IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2026-0251

BILLY LEON KEARSE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR SAINT LUCIE COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS[1]

Billy Leon Kearse is under an active death warrant based on his November 8, 1991, conviction for first-degree murder of Fort Pierce Police Officer Danny Parrish and his March 24, 1997, death sentence imposed as a re-sentencing after a unanimous death recommendation. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995) (affirming convictions, remand for re-sentencing); *Kearse v. State*,

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[1] The State will use the following to identify the appellate records: **Current Appeal of Fourth Successive Postconviction Litigation** – ("5PCR") case number SC2026-XXXX; **Direct Appeal** ("1ROA-R" for the record and "1ROA-T" for the transcript) case number SC1960-79037 - *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); **Direct Appeal of Resentencing** ("2ROA-R" "2ROA-T") case number SC1960-90310 - *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000); **Original Postconviction appeal and petition for state habeas review** ("1PCR") case number SC05-1876 - *Kearse v. State*, 969 So. 2d 976 (Fla. 2007); **First Successive Postconviction Appeal** ("2PCR") case number SC08-1986 - *Kearse v. State*, 11 So.3d 355 (Fla. 2009) (unpublished); **Second Successive Postconviction Appeal** ("3PCR") case number SC11-244 – *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011) (unpublished); Successive state habeas petition case number SC12-1349 – *Kearse v. Tucker*, 100 So. 3d 1148 (Fla. 2012 (denying petition on the merits; table decision without published opinion); **Third Successive Postconviction Appeal** ("4PCR") case number SC18-458 – *Kearse v. State*, 252 So. 3d 693 (Fla. 2018) and **Federal Habeas Corpus Appeal** - *Kearse v. Sec'y., Fla. Dep't of Corr.*, No. 15-15228, 2022 WL 3661526 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2439 (2023). References to the records will be by record type followed by the page number(s). Supplemental records will be designated with "S" preceding the record type.

770 So. 2d 1119 (Fla. 2000) (affirming death sentence), *cert. denied*, 532 U.S. 945 (2001). Over the thirty-five years since the murder, Kearse pursued direct appeals, four state postconviction motions with an evidentiary hearing and related appeals, two state habeas corpus petitions, and federal habeas review, none of which were successful. *See* footnote 1, *supra*.

On January 29, 2026, the Governor signed a death warrant setting Kearse's execution for March 3, 2026. On February 9, 2026, Kearse filed his fourth successive postconviction motion, fifth overall, which was summarily denied. (5PCR 915-36). He appealed and filed a related state habeas petition on February 15, 2026, in case number SC2026-0250. On February 17, 2026, he filed his initial brief in the postconviction appeal, SC2026-0251.

Facts of Crime and Penalty Phase

On direct appeal, this Court set forth the facts of the crime. "Kearse was charged with robbery with a firearm and first-degree murder in the death of Fort Pierce police officer Danny Parrish on January 18, 1991." *Kearse*, 662 So. 2d at 680. Upon seeing "Kearse driving in the wrong direction on a one-way street," Parrish called in the vehicle's license plate number and stopped the car. *Id.* When

Kearse failed to produce a driver's license and gave multiple aliases, none matching "any driver's license history," Parrish demanded Kearse get out of his vehicle and place his hands on the car's roof. *Id.* As "Parrish was attempting to handcuff Kearse, a scuffle ensued, Kearse grabbed Parrish's weapon and fired fourteen shots," thirteen of which "struck Parrish, nine in his body and four in his bullet-proof vest."[2] *Id.* "A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female[3] drive away from the scene, and called for assistance" on Officer Parrish's radio. *Id.* Paramedics "transported Parrish to the hospital where he died from the gunshot injuries." *Id.*

Responding officers "issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo." *Id.* Law enforcement found the car and gun at the address where Kearse

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[2] One of the bullets shattered Parrish's leg below the knee and one severed his spinal cord. (1ROA-T 1537-57, 1563-64).

[3] Rhonda Pendleton was the passenger with Kearse. (1ROA-T 1452-53). She explained that Parrish would give Kearse a citation if Kearse would just admit he had a suspended license. When Parrish told Kearse to put his hands on top of the car, Kearse said, "Don't touch me man" followed by a shot with Parrish saying, "Oh God!" Pendelton saw Kearse wrestling with and shooting Parrish. When Pendelton asked Kearse why he shot the officer, he admitted "that his probation was suspended and the police were looking for him already." (1ROA-T 1458-70).

was arrested. *Id*. "Kearse was arrested.[4] After being read his *Miranda*[5] rights "and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop." *Id*. (1ROA-T 1296-97). Kearse's jury convicted him of both indicted counts and recommended death. *Id*.

On direct appeal, Kearse raised twenty-five issues.[6] This Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase trial. *Kearse*, 662 So. 2d at 686.

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[4] All of the bullets recovered from Parrish's body were fired from his service weapon which was found at the scene where Kearse said he had hidden it. (1ROA-T 1285-96, 1387-1604, 1627-39).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] Given the remand for a re-sentencing, only the guilt phase issues, are provided:

> ... 11) the giving of the State's special requested instruction on premeditated murder over defense objection; 12) instructing the jury on escape as the underlying felony of felony murder; 13) the denial of defense challenges for cause of prospective jurors; 14) the admission of testimony regarding the purpose of a two-handed grip on a gun; 15) the denial of defense motions to suppress evidence on the basis that Kearse's warrantless arrest was not based on probable cause; 16) the instruction on reasonable doubt denied Kearse due process and a fair trial; 17) the admission of hearsay evidence during the guilt phase....

Kearse, 662 So.2d at 680-81.

The new penalty phase began on December 9, 1996, and the State offered testimony to support the first-degree murder and robbery of Officer Parrish for which Kearse was convicted.[7] The defense mitigation case consisted of Kearse's testimony along with the testimony of school officials, family members, a friend, and mental health professionals. These witnesses discussed Bertha Kearse's drinking during her pregnancy, Kearse's difficult family life, the designation by the school that Kearse was learning disabled and emotionally dysfunctional. The defense case also included that Kearse suffered from Fetal Alcohol Effect, had brain dysfunction, concentration and behavioral problems, and had low intellectual function but was not intellectually disabled. Dr. Petrilla offered that two statutory mental health mitigators applied to Kearse: (1) Kearse was suffering under extreme emotional disturbance at the time of the crime and (2) due to his emotional disturbance, Kearse was substantially incapable of conforming his conduct to the requirements of the law. See Kearse v. State, 969 So. 2d 976, 983-

[7] (2ROA-T 1156-57, 1163, 1170, 1173, 1174, 1189-90, 1210-17, 1237-40, 1282, 1292, 1331-33, 1337-42, 1364-68, 1405-06, 1412-16, 1421-22, 1467-93, 1521-22, 1525, 1532-35, 1557-75, 1584, 1603-04, 1635, 1638-41, 1644-45, 1650, 1677, 1682-90, 1696-98, 1708, 1711-12).

85 (Fla. 2007).

For the State, Dr. Martell, an expert in forensic neuropsychology, concluded that neither mental health mitigator applied in the case, that there was no evidence of severe mental or emotional disturbance, and that Kearse was malingering. The doctor also rejected the notion Kearse was confabulating, instead finding he was a pathological liar with an antisocial personality disorder. Dr. Martell refuted the opinion that Kearse suffered from Fetal Alcohol Effect. (2ROA-T 2355, 2357-58, 2369-76, 2380-83, 2388-89, 2412).

Based on this, the jury unanimously recommended death, and on March 25, 1997, the trial court again sentenced Kearse to death for the first-degree murder of Officer Parrish. In aggravation, the court found: "murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer engaged in performance of his official duties (merged into one factor)." *Kearse*, 770 So. 2d at 1123. The statutory mitigator of "age" was given "some but not much weight." *Id.* Kearse offered forty non-statutory mitigating factors, but the court found only that "Kearse exhibited

acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems." *Id.* In sentencing Kearse, the trial court determined that the established mitigators "neither individually nor collectively, were 'substantial or sufficient to outweigh the aggravating circumstances.'" *Id.*

Kearse raised twenty-two issues[8] in his re-sentencing appeal. This Court rejected each and affirmed the death sentence. *Kearse*,

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[8] He claimed error: (1) to return venue to the county where the offense occurred; (2) to compel Kearse to comply with a mental health examination; (3) to deny a continuance; (4) to sentence to death-sentence not proportional; (5) in the evaluation of mitigation; (6) evaluating nonstatutory mitigation of emotional or mental disturbance; (7) to deny motion to disqualify the prosecutor; (8) to deny mistrial based on prosecutor's closing argument comments; (9) to inform jury Kearse had been found guilty previously and that remand was for re-sentencing; (10) to deny juror interviews; (11) because Kearse's absence during pretrial conferences was involuntary; (12) to grant State's cause challenge to Juror Jeremy; (13) to deny Kearse's cause challenges to Jurors Barker and Foxwell; (14) to compel Kearse's mental health examination as it constituted an unconstitutional one-sided discovery rule; (15) as the compelled mental health exam violated the *ex post facto* clauses of the United States and Florida Constitutions; (16) as the compelled mental health exam violated Kearse's federal constitutional rights; (17) because the victim impact instruction is vague and gave undue importance to evidence; (18) committed in weighing Kearse's age mitigator; (19) for not merging "committed during a robbery" aggravator with the other aggravators; (20) to consider "committed during a robbery" aggravator; (21) to admit photographs of victim; and (22) because electrocution is cruel and unusual punishment. *Kearse*, 770 So.2d at 1122-23.

770 So. 2d at 1135. On March 26, 2001, the United States Supreme Court denied certiorari. *Kearse v. Florida*, 532 U.S. 945 (2001).

