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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2026-0251

EXECUTION SCHEDULED FOR MARCH 03, 2026, AT 6:00 PM

BILLY LEON KEARSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, ST. LUCIE COUNTY, FLORIDA

LOWER CASE NO. 1991-CF-000136

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February 17, 2026

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Florida Office of the Attorney General, Government-in-the-Sunshine Manual (2025 ed., Vol 47) 68

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REQUEST FOR ORAL ARGUMENT

Mr. Kearse respectfully requests oral argument by counsel pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Mr. Kearse lives or dies. Mr. Kearse has raised meritorious issues that warrant an opportunity to be heard before this Court. A full opportunity to argue the issues at oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Kearse.

CITATIONS TO THE RECORD

References to the record will note the relevant proceeding on appeal and page number: Direct Appeal (R1. __); Resentencing Direct Appeal (R2. __) and transcripts (R2T. ___); Postconviction Record on Appeal following evidentiary hearing (PCR2.__); and Warrant Record on Appeal (WR. ___).

All other references and citations are self-explanatory or explained herein.

STATEMENT OF THE CASE AND FACTS

A. Guilt, Penalty Phase And Sentencing Proceedings

Mr. Kearse was convicted and sentenced to death in St. Lucie County, Florida for the 1991 murder of Fort Pierce Police Officer Danny Parrish when Mr. Kearse was eighteen years and eighty-four days old.

Following a jury trial and an 11-1 jury recommendation of death, the court imposed death. (R1. 1864-65; 2361, 2367; 2395, 2403, 2423). This Court affirmed Mr. Kearse's convictions but remanded for a resentencing new after striking an aggravator. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995).

The resentencing jury returned a unanimous death recommendation. (R2-T. 2695). The trial court found two aggravators (1) in the course of a robbery, and (2) avoid arrest, hinder law enforcement, and the victim was a law enforcement officer (merged). (R2. 706-09). The court found age to be a statutory mitigator, giving it "some but not much weight." (R2. 708). The court also found that Mr. Kearse exhibited acceptable behavior at trial and that he had a difficult childhood that resulted in psychological and emotional

problems.[1] (R2. 709). The non-statutory mitigating factors directly related to, or a byproduct of, Mr. Kearse's intellectual deficits and low IQ that were found by the trial court include: "Low IQ, impulsive, and unable to reason abstractly"; "Impulsive person with memory problems and impaired social judgment"; "Difficulty attending to and concentrating on visual and auditory stimuli"; "Difficulty with perceptual organizational ability and poor verbal comprehension"; "Impaired problem solving"; "Impaired cognitive flexibility"; "Deficits in visual and motor performance"; "Lower verbal intelligence"; Poor auditory short-term memory"; Mildly retarded and functioned at a third or fourth grade level"; "Developmentally learning disabled"; Slow learner and needed special assistance school"; "The Defendant was severely emotionally handicapped"; "Impaired memory"; "Impoverished academic skills"; Mental, emotional, and learning disabilities"; "Delayed developmental milestones"; and "Severely emotionally disturbed child." (R2. 591-92; 709).

[1] The trial court found additional non-statutory mitigation relating to trauma Mr. Kearse suffered in childhood. (R2. 591-92; 709).

This Court affirmed by a 4-3 margin. *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000). The dissent expressed "several concerns with the majority's treatment of the issues, and especially with the conclusion that this is one of the most aggravated and least mitigated murders requiring that the eighteen-year-old defendant be executed." *Id.* at 1135 (Anstead, J., dissenting). It also pointed out that "there is no evidence that Kearse set out that night intending to commit any crime, let alone murder." *Id.* at 1136. Certiorari was denied. *Kearse v. Florida*, 532 U.S. 945 (2001).

B. Direct Appeal And Postconviction

Kearse filed a Rule 3.851 motion, (PCR2. 14-68; 1458-1572), and a limited evidentiary hearing was granted. (PCR2. 1458-1572, 1660-63). Relief was denied. (PCR2. 5703). This Court affirmed and also denied habeas relief. *Kearse v. State*, 969 So. 2d 976 (Fla. 2007).[2]

Mr. Kearse thereafter filed his federal habeas corpus petition, and the next half decade of federal litigation was devoted to

[2] On October 29, 2009, Mr. Kearse's trial and resentencing counsel was disbarred. *The Florida Bar v. Udell*, 22 So. 3d 60 (Fla. 2009). After Udell's disbarment, Mr. Kearse filed a successive Rule 3.851 motion. (PCR3. 4-21). Relief was denied.

addressing the State's unfounded contention that Mr. Kearse's petition was untimely because the sworn verification to his initial 3.851 motion was not stapled to the motion itself; this litigation included two separate dismissal orders from the federal district court and two separate opinions from the Eleventh Circuit Court of Appeals reversing those orders. The district court issued a final order denying habeas relief in 2015, the denial of which was affirmed.[3] *Kearse v. Sec'y, Fla. Dep't. of Corr.*, 2022 WL 3661526 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2439 (2023).

[3] One of the issues before the Eleventh Circuit was whether Mr. Kearse's sentence of death constitutes cruel and unusual punishment due to his deficits in intellectual functioning and mental and emotional impairments, in combination with his youth at the time of the offense. Judge Wilson dissented, finding that this Court unreasonably applied clearly established federal law when it engaged in "a patently unreasonably narrow characterization of [Mr.] Kearse's Eighth Amendment argument" and "failed to analyze whether [his] death sentence was proportional or constitutionally excessive given the facts of his case." *Kearse v. Sec'y, Fla. Dep't. of Corr.*, 2022 WL 3661526, at *29 (11th Cir. 2022). Judge Wilson asserted that "[t]hree justices of [this Court] said it best: 'The bottom line is that this is clearly not a death case" and "[t]he bottom line is the same under federal law." *Id.* at *29-30 (internal citation omitted).

C. Warrant Proceedings

Governor DeSantis signed Mr. Kearse's death warrant on January 29, 2026. (WR. 46-60).

Mr. Kearse timely filed demands for additional public records pursuant Rule 3.852(i) to nine agencies. (WR. 123-150; 153-325). Each agency filed objections. (WR. 326-53, 356-439, 442-44, 447-88). The lower court conducted a public records hearing at 3:00 p.m. February 4, (WR. 502-21), and shortly afterward issued an order denying Kearse's demands (WR. 494-501).

Mr. Kearse's lead counsel, Paul Kalil,[4] had been working on his case nearly around the clock since the signing of his death warrant in order to adequately represent him and meet the court's scheduling deadlines. However, in the afternoon hours of February 5, Mr. Kalil's father was admitted to hospice for end-of-life care. Due to the warrant, Mr. Kalil had been unable to be with his father the entire week leading up to his hospice admission; however, he was

[4] Mr. Kalil has been Mr. Kearse's lead attorney since approximately 2004.

nonetheless having to make critical decisions concerning his father's care during that time and facilitate the hospice admissions process.

Mindful of the courts' scheduling orders, Mr. Kalil was placed in an impossible situation where he could not meet the February 7 deadline for the filing of Mr. Kearse's 3.851 motion. Counsel requested the Court modify the scheduling order by 72 hours to file the motion and push back all other deadlines accordingly. The State did not object to a 46-hour continuance. Mr. Kearse filed emergency motions to modify both courts' scheduling orders. (WR 522-27). The State filed objections in both courts. (WR. 534-38).

The lower court denied Mr. Kearse's motion without prejudice and advised that Mr. Kearse could revisit the issue if this Court amended its scheduling order of if the parties reached a stipulation. (WR. 539-41). This Court revised its scheduling order, granting Mr. Kearse's request for a 72-hour modification of the schedule. (WR. 542-43).

