health mitigation evidence during the May 1995 penalty phase of Bates's capital trial through the testimony of doctors James Larson and Elizabeth McMahon. However, the fact that trial counsel did something is not the standard under Strickland v. Washington, 466 U.S. 668 (1984). It does not excuse trial counsel's decision not to present evidence of organic brain damage. It is un-rebutted by the State that organic brain damage is a significant mental health mitigator. It is a weighty mitigating circumstance because it can be quantified with cognitive testing.

Neither doctors Larson nor McMahon could testify about organic brain damage. Neither doctor had done the testing with the expertise that Dr. Crown had. In 1995, Dr. Larson believed Mr. Bates suffered from organic brain damage, but he was not an expert in that area. Dr. Larson had to bring in an associate to interpret data on Mr. Bates.

Following the lower court's findings, the State represents that Dr. Crown's evidentiary hearing testimony was largely cumulative to the testimony of doctors Larson and McMahon. This

overlooks relevant facts in the record. Specifically, the doctors had nothing to support their conclusions. Neither had spoken to Mr. Bates's wife or father nor had they pieced together the reactions of Mr. Bates with the information that had come in from law enforcement around the time of the crime.

At the post-conviction hearing, Dr. Crown not only testified as to Mr. Bates's organic brain damage, but also provided details about how his cognitive deficits would impact his functioning in stressful situations. Dr. Crown testified that this information was corroborated by others who were close to Mr. Bates at the time of the crime.

Contrary to the State's assertion that Dr. Crown failed to identify any situations that were precursors to Mr. Bates's behavior at the time of the crime, Dr. Crown discussed evidence of prior incidents in which Mr. Bates became "unwrapped." He testified that there were precursors of Mr. Bates's behavior prior to the date of the crime.

> There were micro situations that had occurred within his family, his relationships with family members, relationships with his wife, reactions to being in the National Guard and serving in Miami during before or after those McDuffy riots. So there were indicators,

> I don’t know that anyone would have necessarily picked up the thread, **but he had nightmares that [he] acted out, [and he] had been described as not being the same.**

(PC-R2. 140)(emphasis added).

These nightmares were substantiated by Renita Bates, Kayle’s wife, whom Mr. Dunn did not make available to Dr. Crown. She described Mr. Bates’s nightmares after his return from the Miami riots and said he was “out of it.” Mrs. Bates’s description is consistent with the testimony of Jackie Bates, Kayle’s father, and his observance of Mr. Bates’s behavior after his arrest. The descriptions were exactly the same as what Mr. Bates reported to Dr. Crown. Mr. Bates was described as “babbling, talking fast, like he was going out of his mind.

Similarly, Guy Tunnell testified that when Mr. Bates first approached him at the crime scene he was talking fast, and he was sweating as if he had exerted himself. He described the wooded area around the crime scene as “jungle-like.” Mr. Bates responses to Tunnell’s questions were quick and rapid fire. They were inconsistent and did not make sense. In this same vein, trial attorney Anthony Bajocsky testified that when he saw Mr. Bates at the jail for the first time after the crime, his

responses were “bizarre.” They made no sense and were inconsistent and contradictory. He would have moved for a mental health evaluation if he had continued on the case.

Doctors Larson and McMahon did not testify about this evidence and did not testify about Mr. Bates’s experiences in the National Guard with respect to his “jungle” training, tear gas training and his time in the racially charged Miami area following the McDuffy riots. Mr. Dunn had not asked doctors Larson or McMahon to speak with mitigation witnesses--Renita Bates or any family member witnesses about Mr. Bates’s past stress responses (PC-R2. 102).

Although the State asserts that trial counsel’s strategic reason for not calling Dr. Crown was to avoid negative MRI results, this was not Mr. Dunn’s testimony. Despite the State’s argument that trial counsel refused to admit his strategy for not putting on Dr. Crown, the fact is that trial counsel had no such strategy.

In fact, trial counsel did no new investigation into the Bates case other than what had been done when he represented Mr. Bates in his 1989 post-conviction proceedings (PC-R2. 91). The investigator for co-counsel, Hal Richmond, had only done guilt-innocence investigation and had dealt only with Mr. Richmond,

not Mr. Dunn (PC-R2. 92). No further investigation into mental health mitigators was done, not because there was nothing else to do, but because Mr. Dunn did not have time to do any more investigation.