Original Postconviction Litigation

On October 3, 2001, Kearse filed a "shell" motion under Fla. R. Crim. P. 3.851, a verified Rule 3.851 motion on June 21, 2002, and an amended motion on March 1, 2004. (1PCR 1, 1110-84, 1191-92, 1197, 1458-1572).[9] The postconviction court held an evidentiary hearing on claims of ineffective assistance of counsel under

[9] Kearse raised: (1) public records were withheld; (2) counsel was ineffective for not vigorously advancing "Kearse's position, to cross-examine witnesses at trial and at the motion to suppress hearing, to consult with crime scene, firearm, and medical experts, to request co-counsel at the second penalty phase, to prepare witnesses to testify at the resentencing, to object to the admission of evidence, to argue the age mitigating factor, to present evidence regarding the victim's prior misconduct, to obtain Kearse's consent to concede aggravating factors, and cumulative error;" (3) trial court error in denying: (a) a cause challenge; (b) motion for co-counsel, and (c) rejecting the two statutory mental health mitigators; (4) State violated *Brady v. Maryland*, 373 U.S. 83 (1963); (5) newly discovered evidence demonstrating State's expert was biased; (6) Kearse's rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), were denied due to ineffective assistance of counsel and inadequate assistance of mental health experts; (7) Kearse's death sentence is fundamentally unfair; (8) denial of a fair trial due to pretrial publicity, the lack of adequate venue, and courtroom events; (9) Florida's death penalty scheme violates *Ring v. Arizona*, 536 U.S. 584 (2002); (10) Kearse's death sentence is unconstitutional due to an automatic aggravator; and (11) Kearse is insane to be executed. *Kearse*, 969 So. 2d at 982.

Strickland v. Washington, 466 U.S. 688 (1984), violations under *Brady v. Maryland*, 373 U.S. 83 (1963), and allegations of newly discovered evidence. Kearse presented his trial counsel, Robert Udell, Esq.; Barry Crown, Ph.D.; Tracy Davis; Alan Friedman, Ph.D.; Jonathan Lipman, Ph.D.; Richard Dudley, M.D.; Robert Norgard, Esq.; John Kearse; Demetrius Soloman; Charles Van Pollen; Eric Jones; Anne Fisher Evans; and Thomas Hyde, Ph.D. Kearse proffered the testimony of Stacy Brown and Nicholas Atkinson. The State presented Dr. Daniel Martell. Relief was denied and Kearse appealed. (1PCR-37 5703-40).

On postconviction appeal, Kearse raised four claims and two claims in his state habeas corpus petition. *Kearse*, 969 So. 2d at 982. The appeal addressed: (1) ineffective assistance of penalty phase counsel; (2) error to deny relief on claim of newly discovered evidence; (3) error to deny public records requests; and (4) error to summarily deny several postconviction claims. *Id.* at 982. The state habeas asserted appellate counsel was ineffective and "that both his death sentence and lethal injection are unconstitutional." *Id.* at 990. This Court affirmed the denial of postconviction relief and denied the habeas petition. *Id.* at 989, 992.

In the state habeas litigation, this Court rejected the claim that Kearse's low mental functioning and age (eighteen years-three months) at the time of the murder rendered his capital sentence unconstitutional opining.

> Kearse claims that his death sentence is unconstitutional on various grounds. First, he argues that because of his age, low level of intellectual functioning, and mental and emotional impairments he cannot be executed under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), which prohibited execution of people with [intellectual disability.] However, Kearse's own expert at the resentencing testified that he was not [intellectually disabled,] and he presented no evidence at his postconviction hearing that he was. Thus, his sentence is not unconstitutional under *Atkins*. *See Hill v. State*, 921 So.2d 579, 584 (Fla.), *cert. denied*, 546 U.S. 1219, 126 S. Ct. 1441, 164 L.Ed.2d 141 (2006).

Kearse, 969 So. 2d at 991–92. Again, citing *Hill*, 921 So. 2d at 584, this Court also rejected the claim that Kearse's age, "eighteen years and three months old at the time of the crime" combined with "low level intellectual functioning and mental and emotional impairments," bars his execution under *Roper v. Simmons*, 543 U.S. 551 (2005). *Kearse*, 969 So. 2d at 991-92.

First Successive Postconviction Litigation

On December 26, 2007, Kearse filed his first successive rule 3.851 motion challenging Florida's then existing lethal injection protocols and amended it on July 11, 2008. (2PCR-1 2-109; 2PCR-2 110-99; 2PCR-4 482-507). The trial court summarily denied relief (2PCR-13 1946-47) and this Court affirmed. *Kearse v. State*, 11 So. 3d 355 (Fla. 2009).

Second Successive Postconviction Litigation

Kearse filed a second successive postconviction motion claiming newly discovered evidence of trial counsel's later disbarment and sought reconsideration of the ineffectiveness claims. This Court affirmed the summary denial of relief. *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011).

Successive State Habeas Petition

Kearse filed a second state habeas petition in the Court, case number, SC2012-1349. There he alleged that *Wyatt v, State*, 71 So. 3d 86 (Fla. 2011) altered the definition of "newly discovered evidence" as it relates to the evidence Kearse wanted to present in his original postconviction litigation regarding Dr. Martell. Kearse asked this Court to revisit its decision in *Kearse*, 969 So. 2d at 987.

This Court denied the petition on the merits. *Kearse v. Tucker*, 100 So. 3d 1148 (Fla. 2012) (table - unpublished).

Third Successive Postconviction Litigation

During the pendency of his federal habeas litigation, discussed below, Kearse filed his third successive Rule 3.851 motion. There he sought relief based on *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The trial court denied relief. This Court affirmed, stating: "Kearse was sentenced to death following a jury's unanimous recommendation for death. . . . His sentence of death became final in 2001. . . . Thus, *Hurst* does not apply retroactively to Kearse's sentence of death. *See Hitchcock* [*v. State*], 226 So. 3d [216, 217 (Fla. 2017)]." *Kearse v. State*, 252 So. 3d 693, 694 (Fla. 2018), *cert. denied*, 587 U.S. 922 (2019).

Federal Litigation

Kearse filed his federal habeas corpus petition on July 16, 2009, and, after litigating its timeliness,[10] on September 1, 2015, the petition was denied on the merits. On appeal, the Elevrnth

[10] *Kearse v. Sec'y. Fla. Dep't of Corr.*, 669 F.3d 1197 (11th Cir. 2011)(remand for consideration of timeliness of federal petition); *Kearse v. Sec'y. Fla. Dep't of Corr.,* 736 F.3d 1359 11th Cir. 2013) (remand for consideration of petition on the merits).

Circuit Court of Appeals addressed: (1) penalty phase counsel's effectiveness in investigating and preparing for Dr. Martell's testimony; (2) penalty phase counsel's effectiveness in failing to investigate and present Officer Parrish's misconduct and difficulties with the public; and (3) whether Kearse's death sentence is unconstitutional under *Atkins* and *Roper*. On August 25, 2002, each claim was rejected. *Kearse v. Sec'y., Fla. Dep't Corr.,* No. 15-15228, 2022 WL 3661526 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2439 (2023).

Fourth Successive Postconviction Litigation (Active Warrant)

On February 3, 2026, Kearse filed public record demands on the Governor, Attorney General, Department of Corrections, Office of the State Attorney-Nineteenth Judicial Circuit, Office of Executive Clemency-Florida Commission on Offender Review, District Eight Medical Examiner, Florida Department of Law Enforcement, Saint Lucie County Sheriff's Office, and Fort Pierce Police Department. After a hearing, all demands were denied. (5PCR 494-501). On February 6, 2026, Kearse sought to extend the time for the filing of his successive postconviction relief motion. After this Court ruled

on the same request, the trial court extended the date for the filing of the successive Rule 3.851 motion by two days. (5PCR 557-61).

On February 9, 2026, Kearse filed his fourth successive motion wherein he raised three claims: (1) his 1996 penalty phase was unfair due to the presence of law enforcement officers in the courtroom; (2) he is intellectually disabled and barred from execution; and (3) the "surprise" signing of his death warrant coupled with the shortened warrant period denies him due process. (5PCR 599-742). Simultaneously, he filed motions to stay his execution and interview Juror Matthews. (5PCR 743-58). He also demanded additional public records from the Attorney General, State Attorney, and Saint Lucie County Sheriff. (5PCR 569-98). The Agencies and State filed objections to the demands and to the motion to interview the juror. (5PCR 839-46).

After the State responded to the successive motion on February 11, 2026, Kearse filed a Motion to Declare § 921.137(4), Fla. Stat. Unconstitutional, asserting the standard of proof, "clear and convincing," was unconstitutional for being too high. The State objected. (5PCR 766-91,792-800, 832-36). Later that day, the court

held a Case Management/*Huff*[11] Hearing. (5PCR 871-913). The following day, the court cancelled the evidentiary hearing and denied Kearse's renewed Motion to Continue, the February 9th additional public records demands, and Motion to Interview Juror. (5PCR 956-59). On February 15, 2026, the postconviction court summarily denied relief (5PCR 915-36). Kearse appealed and filed a second successive state habeas petition in case number SC2026-0250.

SUMMARY OF THE ARGUMENT

Issue I - Kearse failed to meet the requirements to establish the information on the juror's post was newly discovered evidence. The postconviction court correctly found the claim that his 1996 re-sentencing was unfair based on officers in the courtroom to be untimely, procedurally barred, and meritless.

Issue II - The lower court did not abuse its discretion when it denied Kearse's request to interview Juror Matthews when it found the motion untimely with no showing of good cause since the underlying issue was whether there were too many officers in the courtroom thereby creating an unfair trial which would have been

[11] *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

evident immediately after the trial. Kearse also failed to establish a valid legal basis for an interview.