Mr. Kearse then renewed his motion to modify the circuit court's scheduling order, requesting the court to allow him until Tuesday, February 10, at 1:00 p.m. to file his 3.851 motion and extend all other deadlines accordingly. (WR. 547-51). The State did not object.

The lower court amended its scheduling order but only extended each deadline in the circuit court by 48 hours, except for its own deadline to issue the final order, which was extended by the full 72 hours. (WR. 557-61).

This Court then granted Mr. Kearse's request based on Mr. Kalil's request to be with his father is his final days, and the parties filed a stipulated motion in the lower court, requesting that the circuit court provide Mr. Kearse the full 72 hours this Court granted to file his 3.851 motion. (WR. 562-65). The court denied the motion. (WR. 566-68).

Motion for Postconviction Relief

Mr. Kearse timely filed his 3.851 motion raising three claims. (WR. 599-742). Because the factual basis of Mr. Kearse's first claim arose from statements made in a voluntary social media post by one of the jurors who served on his resentencing jury after his death warrant was signed, Mr. Kearse simultaneously filed a motion to interview the juror, (WR. 743-50), and three demands for additional public records concerning the juror to the Attorney General's Office ("AG"), Office of the State Attorney, Nineteenth Judicial Circuit ("SAO19"), and St. Lucie County Sheriff's Office ("SLCSO") pursuant

to Rule 3.852(i). (WR. 569-98). Mr. Kearse also filed a motion for a stay of execution. (WR. 751-58).

Claim I asserted that new evidence established he was denied a fair resentencing proceeding because his jury was subjected to impermissible influences outside of the evidence that tended to subvert its purpose in contravention of his Sixth and Fourteenth Amendment rights. This claim was based on new evidence arising from a social media post from one of the jurors (Matthews) at Mr. Kearse's resentencing, which came to light during the social media maelstrom that ensued after Mr. Kearse's warrant was signed.

Mr. Kearse sought an evidentiary hearing on this claim and filed a Motion to Interview Juror Matthews wherein he alleged good cause to investigate this evidence. (WR. 743-50).

Claim II asserted that newly discovered evidence of a full-scale IQ score of 75 on the newly released WAIS-5 establishes he is intellectually disabled.[5] Mr. Kearse asserted that this newly

[5] Mr. Kearse was administered the WAIS-5 by Dr. Robert H. Ouaou, whose report was attached to the 3.851 motion. (WR. 727-36). Mr. Kearse also indicated that Dr. Ouaou would be available to testify to the facts alleged in his motion at an evidentiary hearing.

discovered fact, coupled with his lifelong deficits in adaptive functioning, established that he is intellectually disabled, which is an absolute bar to execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. Mr. Kearse sought an evidentiary hearing to demonstrate that this evidence was timely discovered and that he meets all three prongs of Florida's test for evaluating intellectual disability set forth in Section 921.137(1), Florida Statutes (2013).

Mr. Kearse further asserted that he meets prong 2 of Florida's intellectual disability standard because he exhibits chronic and significant deficits both the conceptual and the social domains. Mr. Kearse pointed to uncontroverted record evidence establishing that he has struggled with language and literacy since birth. In doing so, he noted how he developed physically and emotionally later than his peers and had both slurred speech and trouble pronouncing words "like a child his age should have been able to do." (R2T. 1983). Mr. Kearse likewise noted how his school records are rife with evidence that he functioned below grade level starting in kindergarten, (PCR2. 4409-4994), and how standardized testing shows that he had difficulties with comprehension, reading, mathematics, handwriting, attention, and communication. In this vein, Mr. Kearse highlighted

how he was administered the Weschler Intelligence Scale for Children – Revised (WISC-R) in 1981 and attained a full-scale IQ score of 78. His verbal IQ score of a 74 on the instrument placed him in the 5th percentile.

Mr. Kearse additionally emphasized how administration of the Wide Range Achievement Test – Revised (WRAT-R) when he was in the eighth grade indicated that he was functioning below a third-grade level. He scored in the 2nd percentile for reading and was below the 1st percentile relative to his age and grade-matched peers. Mr. Kearse's scores on the Peabody Individual Achievement Test (PIAT) that same year also showed significant deficits in these areas.

Mr. Kearse asserted that his records were replete with additional notations of learning and emotional problems and show he was placed into special education classes as part of an emotionally handicapped program at the Anglewood Center in St. Lucie County. He also noted how several of his former teachers and counselors throughout his life have attested to his academic and developmental difficulties in this case.

Mr. Kearse finally argued that the above established his deficits "manifested during the period from conception to 18." § 921.137(1), Fla. Stat.

He also filed a separate motion asking the Court to declare § 921.137(4), regarding the "clear and convincing evidence" burden of proof for establishing an intellectual disability claim unconstitutional. (WR. 792-800).

Demands for Additional Public Records Regarding Juror Matthews

Along with his 3.851 motion, Mr. Kearse filed demands for additional public records to the AG, SAO19, and SLCSO. (WR. 569-98). These public records were directly related to Claim I of his 3.851 motion regarding Juror Matthews and her social media post, which was curiously deleted from the platform less than 24 hours after it was made.

Given that Mr. Kearse's team had also seen public comments from one of the Assistant Attorney Generals representing the State in this proceeding on the same social media platform about the signing of Mr. Kearse's warrant, Mr. Kearse's demands sought all

communications between any current or former employees of the AG, SAO19, and SLCSO and Juror Matthews. (WR. 569-98).

Second Emergency Motion to Modify Scheduling Order

On February 10, 2026, Mr. Kearse filed a Second Emergency Motion to Modify Scheduling Order and Motion for Stay of Execution in this Court wherein he informed the Court that Mr. Kalil's father passed away on Sunday, February 8.

The motion noted that CCRC-South—and Mr. Kearse—found itself in an impossible situation and that the filing of the Rule 3.851 motion by no means indicated that the crisis was over. [6] Given that Mr. Kalil remained out of the office, Mr. Kearse asked that this Court modify its scheduling order by at least 14 days—or grant a stay of execution. The State objected and this Court denied the request.

[6] CCRC-South has only three full-time attorneys, including Mr. Kalil, qualified to serve as lead counsel. The office represents other capital defendants with pressing and immoveable deadlines in both state and federal courts. Indeed, two lead counsels have immovable AEDPA deadlines within this warrant period. Moreover, Mr. Kearse's second-chair counsel is not a lead attorney and has never handled an active death warrant as a lead attorney.

The State's Responses

The State filed responses to Mr. Kearse's 3.851 motion, his Motion to Interview Juror Matthews, and his motion to declare § 921.147(4) unconstitutional. (WR. 766-91; 807-20; 832-37). The State asserted all 3 claims he raised should be summarily denied as untimely, procedurally barred, and/or meritless. (WR. 766-921).

Circuit Court Proceedings and Rulings

The circuit court conducted a case management conference on February 11, 2026, and heard argument on Mr. Kearse's 3.851 motion, his Motion to Interview Juror Matthews, his demands for additional public records, and his Motion to Declare § 921.137(4), Fla. Stat., Unconstitutional. (WR. 871-913). The AG and SAO19 filed responses objecting to the demands right before the hearing. (WR. 801-06, 821-29). SLCSO had not filed a response when the hearing commenced and did not appear. The court gave the agency until the end of the day to object, and the objection SLCSO thereafter filed mirrored the SAO19's. (WR. 838-46).

The circuit court denied an evidentiary hearing on all of Mr. Kearse's claims on February 12, at 10:38 a.m. It also denied all public records demands as untimely, overly broad, and not reasonably

calculated to lead to a colorable claim for relief; his Motion to Interview Juror Matthews, finding that the request was untimely under Rule 3.575 and failed to establish a valid legal basis for the interview; and reserved ruling on his motion for a stay of execution and his motion to declare § 921.137(4) unconstitutional. (WR. 956).