Dr. Larson previously testified during post-conviction proceedings that Mr. Bates suffered from organic brain damage. Mr. Dunn did not contact Dr. Crown, an expert neuropsychologist, until five days before Mr. Bates's May, 1995 resentencing. This was after there had already been a mistrial of the penalty phase in January, 1995.

Mr. Dunn did not request funds to retain Dr. Crown until May 10, 1995 (trial began on May 15, 1995) (PC-R2. 94). Mr. Dunn forgot to list Dr. Crown on a supplemental witness list (PC-R2. 96). Mr. Dunn was "overwhelmed." (PC-R2. 96). He had no idea the extent and quality of what Dr. Crown's testimony could be. Mr. Dunn claimed he was "totally surprised and had not anticipated that in the middle of trial, he was facing a new mental health issue." Yet, Mr. Dunn had introduced the new mitigator of organic brain damage in his opening statement (PC-R2. 96-97).

Contrary to the State's argument, it was not trial counsel's "strategy" to send Dr. Crown away to prevent the State

from getting into the negative MRI test. Trial counsel conceded he was not prepared. Lack of preparation is not a reasonable tactic or strategy. Although Dr. Crown was in Panama City, prepared to testify at the resentencing, Mr. Dunn sent him home without even discussing how he could rebut the State's new MRI testing of Mr. Bates. There can be no presumption of reasonableness of counsel's trial decisions when he was not prepared. Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. State, 539 U.S. 510 (2003).

The State argues that Mr. Bates's assertion that Dr. Crown should have been presented because he could have refuted a normal MRI is merely an assertion made with 20/20 hindsight. This is not so when the record reflects that Dr. Crown and Mr. Dunn had absolutely no discussion regarding the MRI results or how Dr. Crown could have assisted in explaining the results.

At the time of trial, Mr. Dunn had all the information presented at the evidentiary hearing available to him. Dr. Crown was at the courthouse. He was, in fact, an expert in imaging and neuropsychology. Dr. Crown was aware that an MRI had been done and that the result had been normal. He did not find that result to be inconsistent with his finding of organic brain damage (PC-R2. 129). Dr. Crown explained:

> Anatomical, which is what the MRI scan measures, electrical or metabolic. Most people with epilepsy have normal MRIs. It is not unusual to find people with various forms of brain damage that have normal MRIs. I think we have learned a lot in the last decade about the inconsistencies and fallacies of MRI, which is why we have now moved to functional neuroimaging, functional MRIs which give us a better picture of what actually goes on in the brain and how it works. And that correlates with the neuropsychological testing. We can have an anatomically clean MRI and there can still be problems. It is like using a camera to take a picture of Swiss cheese. Depending on your focus and depending on the ability of the camera you may not even see the holes in the cheese with a picture.

(PC-R2. 129).

Had Mr. Dunn spoken in depth with Dr. Crown, he could have explained the normal MRI.

Thus, Dr. Crown's testimony was not "largely cumulative" as the State suggests. His testimony fit perfectly with the mitigation defense Mr. Dunn had chosen. The reason it was not presented to the jury was because Mr. Dunn was ill prepared, not

because he had researched all of the options and made an informed and reasoned decision. It was not presented because he was overwhelmed. This was ineffective assistance of counsel.

Contrary to the State's argument, Mr. Bates has proven prejudice. The State suggests that Mr. Bates cannot show a reasonable probability that had Dr. Crown been called to testify that he would have received a life sentence. Answer Brief at 55. That is not the correct standard on which to assess this issue. Strickland's second prong is that the defendant must show there is a reasonable probability that, but for counsel's un-professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome, not that Mr. Bates would receive a life sentence. See, Strickland v. Washington, 466 U.S. at 687.

Evidence of organic brain damage and its effect on stress responses, as well as the detailed corroboration now provided by lay witnesses would have deeply affected an already ambivalent jury. The trial court precluded Mr. Dunn from waiving a life sentence without the possibility of parole for twenty five years. The jury did not know that no one from death row had ever been granted parole even with the twenty-five year parole

eligibility. During deliberations, the jury sent a question to the trial court asking if it could impose life without the possibility of parole, to which the court replied no. The final jury vote was 9 to 3 for death because the jury believed Mr. Bates would soon be eligible for parole. Thus, it cannot be said that the weighty mental health mitigator of organic brain impairment, the only explanation offered by the defense as to why this murder occurred, would have been insignificant.