Issue III - The postconviction court found the public records demands on the Attorney General, the Count Sheriff, and the State Attorney were untimely and not calculated to lead to a colorable claim since Kearse was seeking to ascertain if any person in the agencies was in contact with Matthews. Even if that information existed, it would have no bearing on the validity of Kearse's conviction or sentence. The court did not abuse its discretion in denying the demands.

Issue IV - The lower court properly found Kearse's claim of intellectual disability untimely and procedurally barred since the issue had been raised previously in another guise and was not filed within the required time period.

Issue V - The lower court properly found that the motion challenging the constitutionality of the burden of proof required in § 921.137(4) was untimely and found it constitutional, citing *Hall v. Florida*, 572 U.S. 701, 711 (2014).

ARGUMENT

ISSUE I

Kearse's Claim That His Re-Sentencing Penalty Phase Was Unfair Because of Law Enforcement in the Courtroom Was Proper Denied as the Claim Was Untimely, Procedurally Barred, and Meritless.

Kearse asserts that his re-sentencing was unfair under the Sixth and Fourteenth Amendments due to the presence of law enforcement in the courtroom. He claims that he could not have discovered that there were law enforcement officers in his courtroom until Juror Claire Matthews posted a statement on "Slscanner" commenting on the death warrant Governor DeSantis signed on January 29, 2026. The trial court found the claim of the denial of a fair resentencing to be "untimely, is not based on newly discovered evidence, is procedurally barred, and is without merit." (5PCR 923-26). That ruling is supported by the record and should be affirmed.

A. Standard of Review

This Court has stated: "Summary denial of a successive postconviction motion is appropriate '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to

no relief.'" *Owen v. State*, 364 So. 3d 1017, 1022 (Fla. 2023) (quoting *Bogle v. State*, 322 So. 3d 44, 46 (Fla. 2021) (alteration in original)). The Standard of review is "*de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Owen*, 364 So. 3d at 1022–23. This Court has found it appropriate to "summarily dismiss claims raised in a successive postconviction motion that are untimely or procedurally barred." *Zack v. State*, 371 So. 3d 335, 344–45 (Fla. 2023). *See also Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021).

B. Facts

On November 14, 1996, Kearse's penalty phase counsel filed his Motion for Order Regulating Courtroom Spectators. (2ROA-R 532-33). That motion was addressed on December 9, 1996, at which time penalty phase counsel noted that there were no officers in the courtroom, but counsel was bringing the matter to the Court's attention given the number of officers who attended the 1991 trial and was giving notice he may seek relief later. (2ROA-T 216-18).

In his 2004 postconviction motion, Kearse claimed the presence of numerous uniformed officers in the courtroom during his 1991 trial created an "unacceptable risk" of impermissible factors coming into play. For support, Kearse pointed to his counsel's December 9, 1996, comment during a pre-trial hearing describing the 1991 courtroom, which he asserted was filled with uniformed officers from agencies statewide and that the courtroom "was standing room only." (2ROA 216-17; 1PCR 1505 see 2004 Amended Rule 3.851 motion at page 48 ¶¶ 8-11). This Court affirmed the summary denial of relief as the claim, based solely on trial counsel's characterization of the 1991 trial, was legally insufficient to support the constitutional claim "because the mere presence of the officers was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice." *Kearse*, 969 So. 2d at 989. This Court stated that "Kearse does not allege any other facts that in the 'totality of the circumstances' would entitle him to relief. *See Woods v. Dugger*, 923 F.2d 1454, 1455 (11th Cir. 1991) (applying a totality of the circumstances test to a similar claim)." *Kearse*, 969 So. 2d at 989.

C. Overview

Now, almost twenty-two years later, and after a death warrant was signed, he again asserts his trial was unfair because of uniformed officers in the courtroom for the re-sentencing. To be crystal clear, the substance of the underlying claim is whether the presence of numerous officers in the courtroom affected the fairness of the penalty phase. Kearse challenges his 1996 penalty phase based on Juror Matthews's social media post. To excuse the deficiency in his original postconviction investigation by maintaining: (1) he had no way of knowing officers were present because penalty phase counsel was concentrated on the trial, not the gallery behind him; (2) Kearse was concerned that if he turned around to look at the gallery he may be accused of not paying attention; (3) there was nothing in the record to show what defense witnesses may have observed; and (4) there was nothing in the record to alert postconviction counsel that officers in the 1996 courtroom for the murder trial involving the killing of an on-duty officer may be an issue necessitating further investigation. (IB 34-35, 37-39).

These excuses fail to recognize that postconviction counsel is

not limited to the appellate record but may investigate and talk to his client, defense counsel, and other potential witnesses about the case and the atmosphere of the trial to discern what collateral issues should be raised on postconviction review. Kearse has not pointed to a case which holds that postconviction counsel may not go outside the appellate record to make a case for postconviction relief. Kearse's lack of diligence in pursuing this claim, in spite of challenging the 1991 trial on the same grounds of officers in the courtroom, clearly shows that the claim is time barred, not newly discovered, and procedurally barred. The fact that it is also meritless will be addressed later.

D. The Claim is Untimely; Due Diligence Was Not Shown

The postconviction court found that the claim was untimely and Kearse did not overcome the bar with evidence that was unknown or could not have been ascertained by the exercise of due diligence. (5PCR 924). The court determined that Kearse knew of the issue based on what occurred in 1991 and could have developed evidence to support a challenge to the 1996 penalty phase by talking to counsel and his defense witnesses as well as providing his own account of what he observed. (5PCR 924-25). The

trial court's determination is supported by the record and should be affirmed.

Kearse focuses his claim of an unfair trial solely on Juror Matthews's 2026 post.[12] He asserts he had no way of discovering the presence of officers in the courtroom until Juror Matthew's made her comments. This claim was raised in his fourth successive motion for postconviction relief well beyond the one-year time limit for filing such motions under Fla. R. Crim. P. 3.851(d)(2). In his original postconviction appeal, Kearse challenged the fairness of his 1991 trial because of the number of officers in the 1991 gallery during his trial. *Kearse*, 969 So. 2d at 989. Hence, this is a successive motion, and Kearse must show that he exercised due diligence in bringing his claim. As noted in *Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008):

> Rule 3.851 requires motions filed beyond the time limitations to specifically allege that the **facts on which the claim is predicated** were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim.

[12] As will be discussed below, in order to prevail on the merits of a claim of an unfair trial, Kearse must show actual or inherent prejudice. Matthews's post does not establish such evidence. It merely reports what Kearse previously alleged in his original 2004 postconviction motion, i.e., officers attended Kearse's trial.

> P. 3.851(d)(2)(A). Furthermore, the rule requires successive motions to articulate the reasons why a claim was not raised previously and why the evidence used in support of the claim was not previously available. Fla. R. Crim. P. 3.851(e)(2)(B), (e)(2)(C)(iv).

(emphasis supplied). Here, the facts upon which the claim is predicated is "officers in the courtroom."

Kearse's judgment and sentence were final on March 26, 2001, with the denial of certiorari. *Kearse v. Florida*, 532 U.S. 945 (2000). Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Rule 3.851 provides an exception to the one-year limitation when the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of diligence. Fla. R. Crim. P. 3.851(d)(2). The burden is on Kearse to demonstrate that any of the evidence he references qualifies for this exception. Fla. R. Crim. P. 3.851(d)(2)(A); *See Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023). Claims of newly discovered evidence must be filed within one year of when the information was discovered or could have been discovered through the use of due diligence. *Hamilton v. State*, 236 So. 3d 276

(Fla. 2018). Although he asserts he has newly discovered evidence in the form of Juror Matthews's February 3, 2026, post, such does not satisfy the dictates of Rule 3.851(d)(2)(A). *See Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008), as revised on *denial of reh'g*. (Dec. 18, 2008) ("[t]o be considered timely filed as newly discovered evidence, the successive Rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence") (citations omitted). Kearse's narrow focus on Matthews's post ignores the reality that he could have discovered that officers from multiple agencies statewide were in the courtroom anytime during his 1996 penalty phase and surely during his original 2001-2004 postconviction litigation with the merest modicum of diligence. See *Kearse*, 969 So. 2d at 989. Surely defense counsel's 1996 comment about officers in the 1991 courtroom would prompt postconviction counsel to investigate whether those officers again showed their support to their fellow officer during a re-sentencing.

Kearse claims that he could not have discovered this claim and Matthews's report of what happened in the courtroom until she posted her comments following the signing of the death warrant in

this case and suggests that he was not required to ask every witness about every possible legal claim available. (IB 38). He asserts that such "diligence" is more than what is required to show "due diligence" under *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). (IB 38). That does not explain Kearse's failure to develop evidence to support his claim through other witnesses. Kearse had his trial counsel's 1996 account of who was in the courtroom during the 1991 trial, yet Kearse does not offer what he did to uncover evidence to support his challenge to the 1991 trial or to discover if the same number of officers returned for the 1996 penalty phase to support a challenge to that proceeding. Clearly, Kearse was a witness to his own 1996 penalty phase, as were family members, friends, and defense experts. Surely Kearse could have contacted any of them about conditions in the courtroom, putting any supporting information in the original postconviction motion. The limited number of people he needed to contact would not over-tax postconviction counsel. Further, penalty phase counsel, Kearse, and the defense witnesses would have been facing the jury and gallery at times as they moved about the courtroom and testified. Kearse's suggestion that an evidentiary hearing is required to

ascertain what they saw is not supportable. Common sense indicates that postconviction counsel should have made that simple inquiry in 2001 and his failure to develop such evidence shows a lack of diligence in developing evidence of this claim.