The lower court entered its final order denying relief on Saturday, February 14, at 3:25 p.m. (WR. 915-36). Mr. Kearse did not receive the order until Sunday February 15, at 10:29 a.m., when he received a "back-up service" email from the court's judicial assistant with a copy.[7]

Mr. Kearse timely filed a Notice of Appeal. (WR. 937-39).

SUMMARY OF ARGUMENTS

1. New evidence arising from a voluntary social media post by one of the jurors (Matthews) who served at Mr. Kearse's resentencing establishes that impermissible influences external to

[7] A subsequent email from the court's judicial assistant at 10:58 a.m. advised that "[t]he order was served via -e-portal on 12/14/26 [sic]. However, the e-portal is down. Therefore, the order was e-served via back-up service this morning again to all interested parties by Judge Heisey." This delay in service deprived Mr. Kearse of nearly 20 hours of already very limited time to review and analyze the court's ruling and prepare this initial brief.

the evidence in the case deprived him of his right to trial by a fair and impartial jury in contravention of the Sixth and Fourteenth Amendments to the United States Constitution. This Court should remand for an evidentiary hearing on Mr. Kearse's claim.

2. The lower court abused its discretion in denying Mr. Kearse's Motion to Interview Juror Matthews where Mr. Kearse established good cause for filing the motion outside the 10-day timeframe contemplated by Florida Rule of Criminal Procedure 3.575 based on new evidence that his resentencing jury was improperly influenced by external factors when it recommended that he be sentenced to death.

3. Mr. Kearse was denied access to files and records to which all other individuals are able to routinely obtain, depriving him of his rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Access to public records is critical to meaningful postconviction review. Records produced under warrant in other cases have led to the discovery of exculpatory evidence, claims for postconviction relief, and stays of execution. The lower court's rote denial of access to the

public records in Mr. Kearse's case renders Rule 3.852 a hollow exercise on an execution check-list.

4. Newly discovered evidence on February 2, 2026, establishes that Mr. Kearse is intellectually disabled as he has significant subaverage intellectual functioning and uncontroverted, lifelong deficits in adaptive functioning, therefore the Eighth Amendment categorically prohibits the State from carrying through with the March 3, 2026 execution. This Court should remand for further evidentiary development or enter a ruling granting Mr. Kearse's claim.

5. The Court should determine that the "clear and convincing" evidence burden of proof allocated by Florida law in intellectual disability cases is unconstitutional, and the lower court should be given the opportunity to assess the evidence through the prism of a preponderance standard.

ARGUMENT I

Mr. Kearse's Resentencing Jury Was Subjected To Impermissible Influences Outside Of The Evidence That Tended To Subvert Its Purpose, In Violation Of The Sixth And Fourteenth Amendments. The Lower Court's Summary Denial Should Be Reversed And An Evidentiary Hearing Ordered.

A. Introduction

When a Florida Governor signs a death warrant and schedules an execution, media attention ensues especially if the case arises from a smaller community or is otherwise one that is of a higher profile, such as when a member of law enforcement has been killed. These days, with the advent of 24-hour media availability including a variety of online social media outlets, online scrutiny of cases is far more intensive than in earlier times. Mr. Kearse's case is one of those higher profile cases that garnered a great deal of media attention at the time of his initial trial in 1991 and at his 1996 resentencing. The signing of Mr. Kearse's death warrant resulted in a new series of media stories about his case and his imminent execution, stories which were then reposted on social media outlets like Facebook. And when stories are posted, people comment on them.

While relatively rare, it is not unheard of for individuals who involved at the trial level of a capital defendant's case—be they judges or jurors—to make voluntary public statements concerning the defendant's case when an execution is scheduled and the media is energized to publish new stories about the case. Sometimes those statements are innocuous expressions of either support for, or opposition to, the inmate's pending execution. However, sometimes these voluntary statements from participants in the trial directly implicate the reliability of the outcome of the defendant's case. As Juror Matthews's voluntary social media post shows, Mr. Kearse's case is one of these rare cases. So was the case of Raleigh Porter in 1995, which is instructive on how this Court should evaluate Mr. Kearse's present claim.

Raleigh Porter was convicted of a double homicide in Punta Gorda, Florida, in 1978;[8] the jury returned two life recommendations which the trial judge, Richard Stanley, overrode to impose two death sentences. *Porter v. State*, 400 So. 2d 5 (Fla. 1981). This Court

[8] Mr. Porter's case arose from Charlotte County, Florida, but venue was changed to Glades County, Florida, due to pretrial publicity. *Porter v. State*, 400 So. 2d 5, 6 (Fla. 1981).

ordered a resentencing due to a *Gardner*[9] violation, and at resentencing, Judge Stanley again overrode the life recommendations. This Court affirmed. *Porter v. State*, 429 So. 2d 293 (Fla. 1983).

Issues about Judge Stanley's bias and lack of impartiality plagued Mr. Porter's case almost from the beginning, and those concerns dogged the case throughout the years of postconviction proceedings. For example, when later recounting the chronology of the judge bias issues in Mr. Porter's case, this Court noted that Mr. Porter had raised the issue of judicial bias "on several prior occasions," including on direct appeal when he "attempted to raise the trial judge's bias by introducing an affidavit of [trial counsel] stating that the judge had brass knuckles and a gun with him during sentencing." *Porter v. State*, 653 So. 2d 374, 377 & n.2 (Fla. 1995). This Court, however, "struck that affidavit." *Id.* at n.2.

When former Governor Lawton Chiles signed Mr. Porter's death warrant on March 1, 1995, media attention in southwest Florida refocused on the case. Shortly after the warrant was signed, Judge

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[9] *Gardner v. Florida*, 430 U.S. 349 (1977).

Stanley, who had since retired, was interviewed by local media and made a voluntary public statement to the effect that he "had already decided to sentence Porter to death before receiving the jury's advisory sentence." *Id.* at 377. The publication of Judge Stanley's statement prompted Mr. Porter's collateral counsel to renew the claim concerning Judge Stanley's bias as it was new information establishing that he had made up his mind to sentence Mr. Porter to death even before the jury returned any recommendations. This Court, however, was unpersuaded and declined to order an evidentiary hearing or issue a stay of execution. *Id.* at 377-78.

In the meantime, as Mr. Porter's case continued its under-warrant litigation and just before this Court issued its opinion declining to intervene based on Judge Stanley's media statements, his collateral counsel received a telephone call from Jerry Beck, the Clerk of Court in Glades County, Florida, the county to which venue had been changed for the Porter trial.[10] Clerk Beck disclosed to Mr.

[10] The call from Clerk Beck was made in the morning hours of March 28, 1995, shortly after this Court heard oral argument that morning in Mr. Porter's appeal. *See Porter v. State*, 723 So. 2d 191, 194 (Fla. 1998).

Porter's collateral counsel that the media attention surrounding the imminent execution date for Mr. Porter and the comments made by Judge Stanley to the media caused him to recall a conversation he had with Judge Stanley either before or during the first day of Mr. Porter's trial. Clerk Beck recounted that Judge Stanley had told him that

> he had changed the venue in the Porter trial from Charlotte County to Glades County because there had been a lot of publicity and Glades County "had good, fair-minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said, he would send Porter to the chair."

Porter, 723 So. 2d at 194. Because this Court had yet to issue a decision in Mr. Porter's appeal, Mr. Porter's collateral counsel immediately submitted an affidavit detailing Clerk Beck's disclosure but the Court later that day issued an opinion denying relief and a stay of execution, merely noting it had "considered" counsel's affidavit. *Porter*, 653 So. 2d at 377 n.2.