The proper standard for this Court is not whether Mr. Bates would have received a life sentence, but whether a reliable adversarial testing of the evidence was possible due to the omissions of trial counsel. Here, "[c]ounsels errors deprived [defendant] of a reliable penalty phase proceeding." Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995). A new resentencing proceeding is warranted.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. BATES'S CLAIMS.

I. Ineffective Assistance of Counsel–Exclusion of Jurors.

The State mistakenly argues that Mr. Bates's claim is factually inaccurate. In reality, the State misinterpreted the argument. The State believes the defense argument is that jurors were excused "without the presence of defense counsel or Mr. Bates." In fact, Mr. Bates acknowledged that co-counsel was present at the jury qualification proceeding (Initial Brief at 55). Mr. Bates's argument that defense counsel was not present must be read in full context to be correctly understood.

This Court ordered that a 24 hour stay be put into place until Mr. Dunn was available to start voir dire and jury selection (R. 459). Pursuant to that order, Mr. Dunn had a telephone conference with Judge Sirmons and the prosecutor as to what to tell the jury venire that had been ordered to appear that day. An agreement was reached that the parties would send the jury home and be told to return the next day unless there were other trials besides Mr. Bates that needed juries to be selected from the pool (R. 660-2).

Mr. Bates's trial, however, was the **only** trial that was to go forward that day. Contrary to the agreement, the prosecutor,

without the presence of defense counsel or Mr. Bates, allowed some jurors to be excused from the panel by Judge Hess for hardship reasons. Co-counsel Hal Richmond was not present at the telephone conference, and therefore, not privy to the agreement between the prosecutor and "lead defense counsel" Mr. Dunn. Thus, co-counsel's presence was meaningless because he did not know that Judge Sirmons had agreed to send the jury panel home until the next day, unless other juries needed to be selected from the pool. When Mr. Bates's jury was the only one to be selected, Mr. Richmond did not know to object when Judge Hess and the prosecutor (who was privy to the telephone conversation) began dismissing jurors for cause. More importantly, the State overlooks the fact that Mr. Bates was not present for the excusal of jurors.

Mr. Bates has never alleged that the prosecutor himself excused jurors, as the State would have this Court believe. Rather, the prosecutor *allowed* the proceeding and the excusals to take place despite an agreement to the contrary (R. 660-2).

Finally, the State argues that Mr. Bates's claim that trial counsel failed to make a record of the jury excusals is without factual support because the prosecutor placed on the record "a summary of what occurred" (Answer Brief at 60). The State cites

no authority for this proposition–-that a prosecutor's summary can substitute for a record of juror dismissals.

Without a detailed record, it is impossible to know what discussions occurred between the judge and potential jurors and what input the prosecutor may have had. While counsel may have protested the lack of a record, nothing was done to ensure the record was reconstructed. Defense counsel was ineffective for failing to ensure that a full and complete record existed on which to document the excusal of the members of the jury panel.

II. The State Failed to Disclose Police and Prosecutorial Misconduct.

The State incorrectly argues that most of the campaign contributions referenced by Mr. Bates in this claim were made in 1996, after his resentencing. But the contributions were made well before the time they were reported. Some were campaign contributions as early as Mr. Bates's resentencing.

As Mr. Bates detailed in his initial brief, Dennie Sanders not only had a close relationship with the victim's family, but also provided a victim impact statement in 1983 and the resentencing record shows he attended the 1995 resentencing (R2. 1075). Election records show that he was a large contributor to Mr. Appleman's campaign after his successful prosecution of Mr. Bates. In 1984, shortly after trial, Mr. Sanders and his father contributed $750 to Mr. Appleman's re-election. Prior to trial in 1980, Mr. Sanders and his father contributed $1,000 in cash,

lodging, party supplies and beverages for Mr. Appleman's re-election.

Additionally, other friends and family of the victim contributed generously to Mr. Appleman's re-election. L.E.Thomas, a family relation to the victim, donated in 1992. Even if the contributions occurred subsequent to the 1995 resentencing, an air of impropriety remains. Numerous contributions from family members and friends of the victim, as well as witnesses in the case occurred in 1996, in payment for Mr. Appleman's 1995 success in securing a conviction against Mr. Bates.

The State conveniently ignores the pressure exerted by the family and a small community that is evident on the face of Mr. Bates's record and directly affected his jury selection and conviction. *See* Initial Brief at 68-9, fn. 5; R. S. 171-181. These contributions are evidence of personal and financial interests in securing a conviction against Mr. Bates. None of these financial and personal interests were disclosed to the defense at the time of either resentencing.