Also, Kearse's reference to *Martin v. State*, 322 So. 3d 25, 33-34 (Fla. 2021) and *Rivera v. State*, 2025 WL 3534064 (Fla. 2d DCA Dec. 10, 2025) (IB 33) do not further his position that he could not have discovered this information sooner. The relevant information is the presence of uniformed officers in the courtroom. The presence of officers was known by Kearse, his trial counsel, and his postconviction counsel. In *Martin*, the claim was one of juror misconduct for not disclosing material facts when asked during voir dire, the material facts were something only the juror would know. Conversely, in *Rivera*, the juror misconduct was based on information the juror withheld regarding prior contacts with the judicial system or lawsuits. The appellate court determined that such information was discoverable through due diligence, such as a search of court records. Here, anyone sitting in the courtroom during Kearse's trials, including Kearse himself, would be able to see if uniformed officers were present. Due diligence has not been

shown.

E. The Claim Is Procedurally Barred

The postconviction court found the claim procedurally barred because Kearse knew of the issue based on penalty phase counsel's statement about officers' presence during the 1991 trial and that he raised the claim in the original postconviction litigation. (5PCR 925). This was a correct resolution and it should be affirmed.

Postconviction claims which were raised or could have been raised on direct appeal or in a prior postconviction motion are procedurally barred. *See Rogers*, 409 So. 3d at 1263 ("[I]n an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred."); *King v. State*, 597 So. 2d 780, 782 (Fla. 1992) (same). In 1996, Kearse's penalty phase counsel voiced his concern about uniformed officers in the courtroom based on officers in the 1991 courtroom. Counsel did not raise this issue on direct appeal but raised the presence of uniformed officers in the courtroom in the original 2001-2004 postconviction litigation, thus, rendering this claim barred. (1PCR-1504-7).

Kearse claims that his original postconviction litigation was an

attack on his 1991 trial not his 1996 penalty phase. While this Court construed the original postconviction claim as limited to the 1991 trial, *Kearse*, 969 So. 2d at 989, that does not allow Kearse to avoid the procedural bar. The issue could have been raised in the original postconviction case had Kearse used diligence to discover the supporting evidence. Kearse was on notice of the potential claim but either never investigated or chose to forego the issue. In either case, the matter is barred as he could have raised the claim in his original postconviction litigation. Again, Kearse was not limited to the cold record but could investigate and develop facts outside the record to support collateral claims. Having failed to do so and having failed to show diligence in uncovering evidence of officers in the courtroom bars him from raising the claim twenty years after the fact.

Kearse also suggests that the State's claim of untimeliness or a procedural bar should be rejected because he received ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). (IB 46). That assertion is legally insufficient as pled. Kearse fails to plead deficiency or prejudice, rendering the *Strickland* claim conclusory. Conclusory allegations are legally insufficient on their

face and may be denied summarily. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."). Also, the claim is procedurally barred as Kearse raised a *Strickland* claim previously. *Owen*, 854 So. 2d at 188 (explaining capital defendant failed to establish that his successive motion was predicated on newly discovered evidence so he could not overcome the procedural bar).

F. The Claim Is Without Merit.

In denying relief, the postconviction court reasoned:

> Defendant claims that Matthews purported social media posts remembering the presence of law enforcement and hoping the victim's family found peace and knew he was loved somehow establishes that law enforcement's presence was to "send an implied message to the jury that Mr. Kearse should get the death penalty." Defense Motion at fn. 10. The Court disagrees and finds the Defendant's interpretation purely speculative.

(5PCR 925). Continuing, the court reasoned: "[a]t best, Juror Matthews social media post indicates some amount of admiration for the family support, and what the Defendant already knew as

established by the record, that uniformed officers were in the courtroom and were from multiple agencies across the state." (5PCR 926) The court found that Matthews's post "does not show misconduct or prejudice" and that "the mere presence of law enforcement does not show a hostile courtroom, and no actual or implied prejudice arises from the officers in Kearse's case." (5PCR 926). The trial court correctly decided this issue and this Court should affirm.

Matthews's post does not show juror misconduct and it does not establish actual or inherent prejudice. Under the Sixth and Fourteenth Amendments, a defendant is entitled to a fair trial, one decided by a panel of impartial jurors whose verdict is based on the evidence developed at the trial. *Irwin v. Dowd*, 366 U.S. 717 (1961). While courts must guard against "the atmosphere in and around the courtroom [becoming] hostile as to interfere with the trial process," W*ood v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991), the presence of spectators showing affiliation or support for one party does not automatically present "'an unacceptable risk . . . of impermissible factors coming into play.'" *Holbrook v. Flynn*, 475 U.S. 560, 570, (1986) (finding inherent prejudice requires an

unacceptable risk of impermissible factors)). As the Supreme Court of Washington recognized, "[c]ourts must presume that jurors we entrust with determining guilt both understand, and have the fortitude to withstand, the potential influence from spectators who show sympathy or affiliation." *State v. Lord*, 161 Wash.2d 276, 278 165 P.3d 1251, 1253 (2006) (en banc). Moreover, courts presume jurors follow the law as instructed. *See Fletcher v. State*, 415 So. 3d 147, 159 (Fla. 2025) (recognizing that "in the absence of evidence to the contrary, we presume that jurors follow the trial court's instructions."), *cert. denied*, *Fletcher v. Florida*, No. 25-5923, 2026 WL 79738 (U.S. Jan. 12, 2026) (quoting *Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018); *Crain v. State*, 894 So. 2d 59, 70 (Fla. 2004) (recognizing the presumption courts apply that a properly instructed juror will comply with his or her obligations of the oath and render a true verdict according to the law and the evidence) (citing *Burnette v. State*, 157 So. 2d 65, 70 (Fla.1963).

When the claim of an unfair trial is raised based on the atmosphere in and around the courtroom, courts must review the issue on a case-by-case basis and then consider the "totality of the circumstances." *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966);

Holbrook, 475 U.S. at 569; *Shootes v. State*, 20 So. 3d 434, 438 (Fla. 1st DCA 2009). To establish his claim, Kearse must show either actual prejudice or inherent prejudice resulted. *Woods*, 923 F.2d at 1457. "Actual prejudice requires some indication or articulation by a juror or jurors that they were conscious of some prejudicial effect. *See Pozo v. State*, 963 So. 2d 831 (Fla. 4th DCA 2007). Inherent prejudice . . . requires a showing by the defendant that there was an unacceptable risk of impermissible factors coming into play." *Shootes*, 20 So. 3d at 438 (citing *Holbrook*, 475 U.S. at 570). As the trial court concluded, Kearse failed to carry his burden.

Matthews's post provides that she[13] was a juror for Kearse's resentencing and her service "was one of the hardest things [she had] ever done, but there was no doubt it was the right sentence." (5PCR 643). Matthews also noted "Leo's" (assuming law enforcement officers) presence "from every city and county in the state" in the back of the courtroom showing respect and support for the victim. Matthews stated, "I remember silently hoping that his

[13] Matthews was the subject of a challenge for cause and the issue was preserved for appeal but was not raised in the direct appeal of the re-sentencing. *Kearse*, 770 So. 2d at 1119. In the original state habeas, this Court rejected the claim of ineffective assistance of appellate counsel. *See Kearse*, 969 So. 2d at 990-91.

family and friends would know how much he was loved." (5PCR 641 - emphasis supplied). At best, the post reports what Kearse already knew, uniformed officers were in the courtroom and they were from multiple agencies across the state. The fact that Matthews believed her decision was a hard one, but proper, does not show misconduct or prejudice. Her comments are on matters that inhere in the verdict, which are not subject to juror interviews.

Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" *Sconyers v. State*, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). *See*, *Mitchell v. State*, 527 So.2d 179, 181 (Fla. 1988). The statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, understanding of the applicable law, or other matters resting alone in the juror's breast. *See, Devoney*, 717 So.2d at 502; *State v. Hamilton*, 574 So.2d 124 (Fla. 1991). "In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." *Id.* Further, "[j]uror may not be interrogated as to whether the [outside] influence actually affected their decision. *Pozo*, 963 So. 2d at 837.

Kearse parses Matthews's words trying to show actual and/or

implied prejudice as required by *Woods*, 923 F.2d at 1257. His attempt fails as nothing the juror posted shows any misconduct or extrinsic factual evidence beyond what was known at the time of trial and re-sentencing or could have been discovered with due diligence. Matthews merely acknowledges what Kearse knew for almost twenty years, there were uniformed officers in the courtroom. As noted above, the mere presence of law enforcement does not show a hostile courtroom and no actual or implied prejudice arises from the officers in Kearse's case. *Kearse*, 969 So. 2d at 989 (announcing that the mere presence of the officers was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice).

Moreover, the officers' presence was well known since 1996 and nothing Matthews posted in 2026 adds to Kearse's knowledge of the facts or furthers a claim of actual or implied prejudice. Matthews's comments regarding how difficult her decision was to make establishes she was not influenced by the officers' presence but deliberated with her fellow jurors to render a unanimous death recommendation, one she feels today was the "right decision." Under the totality of the circumstances, Matthews's post does not

establish actual or implied prejudice. Her post adds nothing to the rejected claim and relief should be denied.

ISSUE II

The Postconviction Court Properly Denied an Interview with Juror Matthews

Kearse appeals the denial of his motion to interview Juror Matthews claiming he made a prima facie showing of good cause to interview the juror and why it was filed outside the ten-day limit required by Fla. R. Crim. P. 3.575. (IB 48). The State disagrees.

A. Standard of Review.

In *Joseph v. State*, 336 So. 3d 218 (Fla. 2022), this Court stated:

> "A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009). "The trial court does not abuse its discretion in denying motions to interview jurors based on juror bias or misconduct where there is no indication of bias or misconduct in the record." *Johnston v. State*, 63 So. 3d 730, 739-40 (Fla. 2011). Further, in order to be entitled to interview jurors, Joseph must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001).

Joseph, 336 So. 3d at 236.