With Mr. Porter's execution looming, he immediately filed federal litigation challenging his sentence, including the issue of judge bias relying heavily on the statements made by Judge Stanley to the media and to Clerk Beck. After the federal district court denied

relief, the Eleventh Circuit, hours before Mr. Porter's scheduled execution, issued a stay and remanded for an evidentiary hearing on whether Mr. Porter's counsel could have previously learned of the information Clerk Beck disclosed concerning Judge Stanley's statements of bias. *See Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995). After a remand which resulted in a finding that neither Mr. Porter nor his counsel could reasonably have learned about the statements made by Judge Stanley to Clerk Beck, the case returned to the Florida courts, where, after an evidentiary hearing at which Judge Stanley testified and a denial of relief by the circuit court, this Court granted relief to Mr. Porter and vacated his override death sentences. *Porter*, 723 So. 2d at 199. Mr. Porter was subsequently sentenced to life imprisonment.

While the media comments at issue in *Porter* emanated from the sentencing judge, the odyssey of the *Porter* litigation serves as a reminder that even under an active death warrant, this Court has an obligation to ensure that justice is done in Mr. Kearse's case notwithstanding the current scheduling exigencies. Just as Judge Stanley did in the *Porter* case, Juror Matthews made a wholly unanticipated voluntary statement which calls into question the

reliability of Mr. Kearse's death sentence. This matter must not be cast aside or given short shrift just because there is a pending execution date. While "the postconviction process still may appear inordinately long to the general public in some cases, . . . neither public perception nor the reality of a lengthy postconviction process justifies foreclosing meritorious claims of newly discovered evidence. While finality is important, its importance must be tempered by the finality of the death penalty." *Swafford v. State*, 679 So. 2d 736, 741 (Fla. 1996) (Harding, J., specially concurring).

B. Overview of Claim

The Supreme Court has repeatedly cautioned against "the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). So too have the Eleventh Circuit Court of Appeals and Florida's courts. *See, e.g.*, *Woods v. Dugger*, 923 F. 2d 1454 (11th Cir. 1991); *Shootes v. State*, 20 So. 3d 434 (Fla. 1st DCA 2009). "The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried 'by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial.'" *Woods*, 923 F. 2d at 1456-57 (citing *Irvin v.*

Dowd, 366 U.S. 717, 722 (1961) (citations omitted)). Additionally, "due process requires a trial court to safeguard against the intrusion of factors into the trial process that would tend to subvert its purpose." *Estes v. Texas*, 381 U.S. 532, 560 (1965) (Warren, J., concurring). "Judges are not free to disregard factors external to the evidence, such as the atmosphere in and around the courtroom, which may influence a jury's verdict." *Shootes*, 20 So. 3d at 438.

To prevail on a claim of the denial of a fair proceeding due to undue influences on the jury external to the evidence, Mr. Kearse must show actual *or* inherent prejudice. *Id.* (citing *Holbrook,* 475 U.S. 560; *Irvin*, 366 U.S. 717);[11] *see also Shootes*, 20 So. 3d 438-39. This claim is not susceptible to harmless error analysis,[12] and is fundamental error. *Id.* at 437-38. Although he is not required to show both actual *and* inherent prejudice under *Woods*, Mr. Kearse can do

[11] The precise counters of the actual and inherent prejudice tests are discussed *infra*.

[12] *See Woods*, 923 F.2d at 1460 ("[D]enial of a fair trial can never be harmless because the right is so fundamental to our notion of due process.") (citing *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)).

both if given a fair opportunity to establish his entitlement to relief at an evidentiary hearing.

C. Standard of Review

This Court reviews the summary denial of a successive Rule 3.851 motion *de novo*. *See Davis v. State*, 417 So. 3d 242, 247 (Fla. 2025). A summary denial will be upheld only "if the motion is legally insufficient or procedurally barred, or if its allegations are conclusively refuted by the record." *Sparre v. State*, 391 So. 3d 404, 405 (Fla. 2024). If a court determines that a claim is conclusively refuted by the record, it must attach the portion(s) of the record, or at least reference those parts of the record, that justify summary disposition. *See* Fla. R. Crim. P. 3.851(f)(5)(F).

If a successive motion falls outside of the 1-year time limitation under Rule 3.851, a defendant must establish diligence, *i.e.*, the reasons why the claim could not have been previously raised. *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009). If the motion and arguments of counsel make out a prima facie case alleging diligence, an evidentiary hearing is mandated. *Id.* at 528. ("Specifically, counsel informed the postconviction trial court during the [case management] hearing that investigators conducted computer searches to locate the

witnesses and traveled to Illinois in an attempt to find them. However, upon traveling to Illinois the investigators were unable to contact the witnesses. At the pleading stage, this information was sufficient to establish due diligence"); *Swafford v. State*, 679 So. 2d at 739 (at the pleading stage, counsel's claim that an affidavit amounted to newly discovered evidence combined with a statement that counsel was unable to locate a witness because no address was available was sufficient for the purpose of demonstrating that an evidentiary hearing was required). A bald conclusory allegation from the State that the defense had "years" to uncover what it claims to be new evidence is insufficient to justify denial of a hearing. *Id.* ("Our acceptance [that an evidentiary hearing is warranted on the issue of diligence] is based in part on the State's failure to assert, with regard to this issue, anything more than an allegation that defense counsel had years to find Lestz.").

D. The Resentencing Record

Prior to jury selection at Mr. Kearse's resentencing, counsel filed a Motion for Order Regulating Courtroom Spectators, arguing that Mr. Kearse would be deprived of a fair resentencing due to the presence of uniformed officers in the courtroom during the 1991 trial.

(R2T. 216-17; R2. 532-33). The court deferred ruling "until counsel believes that the situation exists that requires their ruling and we can discuss that out of the presence of everybody." (R2T. 225)[13]

Claire Hamblin Matthews was a juror at Mr. Kearse's resentencing. (R2. 1112). During voir dire, Matthews acknowledged handling "some insurance matters" for one of the prosecutors, David Morgan, and had spoken with him and his family over the phone and in person. (R2T. 860). Matthews also acknowledged "vaguely remembering something" about Mr. Kearse's case from the media, stating "I feel like there might be something else I should add to that, I don't know if this is the time or place to say it." (R2T. 866). The following exchange occurred:

> MR. UDELL: Okay. Is it something you learned about this case?
>
> MS. MATTHEWS: No, sir.
>
> MR. UDELL: Go on and tell us.
>
> MS. MATTHEWS: Yes, it is, but I just – in conversations

[13] Based on counsel's statement that the courtroom at Mr. Kearse's initial trial was packed with uniformed police officers, Mr. Kearse's initial 3.851 motion alleged that jury at his trial was subjected to improper influences. No evidentiary hearing was granted, and this Court found the claim legally insufficient. *Kearse v. State*, 969 So. 2d 976, 989 (Fla. 2007).

> with a family member last night, learned of another family member who was coming into town for the holidays only because he has to testify in a trial where a cop was killed and I have a feeling, and I'm assuming that it's possibly this trial, because I'm sure there aren't many trials going on. I don't know, I feel the need to tell you this.
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> MR. UDELL: Who's that person?
>
> MS. MATTHEWS: Should I give his name?
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> MR. UDELL: Please.
>
> MS. MATTHEWS: I only know his father-in-law's half brother and I haven't seen him in three years. His first name is Leo and last name Raulerson. Leo may be a nickname and another reason I feel related is because he's retired from the Fort Pierce Police Department.

(R2T. 867-68).

Mr. Morgan explained there was a law enforcement witness named "Les Raulerson," (R2. 868), after which Matthews was asked to explain how the discussion about Raulerson arose. (R2T. 868-69). After more discussion between Matthews and trial counsel, Matthews indicated she would not see Raulerson while he was in town for the Christmas holidays. (R2T. 870-71).