The State argues that Mr. Bates has made no connection between these contributions and Mr. Bates's case. However, in the intial brief, Mr. Bates set forth the effects this pressure

had on his trial. Mr. Appleman chose certain witnesses to appeal to his contributors, for example, he chose the minister from the victim's church to pray over Mr. Bates jury. In his brief, Mr.
Bates argued the impropriety of failing to disclose such contributions from the victim's family and friends.

Prosecutors are "quasi-judicial officers," Gluck v. State, 62 So. 2d 71, 73 (Fla. 1952). "It is their duty to see that a defendant gets a fair and impartial trial." Id. "[P]rosecuting officers are clothed with quasi-judicial powers and its duty is consonant with the oath they take to conduct a fair and impartial trial." Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951). See, Oglesby v. State, 23 So. 2d 558 (Fla. 1945).

As a result, due process prohibits a prosecutor from having personal, familiar, and or/financial interests in obtaining a criminal conviction. These contributions must be considered in light of how Mr. Appleman was using the contributions.

Mr. Appleman was cited for false reporting for using campaign funds to defray normal living expenses on 30 separate occasions, and for making or authorizing expenditures prohibited by Florida Statute sec. 106.19(1(d) on 60 separate occasions. Given the extent of these abuses, it is probable that some of

the funds given by the friends and family members of the victim may not have been used only for Mr. Appleman's campaign. These contributions were a payoff which were used for his own personal gain.

The State also argues that Mr. Bates has not made a connection between campaign contribution irregularities, soliciting of contributions from defendants in exchange for dropped charges, "and other 'corruption' charges" to Mr. Bates's prosecution. State's Answer Brief at 65. What the State overlooks, just as the trial court did, is the impact of this pervasive misconduct on the credibility of the investigation and prosecution as a whole. The effect of the nondisclosures exposed the prosecution's biased motives and law enforcement's techniques which would have led to substantial impeachment evidence against state witnesses Lavelle Pitts, Guy Tunnell, Frank McKeithen and Dr. McLaren.

The pattern of misconduct that has pervaded Bay County for the entire length of Mr. Bates's trial and two resentencings is overwhelming and gives credence to Mr. Bates's claim that he was coerced by law enforcement to confess, that the investigation was skewed to only implicate Mr. Bates and that he was not tried by a jury of his peers, but by members of an outraged community

ready to pay off their state attorney for a conviction. Yet, none of this information was ever disclosed to Mr. Bates.

Mr. Bates, an indigent defendant, has never been able to afford the luxury of due process from the Bay County State Attorney's office, police or the courts that was apparently for sale at a price. He was never privy to the quid pro quo at work when Dr. McClaren, the state's mental health expert, testified at resentencing after he had contributed to Mr. Appleman's campaign.

Had Mr. Bates known this information, he could have exposed any bias that Dr. McClaren had in favor of getting desirable results for the prosecution. It would have been important for Mr. Bates to know at the time of his trial and resentencing that Sheriff Pitts's credibility could have been impeached with his unfit conduct in office and information that he had lied to a grand jury.

However, this information was not disclosed. It is not the defense attorney's responsibility to ferret out the information from the State. It is the State's continuing duty to disclose. See, Kyles v. Whitley, 514 U.S. 419 (1995). All of these undisclosed matters prejudiced Mr. Bates when he was prevented from investigating them by the State Attorney and law

enforcement. The State points to nothing in the files and records that conclusively demonstrates that Mr. Bates is entitled to no relief. As such, the trial court erred in summarily denying this claim. An evidentiary hearing is warranted.

CONCLUSION

As to the remaining arguments argued in Mr. Bates's brief, he relies on the arguments and authority cited therein. Based on the forgoing arguments and those in his initial brief, Mr. Bates requests that this Court reverse the lower court and grant an evidentiary hearing, and/or grant his request for a new trial and/or sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by electronic filing and by United States Mail, first-class, postage prepaid on this 10th day of July, 2008 to Clerk of Court, Florida Supreme Court, 500 S. Duval St., Tallahassee, FL 32399; Ms. Meredith Charbula, Asst. Attorney General, Dept of Legal Affairs, The Capitol, PL-01, 400 S. Monroe St., Tallahassee, FL 32399-6536.

_____
TERRI L. BACKHUS
Assistant CCRC
Florida Bar No. 0946427

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this initial brief is typed in Courier New, 12 pt. type.

_____
TERRI L. BACKHUS
Assistant CCRC
Florida Bar No. 0946427