B. Facts.

As set forth in Issue I, in 1996, penalty phase counsel informed the re-sentencing court that there were uniformed officers in the 1991 courtroom and that they represented multiple agencies (2ROA 216-17). The issue of a fair trial based on the presence of law enforcement officers in the courtroom was raised and rejected in the original postconviction appeal as legally insufficient and that no prejudice was shown. *Kearse*, 969 So. 2d at 989. Kearse did nothing to investigate/pursue a similar claim regarding his 1996 penalty phase. After Governor DeSantis signed Kearse's death warrant on January 29, 2026, Juror Matthews responded to a news article by posting her recollection of her time on Kearse's jury. (5PCR 643) Based on that post, Kearse included a claim in his successive motion challenging the fairness of his 1996 penalty phase and moved to interview Matthews. (5PCR 743-49). The State objected. (5PCR 807-20). The trial court denied the interview finding Kearse did not meet the dictates of Fla. R. Crim. P. 3.575 as he did not establish "good cause" for not seeking to interview the juror

earlier but also did not satisfy any of the exceptions to the one-year time limitation under Rule 3.851(d)(1). (5PCR 958). Further, the postconviction court found that Kearse's motion "failed to contain sworn allegation that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.' (5PCR 958). Continuing, the court found Matthews's post did not provide Kearse with new information about officers in the courtroom and that her comment about her decision did not show misconduct or prejudice. (5PCR 959). The denial of the juror interview was proper.

C. The Denial of Motion to Interview Juror Was Proper.

Florida Rule of Criminal Procedure 3.575 provides for juror interviews under certain conditions where the defendant believes "the verdict may be subject to legal challenge." As provided in *Bates v. State,* 398 So. 3d 406, 406-07 & n.1 (Fla. 2024), "[r]ule 3.575 requires that a motion seeking to interview a juror 'be filed *within 10 days* after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time.'" *Id.* at 407 (original emphasis) (quoting Fla. R. Crim. P. 3.575).

When the motion has not been filed within the 10-day

timeframe, the defendant bears the burden to establish "good cause" to excuse the delay. *Id.* A review of Matthews's post[14] does not subject Kearse's verdict to challenge. Instead, the comments are on matters that inhere in the verdict. *See* § 90.607(2)(b), Fla. Stat.; *Marshall v. State*, 854 So. 2d 1235, 1240 (Fla. 2003) ("A juror is not competent to testify about matters inhering in the verdict, such as jurors' emotions, mental processes, or mistaken beliefs."). As explained in *Baptist Hospital of Miami, Inc. v. Maler*, 579 So.2d 97, 100 (Fla. 1991), "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.

[14] Kearse insinuates that there was some nefarious link between the juror and a Facebook post allegedly made by an Assistant Attorney General. (IB 49) There is no dispute that the two posts were made on different pages and were in no way related to each other. The State notes that much of the world is on this same social platform. The two posts do not give rise to any reasonable allegation of coordination or misconduct. Also, any allegation of disparagement of the defense by an Assistant Attorney General is absolutely refuted by the record (IB 49-50; 5PCR 892-93). The clear pith of the argument was that the issue of officers in the courtroom could have been investigated and developed during the original postconviction litigation merely by talking to Kearse, his penalty phase counsel, and defense mitigation witnesses, yet he waited some thirty years to raise a claim of an unfair penalty phase based on a post-warrant posting. That is not disparaging, those are the facts.

This standard was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" *See Martin v. State*, 322 So. 3d 25, 33-34 (Fla. 2021); *Devoney v. State*, 717 So.2d 501, 502 (Fla. 1998) (describing matters that may be inquired into as: juror was improperly approached by a party, his agent, or attorney; witnesses or others conversed about facts/merits of the cause, out of court and in the presence of jurors; verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner). This Court has "cautioned against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. *Griffin v. State*, 866 So.2d 1, 20-21 (Fla. 2003) (citing *Johnson v. State*, 593 So.2d 206, 210 (Fla. 1992) (stating "it is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations").

Kearse asserts that the trial court erred in denying his motion on the ground it did not contain sworn allegations as that requirement is not demanded by the rule. (IB 55). In 2022, this

Court considered a juror interview issue in *Joseph*, 336 So. 3d at 236 and quoted *Johnson*, 804 So. 2d at 1225 and the requirement for "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings" before juror interviews could be granted. Nonetheless, even without sworn allegations, Kearse's motion to interview Matthews because it was untimely, did not present a valid legal basis, and showed no misconduct or prejudice by the juror, and offered no new information to inform his claim of an unfair trial.

With respect to the time limitation imposed by Rule 3.575, this Court observed that while defendants are not expressly prohibited from filing such motions in postconviction proceedings, "the timing contemplated by the rule suggests that the best time for a rule 3.575 motion is on the heels of trial, and thus in connection with a direct appeal, when memories are fresh and facts more readily ascertained." *Bates*, 398 So. 3d at 407; *see also Tanner v. United States*, 483 U.S. 107, 120 (1987) (noting the disruptive nature of juror misconduct allegations "raised for the first time days, weeks, or months after the verdict"). And when the motion

was not filed within ten days of the verdict, it is the defendant's burden to establish "good cause" to excuse the delay. *Bates*, 398 So. 3d at 407.

This Court also observed that "the courts of our state regularly hold appellants to this burden" - even when the motion is filed shortly after the trial but outside of the ten-day period. *Id.* at 407-08 (citing *Rivet v. State*, 307 So. 3d 801, 807 (Fla. 1st DCA 2018) (finding motion filed 14 days after trial was "untimely without good cause" because defense counsel discovered the issue during trial); *Beyel Bros., Inc. v. Lemenze*, 720 So. 2d 556, 558 (Fla. 4th DCA 1998) (finding motion untimely where defendants did not file until about three months after the final verdict).

Additionally, when a motion to interview jurors is filed during postconviction proceedings in a capital case, the motion is further subject to the procedural limitations of Florida Rule of Criminal Procedure 3.851. *Bates,* 398 So. 3d at 406 n.1; *see* Fla. R. Crim. P. 3.851(a) ("This rule shall apply to all postconviction proceedings that commence upon issuance of the appellate mandate affirming the death sentence *to include all motions and petitions for any type of postconviction or collateral relief* brought by a defendant in state

custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal.") (emphasis added).

Moreover, "'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it,'" Florida law allows jurors to be interviewed only in limited circumstances where "the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001) (quoting *Baptist Hosp. of Miami, Inc. v. Maler*, 579 So. 2d 97, 100 (Fla. 1991)). Accordingly, to be considered legally sufficient, "[a] motion for juror interview must set forth allegations that are not merely speculative or conclusory, or concern matters that inhere in the verdict." *Foster v. State*, 132 So. 3d 40, 65 (Fla. 2013).

D. The Motion Was Untimely.

The time limitation of rule 3.575, alone, is dispositive of Kearse's motion seeking to interview Matthews. Kearse sought to interview the juror not "days, weeks, or months after the verdict,"

Tanner, 483 U.S. at 120, but decades later and after the warrant was signed in order to ascertain how officers in the 1996 courtroom impacted her role in the case. Kearse based his motion, not on newly discovered evidence, but on comments made by a juror on social media about facts which would have been fully evident to all involved in the trial itself.

As addressed above, Kearse has been aware of officers in his 1996 courtroom since that penalty phase as he was present. Yet, he chose not to raise it on direct appeal or to investigate further and raise it in the original postconviction litigation although he had the necessary information regarding a possible claim. His attempt in the original postconviction litigation was based on a comment made by defense counsel in 1996 describing the 1991 trial. Such was found legally insufficient to challenge the fairness of the 1991 trial and the summary denial of relief was affirmed "because the mere presence of the officers [in the courtroom] was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice." *Kearse*, 969 So. 2d at 989.

In *Bates*, this Court affirmed the denial of a motion to interview a juror that, as in this case, was filed decades after the

defendant's jury trial. *See Bates*, 398 So. 3d at 406-08. There, the motion was premised on Bates's alleged discovery of a distant family relationship between one of the jurors and the victim. *Id.* at 406. Noting that Bates's motion was "40 years late" under rule 3.575, this Court explained that it was "Bates's burden to establish good cause to excuse the long delay—which he [was] hard-pressed to do without explaining the timing of all this." *Id.* at 407. Bates, however, did not say when he discovered the alleged family relationship. This Court held that, "was the end of the matter," since it was Bates's burden to establish good cause for filing the motion out of time. *Id.* "That is, if he cannot establish when he learned of the alleged relationship between the juror and the victim, it is hard to assess why—obviously, for how long—the relevant information was unknown." Id. at 407-08. Because Bates "failed to carry his burden of showing good cause for the 40-year delay," the lower court's denial of the motion was affirmed. *Id.* at 408.

This Court should find that there is even less support for Kearse's request to interview Juror Matthews than there was in *Bates*. Kearse seeks to interview the juror from his trial, decades later, based on facts that occurred during the trial itself. While

Juror Matthews's post was recent, there can be no good cause to ask her to recall the impact of the officers in the courtroom on her deliberations from almost thirty years ago under these circumstances. This is especially true where Kearse failed to investigate and raise the presence of officers in the 1996 courtroom when he had the opportunity to do so in his original postconviction litigation.

Furthermore, even if the time limitation of rule 3.575 are considered by this Court as not dispositive, Kearse did not satisfy the exception to the one-year time limit of rule 3.851(d)(1) as discussed in Issue I. Clearly, the situation and facts of what happened during the trial are not new evidence that was "unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). Thus, Kearse's motion to interview jurors was denied properly as untimely and this Court should affirm.