Matthews was again questioned about what she had learned about Mr. Kearse's case from sources outside of the courtroom when Mr. Kearse was initially tried:

> MS. MATTHEWS: Not in the last few days. I recall an incident that I think is this incident, I recall reading about it in the paper and hearing about it in media several years ago. I haven't heard of anything recently. I'm sorry if I didn't make that clear earlier.
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> * * *
>
> I just remember it was a cop in Fort Pierce and what I remember was that he was shot about 14 times, and that one thing – and one other kind of sticks out in my mind and, again, I feel kind of stupid because I don't know if it's the same incident that he had – tried to crawl away after he was shot a couple times. There was like a trial where he tried to get away. Again, I don't know if this is the same incident or not. Those two things stick out in my mind about the media.

(R2T. 1007-08). Matthews was "pretty definitive" about what she recalled about how the crime occurred: "Don't ask me why the 14 stuck out, right or wrong." (R2T. 1012). Notwithstanding whatever prior knowledge she recalled from reading media accounts, Matthews said she could be fair. (R2T. 1015-16).

Trial counsel moved to strke Matthews for cause "based upon her knowledge of the facts of the case and other statements which would indicate she could not be fair and impartial." (R2T. 1097). The court denied the cause challenge. (R2T. 1098). The defense later noted it had used its allotted peremptory challenges and requested additional ones in order to assert a peremptory against Matthews,

among others. (R2T. 1105, 1107-08). That request was denied and Matthews sat as a juror. (R2T. 1112).

E. New Evidence Changes The Picture

As Mr. Kearse alleged below, the signing of his death warrant on January 29, 2026, drew a great deal of attention in social media. A Facebook page "Slcscanner"[14] made a post titled "*Widow of Sgt. Danny Parrish Wants Shared Credit Recognized in Long Fight for Justice*." (WR. 603). The post outlined the efforts made by law enforcement agencies, the State Attorney, prosecutors, and Sgt. Parrish's widow to secure the signing of the death warrant for Mr. Kearse. A comment to that post read as follows:

Claire Hamblin Matthews

> ***I was a Juror at the second trial, for a possible resentencing of the young man that killed Danny.*** At the end of that 2nd trial, his death sentence remained. It was one of the hardest things I've ever done, but there was no doubt it was the right sentence. ***I'll never forget the respect and support shown to Danny in that courtroom. Every day, no matter how long the trial went, the back of the courtroom was filled with Leo's from every city and county in the state, so much***

[14] "Slcscanner" is a media/news company whose Facebook page, which posts news and other information about "what's going on in St. Lucie County," has some 142,000 followers.

> ***support and respect from his fellow Leo's. They would stand there for several hours, never wavering. I remember silently hoping that his family and friends would know how much he was loved.***

(WR. 603; 643) (emphasis added). The post was made on February 3, 2026. (WR. 603, 643).[15]

As Matthews's voluntary social media post makes clear, she is indeed the Claire Hamblin Matthews who served on Mr. Kearse's resentencing jury. Her voluntary post also makes clear that "every day," no matter "how long the trial went," the "back of the courtroom was filled with Leo's from every city and county in the state, so much support and respect from his fellow Leo's."[16] Matthews's voluntary post also specifically recalled that the law enforcement presence in the courtroom was "never wavering," with officers standing there "for several hours." The influence Matthews felt from the fact that the courtroom was "filled" with law enforcement officers "from every city

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[15] As he alleged below, a screenshot of Matthews's post was taken by Mr. Kearse's legal team at 10:42 p.m. on February 3, 2026, and Matthews's comment was posted an hour before the screenshot was taken (WR. 603). Curiously, the post was subsequently deleted. (WR. 603).

[16] Presumably, the use of the term "Leo's" is a reference to Law Enforcement Officers.

and county in the state"[17] is expressed in her statement that she would "never forget the respect and support shown to Danny in that courtroom" and that she "remember[ed] silently hoping that his family and friends would know how much he was loved."

F. Mr. Kearse's Allegations.

1. Matthews's Voluntary Social Media Revelations Could Not Have Been Previously Discovered By Mr. Kearse's Resentencing Or Postconviction Counsel

Mr. Kearse alleged below that Matthews's social media comments establish not just the presence of uniformed law enforcement officers "filling" the courtroom and showing their unwavering support for the victim during Mr. Kearse's resentencing but also that their presence created an atmosphere that prejudiced Mr. Kearse. (WR. 604). That the courtroom was "filled" with law

[17] That Matthews was able to discern—and specifically remember decades later—that the law enforcement officers were members of departments from "every city and county in the state" means that the officers were unformed. The law enforcement officers who wished to show support for the victim and his family could have attended the proceedings in civilian clothes but rather came in their unforms to no doubt "send an implied message to the jury" that Mr. Kearse should get the death penalty. *Long v. State*, 151 So. 3d 498, 502 (Fla. 1st DCA 2014).

enforcement officers "from every city and county in the state" and that at least one juror, Matthews, was influenced by their presence to such an extent that she would "never forget" it and was "silently hoping that [the victim's] family and friends would know how much he was loved" is not information that exists in the extant record nor is there anything in the record of the resentencing proceeding that could have led reasonably diligent counsel to further investigate. (WR. 604-05). Because the "the nature of the information" disclosed by Matthews in her social media post after Mr. Kearse's death warrant was signed could not have been discovered previously by Mr. Kearse's resentencing or postconviction counsel "absent voluntary disclosure from" Matthews herself, *Rivera v. State*, 2025 WL 3534064 at *2 (Fla. 2d DCA Dec. 10, 2025), Mr. Kearse argued that this claim fell outside of the 1-year time bar in Rule 3.851(d)(2)(A). (WR. 605). *See, e.g.*, *Martin v. State*, 322 So. 3d 25, 33-34 (Fla. 2021) (juror misconduct claim qualified as new evidence to surmount the 1-year time bar in Rule 3.851(d)(2)(A) because, as the State conceded, "Smith's juvenile adjudication and grandfather's murder were not discoverable absent voluntary disclosure from Smith himself or from the State").

Mr. Kearse also alleged that there was nothing in the extant record of Mr. Kearse's resentencing record to indicate that the courtroom was filled with uniformed offers from all over the state. (WR. 606). While it is true that resentencing counsel lodged a pretrial objection to prospectively prevent the unduly prejudicial influence of uniformed law enforcement officers in light of counsel's experience at Mr. Kearse's initial trial, (R2T. 216-17), the resentencing court did not address the objection because there was no evidence to suggest, at that time, that there was a concern (R2T. 225).

Mr. Kearse also contended below that should the State suggest that resentencing counsel could and should have later re-raised his objection once the testimony actually began, it may be that counsel "had no opportunity to object at the time the officers filed into the courtroom because he was unaware of what was occurring in the gallery behind him." *Shootes*, 20 So. 3d at 437; (WR. 605). Or it may have been that counsel, in the midst of the testimonial phase of a complicated capital resentencing, simply was distracted. In any event, he contended below that this type of error is fundamental, *Shootes*, 20 So. 3d at 438-39; (WR. 605), and to the extent the State may attempt to argue the instant claim is untimely by blaming

resentencing counsel for not revisiting his pretrial objection and/or putting on the record the nature and extent of the law enforcement presence in the courtroom, Mr. Kearse received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ward v. State*, 105 So. 3d 3, 5 (Fla. 2d DCA 2012) (remanding for evidentiary hearing in Rule 3.850 proceeding because allegations "raise a facially sufficient claim counsel was ineffective for failing to object to the presence of uniformed law enforcement officers").

