

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-66

KAYLE BARRINGTON BATES,

Petitioner,

v.

JAMES R. McDONOUGH,
Secretary, Florida Department of Corrections

Respondent.

REPLY TO STATE'S RESPONSE TO THE PETITION
FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Mr. Bates submits this Reply to the State's Response to the Petition for Writ of Habeas Corpus. Mr. Bates briefly replies only to Claim I. 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 Petition for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

CLAIM I

MR. BATES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I §§ 9, 16(a) AND 17 OF THE FLORIDA CONSTITUTION, AND FULL REVIEW BY THE FLORIDA SUPREME COURT AND THE ORIGINAL TRIAL COURT BECAUSE THE TRANSCRIPT IS UNRELIABLE AND INCOMPLETE.

No record exists of the jury qualification proceeding or the telephone conference regarding the stay that was granted by this Court. The record reflects differing accounts as to what transpired at both the jury qualification proceeding and the telephone conference. While the State maintained that there was

nothing improper about the dismissal of several jurors, defense counsel objected and proffered that the excusals were granted in a discriminatory manner that resulted in African-American jurors being improperly excused from the panel to be used to select Mr. Bates's jury (R. 661). There is no record to resolve any conflict, nor any request by direct appeal counsel to reconstruct the record.

The State complains that Mr. Bates does not point to any appellate issue that "the record of the general jury qualification proceeding or phone conference could illuminate." (State's Response at 12-13). This is precisely the prejudice raised by Mr. Bates. Due to the failure of direct appeal counsel to obtain a complete record of the resentencing proceedings, undersigned counsel, who was not present at the resentencing, has no means to fully review the activities below because the record is defective and incomplete. Thus, post-conviction counsel cannot provide effective assistance to Mr. Bates because there is no means to know what claims may exist. United States v. Cronin, 466 U.S. 648 (1984); Harding v. Davis, 878 F. 2d 1341 (11th Cir. 1989).

While the State suggests that trial co-counsel was present at the jury qualification proceeding, it can only speculate as

to what happened. Trial co-counsel testified at the evidentiary hearing that he was deferring to lead counsel on all substantive matters. Whether or not Mr. Bates receives meaningful appellate review should not depend on the memory of his former trial co-counsel, who abdicated any responsibility for the case, raised no objections and failed to even make his presence known to the judge who was dismissing the African-American jurors.

While the State is correct that direct appeal counsel challenged the failure to stay the jury qualification proceeding on direct appeal, this Court denied Mr. Bates's claim that the trial court erred in going forward with jury qualification because there was no basis in the record to demonstrate prejudice. The State suggests that this Court's denial of the claim is the prejudice Mr. Bates is arguing that he suffered. It is not.

Because direct appeal counsel failed to assure a record of the underlying proceedings, Mr. Bates could not establish a basis for his Batson v. Kentucky, 106 S. Ct. 1712 (1986) challenge, or any other jury selection issue. There was no complete record. It is not the end result of that failure that is the issue. It is that direct appeal counsel deprived Mr. Bates of the ability to pursue the claim. That is the prejudice

Mr. Bates has proved. Contrary to the State's argument, Mr. Bates has shown in his Fla. R. Crim. P. Rule 3.851 motion that he would have had a viable basis for a Batson challenge had direct appeal counsel properly preserved the record and raised the issue.

CONCLUSION

For all of the arguments discussed above, Mr. Bates respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished by United States Mail, postage prepaid to Ms. Meredith Charbula, Asst. Attorney General, Dept. of Legal Affairs, The Capitol, PL-01, 400 S. Monroe St., Tallahassee, FL 32399-6536 on this 10th day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier New type, pursuant to Rule 9.100 (1), Florida Rules of Appellate Procedure.

TERRI L. BACKHUS