E. There Is No Legally Valid Basis to Interview Matthews.

Matthews's post does not give rise to a suggestion of juror misconduct or error so fundamental and prejudicial as to vitiate the entire proceedings. *Baptist Hospital of Miami, Inc.* 579 So.2d at 100.

In *Devoney v. State*, 717 So.2d 501, 502 (Fla. 1998), this Court described matters that may be broached during juror interviews as: whether a juror was improperly approached by a party, his agent, or attorney; whether witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; whether the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner). This Court has "cautioned against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. *Griffin*, 866 So.2d at 20-21 (citing *Johnson v. State*, 593 So.2d 206, 210 (Fla. 1992) (stating "it is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations"). Again, § 90.607(2)(b), mandates that a "juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" *Sconyers v. State*, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). The statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, understanding of the applicable law, or other

matters resting alone in the juror's breast. *See, Devoney*, 717 So.2d at 502. Kearse's request to interview Juror Matthews was nothing more than a fishing expedition for the juror's response to the officers in the courtroom and how their presence may have impacted her deliberations. The lower court properly denied the motion below.

ISSUE III

The Trial Court's Resolution of the Public Records Demands Was Proper.

Kearse argues that the lower court's denial of his untimely, overbroad, and vague public records demands violates his due process rights. His objections, however, misapprehend Rule 3.852 and contradict well-settled law. Before Kearse could establish he has experienced any denial of due process in obtaining public records, he had to first demonstrate that he was entitled to those public records. *See Wyatt v. State*, 71 So. 3d 86, 111 (Fla. 2011); *see also Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) ("To assess whether a violation of due process has occurred, we must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest"). To prevail on

his due process claim, Kearse had to overcome a mountain of case law which expressly contradicts the claim he asserts. The lower court did not abuse its discretion in denying his public records demands.

A. Standard of Review.

This Court reviews a denial of public records requests for abuse of discretion. *See Tanzi v. State*, 407 So.3d 385, 391 (Fla. 2025); *Cole v. State*, 392 So. 3d 1054, 1065 (Fla. 2024). The "discovery tool" of Rule 3.852 "is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." *Id.* at 1066 (quoting *Asay v. State*, 224 So. 3d 695, 700 (Fla. 2017)). Public records requests must "show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed." *Id.* (quoting *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019)).

Kearse makes multiple arguments challenging the trial court's rulings on his public records demands on the Office of the Attorney

General, the St. Lucie County Sheriff's Office, and the State Attorney's Office of the 19th Judicial District. He asserts that it was error to find his demands untimely, overly broad, and not calculated to lead to a colorable claim. The trial court did not abuse its discretion sustaining the objections and denying the public records demands. This Court should affirm.

Rule 3.852(i)(1) provides that collateral counsel may obtain public records "in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule" if counsel files an affidavit which:

> (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
> (B) identifies with specificity those public records not at the records repository; and
> (C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and
> (D) shall be served in accord with subdivision (c)(l) of this rule.

On February 9, 2026, Kearse made the following public records demands on three agencies named above:

> The Demand seeks "[a]ll emails, text messages, faxes, letters, and any other form of correspondence, as well as any memoranda or notes documenting communications, including

> phone calls between any current or former employees of the [agency] (including, but not limited, to attorney's, investigators, and victim advocates), and Claire H. Matthews…."

(5PCR 570, 580, 590 ¶3). All three agencies objected that the demands were untimely and did not relate to a colorable claim; the AG also objected that the demand was overly broad.

B. The Demand Was Untimely.

On February 2, 2026, in accord with the January 29, 2026, scheduling order issued by this Court, the lower court issued its scheduling order setting February 3, 2026, as the deadline for Kearse to file his public records demands. Apparently, later that night, Kearse's counsel found a social media post of a re-sentencing juror, Claire Matthews. The court held a hearing on the objections filed by various agencies on February 4, 2026. Kearse did not advise the court about any new information or that he might seek to file another demand for records. Instead, he waited until February 9, 2026, to file an unauthorized and untimely Demand for additional records. Given that the Demand was filed after the deadline in violation of the scheduling order and *without leave*, the lower court

found it untimely. (5PCR 957-58); *Cf. Jimenez v. Bondi*, 259 So. 3d 722, 726, n. 1 (Fla. 2018) (finding demand untimely where it was filed after the scheduling order deadline on case under warrant).

Kearse argues that he was unaware that the post was deleted until after the public records hearing. Kearse also asserts that because a person from the State Attorney's Office commented on the same post and that an Assistant Attorney General may have commented on a completely different post, on another "page" unconnected to the one the juror had posted, there may have been unauthorized contact with the juror prompting her to delete her post. Kearse further contends that since his lead attorney had a family emergency, he was unable to fully assess the import of the information. The State notes that the lead attorney was part of a team of attorneys representing Kearse. Under Kearse's timeline, he was aware of the need to investigate by the evening of the fourth, yet he failed to alert the court or move for leave to file additional requests. It was only on the ninth that he filed the demands in question. The lower court properly found them untimely.

C. The Demand Was Overly Broad.

Kearse's demand to the agencies for additional public records was effectively an "any and all" demand that amounts to a prohibited fishing expedition. *See Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000) (holding that Rule 3.852 is "not intended to be a procedure authorizing a fishing expedition for records"). Vague, overbroad, and unduly burdensome requests for "any and all" documents or records like the request Kearse makes here are improper under Florida Rule of Criminal Procedure 3.852(i)(2)(D). This Court has held that demands seeking "any and all" records violate this rule. *See, e.g.*, *Zakrzewski v. State*, 415 So. 3d 203, 212 (Fla. 2025) (affirming trial court's denial of post-warrant public records demands and observing, "Zakrzewski's 'any and all' requests were overly broad and burdensome"); *Dennis v. State*, 109 So. 3d 680, 699 (Fla. 2012) (holding that trial court did not abuse its discretion in denying request for "any and all documentation" regarding all work of criminologists that had worked for department for decades because the request was "unduly burdensome" and amounted to a prohibited "fishing expedition").

Paragraph 3 of the Demand was effectively an "any and all" demand. It essentially sought all records within the agencies's

possession relating to any "emails, text messages text messages, faxes, letters, and any other form of correspondence, as well as any memoranda or notes documenting communications…." The lower court did not abuse its discretion in sustaining the objection.

D. The records sought were not related to lead to a colorable claim.

Florida Rule of Criminal Procedure 3.852(i)(2)(C) requires that the records sought be "relevant to the subject matter of a proceeding under Rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence[.]" The "defendant bears the burden of demonstrating that the records sought relate to a colorable claim for postconviction relief." *Branch v. State*, 236 So. 3d 981, 984 (Fla. 2018) (quoting *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014)). Moreover, Kearse "must 'show *how*' the requested records relate to a colorable claim for postconviction relief[.]." *Tanzi v. State*, 407 So. 3d 385, 391 (Fla. 2025) (emphasis added) (quoting *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019)).

Kearse's Demands did not meet these requirements. Paragraph 5c generically claims that the records sought "relate to colorable claims for postconviction relief, including claims" his

death sentence and execution violate the Sixth and Fourteenth Amendments. This was not supportable. Kearse argues that the records sought would go to a claim that there were so many uniformed officers in the courtroom during his re-sentencing that his re-sentencing trial was rendered constitutionally unfair. However, this issue could have been raised in the original postconviction litigation, and to the extent it was raised, this Court rejected the claim. *Kearse*, 969 So. 2d at 989 (announcing that the mere presence of the officers was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice). Any constitutional challenge Kearse raises now is procedurally barred.

The actual records sought from these three agencies were purported communications between a person or persons in the agency with Juror Matthews *after* she posted her initial comment on Facebook regarding the execution. Those alleged communications necessarily would have been made in 2026. Nothing in any such record would provide information on or assistance with Kearse asserting a claim on the presence of officers. Nothing in those records would go to the validity of either Kearse's

conviction or death sentence. The court did not abuse its discretion in finding they did not relate to lead to a colorable claim.

E. The denial of public records was not a due process violation.

The denial of the public records demand does not rise to the level of a due process violation. In *Cole v. State* this Court rejected the argument that the denial of access to public records violates due process and access to the courts under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. *Cole v. State*, 392 So. 3d 1054, 1065-66 (Fla. 2024); *see also Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief." (*citing Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008))). The postconviction court did not abuse its discretion in denying Kearse's requests. This Court should deny these claimed due process violations as nothing more than an attempt to forestall his execution. *See Hannon v. State*, 228 So. 3d 505, 512 (Fla. 2017) ("In the past, we have not condoned eleventh hour attempts to delay the execution with records requests, and we will not begin now.") (internal citation and quotations omitted).

This Court should affirm the denial of public records based on the valid objections that the demands were untimely, overbroad, and did not relate to a colorable claim.

ISSUE IV

The Postconviction Court Properly Summarily Denied Kearse's Intellectual Disability Claim as Untimely, Procedurally Barred, and Without Merit.

Kearse argues that since a new intellectual disability assessment, completed days after the death warrant was signed, concludes that he has an IQ of 75 and that he is intellectually disabled, negates the fact that he had previously raised but did not prove the claim, that his own doctors had previously concluded he was not intellectually disabled, and that he failed to re-raise this claim in a timely manner. Kearse failed to establish that there was any newly discovered evidence to support his claim. The lower court properly denied this claim as untimely, procedurally barred, and without merit. This Court should affirm that denial.

A. Standard of review.

Quoting Fla. R. Crim. P. 3.851(f)(5)(B), this Court has reaffirmed that a successive motion may be denied summarily, "[]f the motion, files and records in the case conclusively show that the

movant is entitled to no relief, the motion may be denied without an evidentiary hearing." *Harvey v. State*, 260 So. 3d 906, 906-07 (Fla. 2018). "A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion." *Owen v. Crosby*, 854 So. 2d 182, 187 (Fla. 2003). While claims which could have been raised in an earlier Rule 3.851 motion are procedurally barred, a defendant may file a successive motion if based on "newly discovered evidence." *See White v. State*, 664 So. 2d 242, 244 (Fla. 1995).