For these same reasons, Mr. Kearse alleged that there could be no argument that this claim was barred because Mr. Kearse did not raise it in prior postconviction challenges. (WR. 606). Again, there is nothing in the record to suggest the presence of uniformed law enforcement officers from around the state in the courtroom during Mr. Kearse's resentencing, and there is no question that Matthews's social media post contained information that could only be discovered by her own voluntary disclosure. Only Matthews had this information, and it was solely within her power to choose if and when to disclose it. She chose to disclose it for the first time after Mr. Kearse's death warrant was signed, and there is nothing Mr. Kearse or his collateral counsel could have done to cause them to learn of

this information previously from Matthews because Mr. Kearse's counsel are prohibited from speaking to or interviewing jurors absent compelling justification and leave of court. *See Marshall v. State*, 854 So. 2d 1235, 1241-44 (Fla. 2003).

Finally, Mr. Kearse argued below that no adequate resolution of this claim (either on timeliness or the merits) can be made absent an evidentiary hearing. The information Matthews voluntarily disclosed in her social media post does not "inhere to the jury's verdict" but rather shows that an "external influence" on the jury that "need[s] to be investigated." *Pozo v. State*, 963 So. 2d 831, 834-35 (Fla. 4th DCA 2007) (reversing denial of motion to interview jurors where information did not "inhere to the jury's verdict" but rather was evidence showing that "influences external to the evidence presented during the trial may have influenced the verdict. Thus, this matter may be the subject of juror interview"). Matthews's remarks showed her "consciousness of external influences on [the jury] and their potential for affecting the verdict." *Id.* at 837.

2. The State's Response

The State presented a scattershot of reasons why the lower court should summarily Mr. Kearse's claim. (WR. 769).

The State first misconstrued Mr. Kearse's claim, contending that it was barred because "Kearse previously alleged in original 2004 postconviction motion . . . that uniformed officers were in the courtroom during the trial and they were from multiple agencies statewide." (WR. 772). This of course is wrong; the current claim has nothing to do with Mr. Kearse's original trial.

As to diligence, the State contended that "Kearse does not offer what he did to uncover evidence of this claim for his original postconviction motion or after that," fatuously suggesting that Mr. Kearse "himself was a witness to his own 1997 penalty phase, as were family members, friends, and defense experts." (WR. 773). However, Mr. Kearse was the defendant in the case, suffers from intellectual disability among other mental health obstacles, and was undoubtedly facing the judge, the jury, and testifying witnesses during the proceedings. The State pointed to (and still cannot point to) anything in the record to establish that Mr. Kearse either turned around or could otherwise have observed the presence of uniformed law enforcement officers from around the state in the courtroom; had he done so he would no doubt have been called out for his disinterest in the proceedings or accused of glaring at members of the victim's

family or other spectators.

As to Mr. Kearse's family members, friends, and defense mental health experts, what they may or may not have observed in the gallery as they were testifying is not in this record, nor is there any evidence to suggest that they would even know that a legal claim could be made based on the presence of uniformed officers in the courtroom. Under the State's theory, counsel—be it trial, resentencing, or collateral—have an obligation to devote their limited time and resources to asking every single witness in every single case about every single possible legal claim available in the panoply of legal claims to ascertain whether there might possibly be something they should be aware of. This is unreasonable and under no definition of reasonable and due diligence is this be required.[18] The only way to test the State's hypothesis about who could have seen that the courtroom was filled with uniformed law enforcement officers from

[18] Due diligence "does not require the maximum feasible diligence, but only 'due,' or reasonable diligence." *Aron v. United States*, 291 F. 3d 708, 712 (11th Cir. 2002). "Due diligence does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Id.*

around the state is at an evidentiary hearing.

The State's argument about diligence is also mystifying given its explicit denial that there were uniformed officers from around the state in the courtroom during Mr. Kearse's resentencing. *See* (WR. 903-04) (prosecutor's argument that "the inescapable conclusion" was that this issue was not previously raised "because it's not the case" that the courtroom was filled with uniformed law enforcement officers"; hypothesizing that Matthews's "perception . . . could have been bailiffs standing in the back of the room," concluding that "I find it hard to believe that the courtroom was packed with people standing in the back of the room").

The State also argued that Mr. Kearse's ineffective assistance of counsel claim was "legally insufficient as pled" and barred because he had previously raised a *Strickland* claim. (WR. 774). This argument will be addressed *infra*.

Finally, the State argued that Mr. Kearse's claim was meritless because Matthews's post "does not show juror misconduct" and her comments about how hard her job was "inhere in the verdict." (WR. 775). Mr. Kearse never argued juror misconduct and the State's argument that her statements "inhere in the verdict" is, as explained

infra, simply wrong as a matter of law.

3. The Lower Court's Denial

The lower court summarily denied this claim as untimely, not based on new evidence, procedurally barred, and meritless. (WR 923). Although it seemingly understood that Mr. Kearse's allegations concerning the improper external influence on the jury arose from Juror Matthews's social media post, the lower court's order evinces a repeated and baffling lack of acknowledgement that **Mr. Kearse's challenge is to his resentencing, not his 1991 trial**.

First, the lower court determined (wrongly) that the claim of uniformed officers in the courtroom was known since his 1991 trial and 1996 resentencing proceeding, citing to this Court's 2007 opinion affirming the summary denial of Mr. Kearse's postconviction claim of external influences *at his original trial*. (WR. 924) (citing *Kearse v. State*, 969 So. 2d 976, 989 (Fla. 2007)). Once again, Mr. Kearse's current challenge has nothing to do with his 1991 trial no matter how many times the State or the lower court stubbornly conclude otherwise. The lower court inexplicably went on to conclude that Mr. Kearse "does not explain nor excuse his failure to" develop this claim previously because "Kearse had his trial counsel's 1996

account *of who was in the courtroom during the 1991 trial*," at which Mr. Kearse was present along with other family members, friends and defense experts. (WR. 924-25). Again, this claim is not about Mr. Kearse's 1991 trial.

Next, the lower court procedurally barred the claim, *again* referencing the 1991 trial. (WR. 924). At the risk of sounding like a broken record, this current claim has nothing to with the 1991 trial.

Lastly, the lower court found the claim meritless because Mr. Kearse's "interpretation" of Matthews's social media post is "purely speculative" and, continuing its insistence that this claim is about the 1991 trial, concluded that Matthews's post "adds no support for *this rejected claim*." (WR 925) (emphasis added). This claim was not previously rejected, and Mr. Kearse is not "interpreting" any of Matthews's statements. They speak for themselves and Mr. Kearse's allegations must be accepted as true. If they are "speculative" then an evidentiary hearing, not summary rejection, was warranted.

As a final word on the lower court's order, Mr. Kearse notes that it failed to address his claim of ineffective assistance of counsel.

4. An Evidentiary Hearing is Warranted.

The test for actual prejudice on this claim requires a defendant

to establish "some indication or articulation by a juror or jurors that they were conscious of some prejudicial effect." *Shootes,* 20 So. 3d at 434. The test for inherent prejudice does not require a showing that "jurors actually articulated a consciousness of some prejudicial effect," but rather "whether 'an *unacceptable risk is presented* of impermissible factors coming into play.'" *Pozo*, 963 So. 2d at 837 (quoting *Holbrook*, 475 U.S. at 570) (emphasis added). The inherent prejudice test requires the court to consider two factors: 1) whether there is an "impermissible factor coming into play" and 2) whether it poses an "unacceptable risk." *Id.* A risk becomes unacceptable when there is a "probability of deleterious effects," *Estelle v. Williams*, 425 U.S. 501, 504 (1976), and "[w]hen such a claim is raised, a case-by-case approach is required to allow courts to consider the 'totality of the circumstances.'" *Long v. State*, 151 So. 3d 498, 501 (Fla. 1st DCA 2014) (citing *Shootes*, 20 So.3d at 548 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966))). This case-specific analysis must consider "[t]he prejudice [that] arises from the presence of uniformed [law enforcement] officers in the context of a trial being held in the midst of an angry community." *Woods*, 923 F.2d at 1459.