As this Court has explained:

> In order to obtain relief based on newly discovered evidence, a defendant must establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal or yield a less severe sentence on retrial. ... Newly discovered evidence satisfies the second prong of the test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

Dailey v. State, 329 So. 3d 1280, 1285 (Fla. 2021). *See also Zack v. State*, 371 So. 3d 335, 344–45 (Fla. 2023); *Rogers v. State*, 327 So.

3d 784, 787 (Fla. 2021); *Kearse v. State*, 709 So. 2d 512, 521 (Fla. 1998). The burden rests on the defendant "to demonstrate that his claims could not have been raised in the initial postconviction motion through the exercise of due diligence." *Rivera v. State*, 187 So. 3d 822, 831–32 (Fla. 2015) (citing *Zeigler v. State*, 632 So. 2d 48, 51 (Fla.1993)).

Kearse argues that he is exempt from execution because he is intellectually disabled, citing *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of the intellectually disabled). In support of that claim, Kearse provides the report Dr. Ouaou tendered on February 6, 2026, after an examination on February 2, 2026. Kearse had presented his behavioral and mental issues at trial as mitigation and then again in his initial postconviction motion, including that it was constitutionally prohibited to execute him under *Atkins*. Notably, at the re-sentencing trial, his own expert testified that he was not mentally retarded and Kearse presented nothing at his postconviction hearing refuting that conclusion. *Kearse*, 969 So. 2d at 991-992. Here, he only presented a new expert who offered a more favorable opinion. The lower court correctly found the claim

untimely, procedurally barred, and without merit. This Court should affirm.

B. The Claim Is Time Barred.

This successive postconviction claim was filed well beyond the one-year time limit for filing such motions under Florida Rule of Criminal Procedure 3.851(d)(2). Rule 3.851 requires, with few exceptions, that any motion to vacate judgement of conviction and sentence of death shall be filed by the defendant within one year after the judgement and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Kearse's judgement and sentence were finalized in 2001 when the United States Supreme Court denied his petition for certiorari. Fla. R. Crim. P. 3.851(d)(1)(B) (judgement becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Rule 3.851 does provide an exception to the one-year limitation when the facts on which the claim is predicated were unknown to the defendant and could not have been ascertained by the exercise of diligence. Fla. R. Crim. P. 3.851(d)(2). It is, however, Kearse's burden to demonstrate that the alleged newly discovered evidence qualifies for this exception. *See* Fla. R. Crim. P. 3.851(d)(2)(A); *Dillbeck v. State*, 357 So. 3d 94, 100 (Fla.

2023). Yet, even if Kearse shows that he could not have discovered this information within one year of his judgement and sentence, to be considered timely filed as newly discovered evidence, the motion must be filed within one year of the date upon which the claim became discoverable through due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008).

To bring a successive postconviction claim outside of the one-year time limitation, the defendant must show either: (1) newly discovered evidence; (2) a new constitutional right held to apply retroactively; or (3) counsel's neglect to file a motion. *See* Fla. R. Crim. P. 3.851(d)(2); *Owen v. Crosby*, 854 So. 2d 182, 188 (Fla. 2003) (explaining capital defendant failed to establish that his successive motion was predicated on newly discovered evidence, thus, he could not overcome the procedural bar); *Knight v. State*, 784 So. 2d 396, 400 (Fla. 2001); *Francis v. Barton*, 581 So. 2d 583, 584 (Fla. 1991). Absent such a showing, the motion should be summarily denied. Fla. R. Crim. P. 3.851(e)(2).

Successive motions for postconviction relief based on newly discovered evidence must allege the facts upon which the claim is based "were unknown to the movant or the movant's attorney and

could not have been ascertained by the exercise of due diligence," and that there is good cause for failing to raise the claim in a prior motion. Fla. R. Crim. P. 3.851(d)(2)(A), (e)(2). If the lower court found the evidence in Kearse's newly discovered evidence claim was previously discoverable, or there is no good cause for failing to assert the claim earlier, it must dismiss the claim under Florida law. *Id*. Kearse also has the burden of showing his claims are timely. *Mungin*, 320 So. 3d at 626 ("It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim.").

As detailed above, claims of newly discovered evidence must be filed within one year of when the information was discovered or could have been discovered through the use of due diligence. *Hamilton*, 236 So. 3d 276. Similarly, where a claim of intellectual disability is not timely filed, Rule 3.203(f) requires a showing of "good cause."[15] Kearse failed to put forth a valid reason for failing to file his *Atkins* claim earlier, within a year of *Hall* issuing.

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[15] Because Kearse had an active postconviction motion in 2004, his intellectual disability claim is governed by Rule 3.203(d)(4)(c) (2004). *See* Amendments to Fla. R. Crim. P. & Fla. R. App. P., 875 So. 2d 563 (Fla. 2004).

Kearse filed a "shell" motion for postconviction relief in 2001, amending it in 2004, two years after the release of *Atkins*. In that initial motion he did assert an *Atkins* claim, somewhat coupled with a claim based on *Roper v. Simons*, 543 U.S. 551 (2002) (barring execution of those who were under eighteen years of age at time they committed murder). He filed his first successive postconviction motion in 2010, and another in 2016. Notably, the Supreme Court issued *Hall v. Florida*, 572 U.S. 701, in 2014, rejecting Florida's standard to prove intellectual disability of a brightline cut off at an IQ score of 70. Despite *Hall* being issued in 2014, Kearse did not have a psychological reassessment of possible intellectual disability or re-raise a claim of intellectual disability. He nevertheless, post warrant, asserted that he should be excused from rule 3.851's diligence requirement because a revised WAIS test was released in 2024, tweaking some of the test's aspects. This argument ignores the plain language of the rule in effect at the time Kearse's first postconviction motion was pending and fails to explain why the present law dictating that such claims are now untimely should not apply here. *See Pittman v. State*, 417 So. 3d 287, 292 (Fla. 2025), as corrected (Sept. 11, 2025), cert. denied *sub nom. Pittman v. Florida*,

146 S. Ct. 74 (2025) (affirming summary denial of intellectual disability claim under an active death warrant, finding it both time and procedurally barred).

Kearse argues that he could not have brought this claim earlier because the revised WAIS test just came out in 2024. However, psychological tests are routinely revised to reflect changes in the population and other factors and do not render test results on earlier tests invalid. Merely because Kearse claims the "new" test is somehow more accurate does not solve his timeliness problem. This claim is clearly untimely. *See Dillbeck*, 304 So. 3d at 288. (rejecting newly discovered evidence claim as untimely which was based upon retention of a new defense expert citing a revision in the Diagnostic and Statistic Manual of Mental Disorders and administration of a quantitative electroencephalogram to the defendant). The claim had to have been filed within a year of it becoming discoverable through due diligence. *Jimenez*, 997 So. 2d at 1064. Kearse raised but failed to prove the *Atkins* claim in 2004. He then did not file this claim within a year of *Hall* being issued and is now time-barred from doing so.

Kearse has fallen far short of establishing any diligence in bringing this claim, much less the due diligence that Rule 3.851 requires. Simply retaining a new expert under an active warrant does not circumvent procedural bars or constitute "newly discovered" evidence. *See Grossman v. State*, 29 So. 3d 1034, 1041 (Fla. 2010). Since there are no exceptions to the time limits of Rule 3.851 which apply in this case, this court should summarily deny the claim. *See Rogers*, 327 So. 3d at 787.

B. Kearse's Claim Is Procedurally Barred.

Claims which either were or could have been raised on direct appeal or in prior postconviction proceedings are not properly raised in a successive postconviction motion. *See Rogers*, 409 So. 3d at 1263 ("[I]n an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred."). Kearse's postconviction motion is both untimely and procedurally barred under controlling precedent. *See Mungin*, 320 So. 3d at 626; *Rodgers*, 288 So. 3d at 1039 (Fla. 2019). Kearse raised a claim based on *Atkins* in his initial motion and this Court affirmed the denial.

> Kearse claims that his death sentence is unconstitutional on various grounds. First, he argues that because of his age, low level of intellectual functioning, and mental and emotional impairments he cannot be executed under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which prohibited execution of people with mental retardation. However, Kearse's own expert at the resentencing testified that he was not mentally retarded, and he presented no evidence at his postconviction hearing that he was. Thus, his sentence is not unconstitutional under *Atkins.*

Kearse, 969 So. 2d at 991–92. The claim is procedurally barred.

In *Hall*, however, "the Supreme Court held that Florida's 'rigid rule' interpreting section 921.137(1) as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability 'create[d] an unacceptable risk that persons with intellectual disability will be executed and thus [was] unconstitutional.'" *Id.* Courts must now take into account the standard error of measurement of IQ tests, which is five points." *Id.* Therefore, in cases where the defendant presents an IQ score that falls within the test's margin of error he must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* After the issuance of *Hall* this Court

initially held it to be retroactive. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016). It was not until 2020 that this Court determined that the reasoning in *Walls* was erroneous. *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020). During that roughly four year period, Kearse did not try to raise an *Atkins/Hall* claim. His case has been in active litigation in state court from 2001 through 2017, and in federal court until 2023; his failure to raise the claim renders it procedurally barred.

To the extent that Kearse contends that intellectual disability is a categorical bar to execution which should not be subject to any procedural bar, Florida has regularly applied procedural bars to exemption-from-execution claims. *See Dillbeck*, 357 So. 3d at 100 (holding that the Court's precedent "flatly refutes Dillbeck's contention that no time limits apply to categorical exemption claims"); *Barwick v. State,* 361 So. 3d 785, 795 (Fla. 2023); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013) (same).