Mr. Kearse has established, at a minimum, a prima facie case

of actual prejudice. By her own account, Matthews's comments, accepted as true, reveal far more than a mere "indication" or "articulation" of "consciousness of some prejudicial effect." *Ward,* 105 So. 3d at 5; *Pozo*, 963 So. 2d at 837. She acknowledges a concrete awareness of the prejudicial effect: she would "never forget the respect and support shown to Danny in that courtroom," there was "so much support and respect" from his fellow law enforcement officers, who would "stand there for several hours, never wavering," and "remember[s] silently hoping that his family and friends would know how much she was loved." (WR 643). These statements demonstrate actual prejudice and go even further than a mere "indication" or "articulation" of "some prejudicial effect."[19] *Shootes*,

[19] In evaluating prejudice, the Court must also consider that the jurors were already subjected to a barrage of improper remarks by the prosecutor. For example, this Court condemned the prosecutor's statement in opening argument urging the jurors to show Mr. Kearse "the same mercy he showed Officer Parrish." *Kearse*, 770 So. 2d at 1129-30. The prosecutor also improperly commented to the potential jurors in jury selection that the case was back for "a proceeding to recommend death." *Id.* As to the "no mercy" argument made by the prosecutor during opening statement, the dissenting justices noted that the comments "set the course forth entire proceeding" and it was therefore "difficult to say that the prosecutor's final words had no effect on the jurors' minds." *Id.* at 1144 (Anstead, J., dissenting).

20 So. 3d at 438.

Mr. Kearse also made out a prima facie case of inherent prejudice. Matthews's comments demonstrate that "an unacceptable risk [of] impermissible factors [came] into play" at Mr. Kearse's resentencing, *Woods*, 923 F.2d at 1459 (quoting *Holbrook*, 475 U.S. at 570) (first alteration in original), and while "presumed prejudice rarely occurs and 'is reserved for extreme situations,'" *id.* at 1459 (quoting *Bundy v. Dugger*, 850 F.2d 1402, 1424 (11th Cir. 1988)), Mr. Kearse's case "is one of those 'extreme' cases." *Id.* Like in *Woods*, where "[v]irtually every seat was occupied," "several people were standing in the back of the courtroom," and "half of the spectators appear to be wearing prison guard uniforms," *id.* at 1458, Matthews's comments, accepted for their truth, establish that the law enforcement presence at Mr. Kearse's resentencing was even more prejudicial than in *Woods*. Not only were there uniformed Fort Pierce Police present, "the back of the courtroom was filled with Leo's from every city and county in the state." (WR 643). In addition to the number of uniformed officers, their conduct also made an impression: "They would stand there for several hours, never wavering." (WR. 643). There can be no question that the uniformed

officers from around the state filled the courtroom at Mr. Kearse's resentencing "to send an implied message to the jury" that Mr. Kearse should receive the death penalty. *Long*, 151 So. 3d at 502; *see also Woods*, 923 F.2d at 1459-60 ("The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. . . . The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.").

As in *Woods*, some of the uniformed law enforcement officers filling the courtroom may have been witnesses at Mr. Kearse resentencing. However, Matthews's social media post makes clear that there were uniformed law enforcement officers "from every city and county in the state." In any event, "[t]he prejudice does not depend on whether the uniformed guards were witnesses or not. The prejudice arises from the presence of the uniformed corrections officers in the context of a trial being held in the midst of an angry community." *Woods*, 923 F.2d at 1459.

Additionally, Matthews's statements in her social media post do not "inhere in the verdict." *See, e.g.*, *Reaves v. State*, 826 So. 2d 932, 943 (Fla. 2002) ("any jury inquiry is limited to allegations which

involve an overt prejudicial act *or external influence*") (emphasis added).

To the extent that the State will continue to argue that Mr. Kearse's claim is barred because resentencing counsel should have made it known to the court that the courtroom was filled with uniformed law enforcement officers from around the state, Mr. Kearse received ineffective assistance of counsel. *See Strickland*, 466 U.S. 668. Had counsel alerted the court to the presence of the uniformed officers, the issue would have been addressed by the court or at least preserved for appeal. But counsel, for reasons unknown at this point without an evidentiary hearing, did not. An evidentiary hearing is required.

Mr. Kearse is entitled to a new sentencing proceeding free from improper influences on the jurors making a life-or-death decision and given the wrongful manner in which this claim was summarily denied below, an evidentiary hearing and a stay of execution are warranted. "A fair trial is, fundamentally, a trial free from 'influence or domination by either a hostile or unfriendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process.'" *Long*, 151 So. 3d at 502 (quoting

Cox v. Louisiana, 379 U.S. 559, 562 (1965); *Frank v. Mangum*, 237 U.S. 309 (1915)).

ARGUMENT II

The Lower Court Erred In Denying Mr. Kearse's Motion To Interview Juror Matthews.

A. Standard of Review

A trial court's decision on a motion to interview jurors is reviewed for abuse of discretion. *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009). The determination whether there has been a sufficient showing of "good cause" for not filing the motion within 10 days after the verdict[20] is factual and reviewed *de novo*. *Bates v. State*, 398 So. 3d 406, 408 (Fla. 2024).

Here, this Court is left without a factual record to review because the lower court failed to make any findings with regard to the "good cause" exception to Rule 3.575 except to summarily conclude that Mr. Kearse had not established it, citing to this Court's inapposite and fact-specific decision in *Bates*, 398 So. 3d at 407.

[20] *See* Fla. R. Crim. P. 3.575 (requiring 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").

(WR. 958).[21]

Mr. Kearse not only made out a prima facie showing of good cause why his motion to interview Juror Matthews was not filed within 10 days of the verdict, but he also established his entitlement to interview Juror Matthews. Because the lower court misapprehended the issue, misapplied precedent, and made factual determinations that are barren of any record support, this Court must reverse and direct that an interview of Juror Matthews be scheduled.

B. Mr. Kearse's Motion

"[A] party must have reason to believe the verdict may be subject to legal challenge to warrant a juror interview." *Foster v. State*, 132 So. 3d 40, 65 (Fla. 2013). To explain his reasons for believing the death verdict in his case may be subject to challenge, Mr. Kearse

[21] In *Bates*, the defendant sought to interview a juror who served at his 1983 trial, alleging that he learned of a familial connection between one of the jurors and a member of the victim's family. The Court found no good cause for the belated filing of the motion to interview because Bates "does not say when he discovered the alleged family relationship between the juror and the victim." *Bates*, 398 So. 2d at 407-08. There is no absence of factual allegations in Mr. Kearse's case.

pointed to his 3.851 motion, which alleged that his resentencing jury was improperly influenced by external factors and that the claim was premised on Juror Matthews's recent social media post. (WR 743-44; 747). He did so not only to put the lower court on notice that there was a pending colorable claim of improper influence, *see Foster*, 132 So. 3d 40, but also to avoid the scurrilous "fishing expedition" accusation from the State, which it made anyway. (WR 817). Mr. Kearse also limited his request to seek to interview only Matthews—and not the other jurors—for the same reason.

The motion to interview Matthews detailed that Matthews made the Facebook post on February 3, 2026, that Mr. Kearse's counsel took a screenshot of the post on the evening of February 3, that Matthews's post was subsequently deleted at some point the following day. (WR 744). The motion also noted that one of the Assistant Attorneys General representing the state in Mr. Kearse's case "has posted public comments on a Facebook posting of a news article about the signing of Mr. Kearse's death warrant" in which that individual "denigrated the criminal defense bar." (WR 744).[22] This

[22] Regrettably, the disparagement of defense counsel has extended to Mr. Kearse's counsel specifically. At the case

allegation was important because, as Mr. Kearse's counsel argued at the case management hearing, Matthews's post was subsequently deleted from Facebook, and the fact that an Assistant Attorney General assigned to Mr. Kearse's case had a public presence on Facebook, the same social media that Matthews used to post her comments, "raises the question of whether there was some sort of misconduct in contacting the juror." (WR 899-900).