Similarly, the Eleventh Circuit has declined to consider arguably meritorious intellectual disability claims on strictly procedural grounds. In *In Re Bowles*, 935 F.3d 1210 (11th Cir. 2019), the defendant had marginal IQ scores - an earlier one of 80

and a more recent one of 74. Bowles failed to raise his *Atkins* claim prior to the 2004 deadline and instead waited until *Hall.* The Florida Supreme Court affirmed the summary denial of the claim because Bowles's intellectual disability claim was not timely filed. *Bowles v. State*, 276 So. 3d 791 (Fla. 2019). Bowles, like Kearse, also failed to raise a straight *Atkins* claim in his federal habeas petition. Instead, his federal claim was a combination one based on the alleged interaction of *Atkins* and *Roper* to exclude execution of those who have brain impairments. The Eleventh Circuit rejected Bowles's request for permission to file a second federal habeas petition on procedural grounds. Regardless of whether his intellectual disability claim had merit, Bowles, the court reasoned, could have filed a timely *Atkins* claim in his initial federal habeas petition, but AEDPA did not permit a second petition where the claim was previously available. The State notes that Kearse's federal habeas petition was affirmed by the Eleventh Circuit and certiorari denied by the United States Supreme Court.

The Eleventh Circuit has also declined to find retroactive application of *Hall*. In *In Re Henry*, 757 F.3d 1151 (11th Cir. 2014), the Eleventh Circuit noted that *Hall* did nothing more than create "a

procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief." *Id.* at 1161. Kearse had that opportunity in 2004 and in his three successive postconviction motions, the last being in 2017, a year after *Hall*. Kearse's claim is bound by the well-established law governing how and when such claims must be brought and, thus, is procedurally barred.

D. Kearse's Intellectual Disability Claim Is Without Merit.

In *Atkins* the United States Supreme Court "held that the Eighth Amendment prohibits execution of the intellectually disabled." *Gudinas v. State*, 412 So. 3d 701, 709 (Fla. 2025). To prove an intellectual disability barring execution, the defendant must establish their intellectual disability by "clear and convincing evidence." § 921.137(4), Fla. Stat. Florida law defines "intellectual disability" as "[1] significantly subaverage general intellectual functioning [2] existing concurrently with deficits in adaptive behavior and [3] manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. "Significantly subaverage general intellectual functioning" means "performance that is two or more

standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Id.* "Adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. "If the defendant fails to prove *any* one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled." *Haliburton v. State*, 331 So. 3d 640, 646 (Fla. 2021) (emphasis added).

Prior to the Supreme Court's 2014 decision in *Hall*, "Florida law required that a defendant have an IQ of 70 or below in order to meet the first prong of the intellectual disability standard - significantly subaverage intellectual functioning." *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020). "Thus, a defendant was required to present an IQ score of 70 or below in order to establish the first prong of the intellectual disability standard." *Id.*

The testimony at both the re-sentencing trial and the postconviction hearing showed that Kearse suffered from emotional dysfunction, had learning disabilities, problems related to possible

brain damage, and a conduct disorder. *Kearse*, 969 So. 2d at 984. Kearse had earlier IQ scores from the original trial and then the retrial which were both 79. Kearse was given an IQ test when he was in the eighth grade where he scored an overall 78; for the performance portion he scored an 89 and scored a 74 for the verbal. (2ROA-T 2124) Those tests were essentially consistent with each other and demonstrated that Kearse had difficulties with language but was normal in the non-verbal sphere. He only achieved a lower score of 75 on the test given by Dr. Ouaou, which got Kearse into a range of 70-80, allowing him to argue that *Hall* applies. Courts must always be cautious of the possibility that a capital defendant is intentionally malingering to obtain a lower IQ score and avoid the death penalty. *See Haliburton v. State*, 331 So. 3d 640, 647 (Fla. 2121) (recounting expert testimony "that 'you can't fake good,' 'meaning a person's higher IQ scores will more accurately reflect a person's capacity, while lower IQ scores achieved on other test administrations might be attributable to a variety of potential factors'"); *see also Commonwealth v. Hackett*, 99 A.3d 11, 33 (Pa. 2014) (noting that capital defendants have "a powerful incentive to malinger and to slant evidence" after *Atkins*, and cautioning that

factfinders should take that motivation into account when assessing "the validity of results of post-*Atkins* intelligence testing").

Kearse points to his difficulty learning in school as examples of adaptive deficits due to mental retardation. However, none of his experts, or presumably the schools, attributed those problems with him being intellectually disabled. Rather, his experts and the school said he had severe learning disabilities, was emotionally disturbed, and had a conduct disorder. There was also speculation that he had brain damage. *Kearse*, 969 So. 3d at 984-85. His experts also declined to diagnose him as intellectually disabled. Those other mental health problems were the source of his problems, not him being intellectually disabled. As noted earlier, those other, different mental issues are not the basis for relief under *Atkins*. This Court should affirm the summary denial of this claim.

ISSUE V

Section 921.137 Fla. Stat. Is Constitutional

Kearse asserts that the postconviction court should have found § 921.137(4), Fla. Stat. unconstitutional on the ground that the "clear and convincing evidence" burden of proof placed on a defendant to prove intellectual disability is too high. He urges that if

this Court reverses the denial of his intellectual disability claim set for in Issue IV and remand for consideration on the merits, the issue of the burden of proof should likewise be remanded for consideration by the postconviction court. Alternately, Kearse asks this Court to find the burden of proof too high allowing for a significant risk of an erroneous determination that the defendant is not intellectually disabled in violation of Due Process and the Eighth Amendment prohibition on executing the intellectually disabled. (IB 96-97). The trial court found Kearse's challenge untimely and barred as it could have been raised earlier and without merit. This Court should affirm.

A. Standard of Review.

"Constitutional challenges to statutes are pure questions of law, subject to de novo review." *Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016).

B. The Constitutional Challenge Was Untimely and Procedurally barred.

In 2004, Kearse litigated some form of an *Atkins* claim. *Kearse*, 969 So. 2d at 989. He could have raised his facial constitutional challenge to the statute at that time but did not. This

renders his challenge here, some twenty years later, untimely and procedurally barred. *See Rogers v. State,* 409 So. 3d at 1263 ("[I]n an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred." *Reaves v. State*, 826 So. 2d 932, 936 (Fla. 2002) (noting that challenges to the constitutionality of Florida's capital sentencing statute are procedurally barred from review in a motion for postconviction relief where they were either raised on direct appeal or should have been raised on direct appeal) *Gorby v. State*, 819 So. 2d 664, 687 (Fla. 2002) (finding challenges to the constitutionality of a statute where were not raised previously are procedurally barred in later postconviction litigation). *See e.g. Haliburton v. State*, 331 So. 3d 640, 652 (Fla. 2021).

C. The Statute is Constitutional.

Kearse asserts that the postconviction court failed to reach the merits of his claim, thus, it is impossible for Kearse to explain where the court erred. (IB 96). The court stated that the constitutional challenge to the intellectual disability burden of proof "is without merit." (5PCR 933). The court reasoned that when the United States Supreme Court reviewed Florida intellectual disability

statute , it found fault with the manner Florida analyzed the IQ prong without taking into effect the standard error of measurement. This the postconviction court reasoned left the burden of proof in place and no other court has held the burden to be unconstitutional. (5PCR 933).

In fact, the United States Supreme Court reviewed Florida's intellectual disability statute in *Hall v. Florida*, 572 U.S. 701, 711 (2014). Essentially the Court found the statute constitutional as written and only held that it was the Florida Supreme Court's interpretation that courts must apply a brightline cut-off IQ level was unconstitutional. *Hall*, 572 U.S. at 711 (stating "[o]n its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case.)

Additionally, the Eleventh Circuit Court of Appeals, in an *en banc* opinion, has rejected a similar constitutional challenge to Georgia's intellectual disability statute which mandates an even higher standard of proof, one requiring the defendant to prove his case beyond a reasonable doubt. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*) (holding that Georgia's requirement that a defendant prove ID beyond a reasonable doubt standard of proof

did not contravene clearly established Supreme Court precedent under the AEDPA, citing *Leland v. Oregon*, 343 U.S. 790 (1952)). The fact that Georgia's Legislature has recently reduced that standard of proof does not call into question the decision in *Hill v. Humphrey*.

Kearse asks this Court to consider *Cooper v. Oklahoma*, 517 U.S. 348 (1996) should it reach the merits. (IB 96). Although the statute is constitutional, this Court need not reach the merits because Kearse's claim of intellectual ability was also denied as untimely and procedurally barred. The State incorporates its analysis in Issue IV to establish that this Court need not reach the merits of this claim. This Court has stated repeatedly that "courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975). *See Haliburton*, 331 So. 3d at 652. Because Kearse is not entitled to an evidentiary hearing on his *Atkins* claim, this Court has no need to address the question of the constitutionality of § 921.141.

Cooper addressed the means States determine whether a defendant is competent to be prosecuted and tried; it has no

bearing on the determination of whether a defendant is intellectually disabled. In *Atkins* the Supreme Court specifically left it to the States to establish the test to determine intellectual disability, including the burden a defendant must meet. Finally, *Hall* was issued in 2016, two decades after *Cooper* and implicitly found the Florida statute constitutional.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Paul Kalil and Courtney Hammer, Assistants, CCRC-South at 110 S.E. 6th Street, Suite 701, Fort Lauderdale, FL 33301 this 18th day of February, 2026.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief of Appellee has been produced in 14-point Bookman Old Style and

that according to the Word program on which this petition was written the petition contains 15,527 words in compliance with Rules 9.100(g) and 9.210, Fla. R. App. P.

Respectfully submitted,

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