Mr. Kearse's motion then detailed the basis for his request for the court to order an interview of Juror Matthews, (WR 747), and argued, in the alternative, that "discovery is allowed in postconviction

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management hearing, an Assistant Attorney General openly accused Mr. Kearse's counsel of "*wait[ing]* over 30 years . . . *to find a juror who makes a post after the signing of the death warrant, and then to raise this claim*." (WR 892-93) (emphasis added). Matthews, for reasons only she can tell us, decided to voluntarily post her comments on a social media platform days after Mr. Kearse's death warrant was signed. She did nothing wrong, nor did Mr. Kearse's counsel, who by pure happenstance, saw the post, recognized that it was from a juror at Mr. Kearse's resentencing, and then noticed that the post had been later deleted. Mr. Kearse unequivocally denies any of the baseless accusations (and the not-so-subtle insinuations flowing from them) that he "waited" for 30 years (*i.e.* that he engaged in sandbagging a claim) to "find a juror who makes a post after the signing of the death warrant" (*i.e.* that he had some contact or collusion with Matthews that resulted in her posting her comment after Mr. Kearse's death warrant was signed).

proceedings based on a showing of good cause." (WR 748) (citing *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994)).

At the case management hearing, Mr. Kearse also noted that the need to interview Matthews was even more acute because "the State somehow is questioning whether there was [sic] officers in the courtroom." (WR 900). Indeed, the State *did* openly challenge the veracity of Williams's social media statement concerning the fact that the courtroom was filled with uniformed law enforcement officers from around the state, arguing that "the inescapable conclusion" was that this issue was not previously raised "because it's not the case" that the courtroom was filled with uniformed law enforcement officers." (WR 903). The State went further, hypothesizing that Matthews's "perception . . . could have been bailiffs standing in the back of the room," concluding that "I find it hard to believe that the courtroom was packed with people standing in the back of the room." (WR 903-04). These statements alone warrant reversal of the denial of the motion to interview Matthews, as Mr. Kearse's counsel argued in response to the State. (WR 905).

C. The State's Opposition

The State's written response misrepresented Mr. Kearse's claim,

failed to accept any of his allegations as true, and instead manufactured speculative factual assertions belied by the record.

First, the State argued that Mr. Kearse was seeking to interview Matthews to "gauge" her reactions to the law enforcement presence and to "ask" her to "recall" her deliberations. (WR 808, 816). This was false, *see* (WR 747-48). Mr. Kearse was not contemplating questioning Matthews "on whether or not [she] was impartial." (WR 880, 901).

Next, the State argued that Mr. Kearse failed to explain the delay in filing his motion. (WR 808). Again, this was absolutely false. *See* (WR 743-44) (explaining dates and times of Matthews's voluntary social media post, when Mr. Kearse's collateral counsel saw the post, and when Mr. Kearse's counsel noticed that the Matthews post had been deleted).

The State also conjured up unsupported factual allegations to counter Mr. Kearse's. For example, it hypothesized that the overwhelming presence of uniformed law enforcement officers from around the state at Mr. Kearse's resentencing "would have been fully evident to all involved in the trial itself." (WR 814). If it was so "evident" one would imagine the State would cite to the portion or

portions of record that support its argument. Yet it cited to **nothing** in the record to substantiate this allegation. It also argued that it was "obvious" that Mr. Kearse "has been aware of any presence of law enforcement at the trial since the time of his trial," (WR 814), but aside from confusing Mr. Kearse's trial from his resentencing proceeding, it cited to **nothing** to support the allegation concerning Mr. Kearse's resentencing. And, as noted above, the State speculated that perhaps Matthews's was referring to "bailiffs standing in the back of the room," because the prosecutor personally found "it hard to believe that the courtroom was packed with people standing in the back of the room." (WR 903-04).

The State also injected confusion into the issue, arguing that a motion to interview jurors filed during capital postconviction proceedings "is further subject to the procedural limitations of Florida Rule of Criminal Procedure 3.851." (WR 813) (citing *Bates*, 398 So. 3d at 406 n.1). Mr. Kearse is not entirely sure what this means but in any event this Court said no such thing in *Bates*.

What the *Bates* Court said in footnote 1 of its 2024 opinion was that Bates had styled his motion for a juror interview as one arising under Fla. R. Crim. P. 3.575, not Fla. R. Crim. P. 3.851. *Bates*, 398

So. 3d at 406 n.1. Despite the fact that Bates did not style his motion under Rule 3.851 (because a Rule 3.851 motion had apparently not been filed), "that is how we review it." *Id.* In other words, the Court did not hold that a Rule 3.575 motion is "subject to the procedural limitations" of Rule 3.851.[23] Rule 3.575 governs motions to interview jurors and contains its own procedural limitations separate and apart from those in Rule 3.851. Mr. Kearse satisfied the rule's "good cause" requirement.

D. The Lower Court's Denial Must Be Reversed

The lower court cited four bases for denying Mr. Kearse's motion but failed to elaborate in any way as to any of them.

First, it found that the motion was not filed within 10 days of the verdict and that Mr. Kearse had not established "good cause" for the belated filing (WR. 958). The court alternatively concluded, based on a misreading of *Bates* that the State encouraged, that Mr. Kearse "failed to satisfy any of the exceptions to the one-year time limit of rule 3.851(d)(1)." (WR. 958).

[23] Rule 3.851 is not even addressed in the body of the *Bates* opinion, the solitary reference to it being in footnote 1.

Second, the court, parroting the inapposite legal precedent from the State's response, found that Mr. Kearse failed to contain "sworn allegations. (WR. 958) (quoting *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001)).

Third, the court determined that "[a]t best, Juror Matthews social media post reports **what the Defendant already knew as established by the record, uniformed officers were in the courtroom and were from multiple agencies across the state.**" (WR. 959) (emphasis added).

Fourth, cherry-picking portions of Matthews's social media post and relying on a statement that Mr. Kearse never proffered as a reason to warrant an interview, the lower court concluded that the fact that Matthews "believed her decision was a hard one, but proper, does not show misconduct or prejudice, and is not subject to a juror interview" (WR. 959) (citing *Marshall v. State*, 854 So. 2d 1235, 1240 (Fla. 2003)). Mr. Kearse actually agrees with this statement; the problem is that this is not the part of Matthews's post that gives rise to the improper influence claim. The relevant portions of Matthews's post were either challenged factually or ignored.

1. Timeliness/Good Cause

The lower court erred in concluding that Mr. Kearse's Rule 3.575 motion was untimely because it failed to satisfy the time limits of Rule 3.851(d)(1). (WR. 958). This is wrong as a matter of law. Rule 3.575 provides that a motion to interview a juror must be filed within 10 days of rendition of a verdict "unless good cause is shown for the failure to make the motion within that time." The "good cause" requirement is separate and apart from any of the time limitations of Rule 3.851(d); the former governs the procedures for seeking a juror interview, while the latter governs the procedures for raising a claim in a postconviction motion. This Court has never conflated the requirements of the two rules in the manner suggested by the State and adopted by the trial court.

The timing of Mr. Kearse's motion turns on his showing of good cause. Here, too, the lower court's order fails. Notably, the lower court did not determine that Mr. Kearse could have ascertained the information from Matthews sooner or was otherwise indiligent; rather, it concluded that Mr. Kearse had not established good cause because Matthews's post "reports *what the Defendant already knew as established by the record*, uniformed officers were in the

courtroom and were from multiple agencies across the state." (WR. 959) (emphasis added). Yet the lower court failed to provide any citation to the record for the proposition that the record "established" that uniformed officers from around the state had filled the courtroom during Mr. Kearse's resentencing much less that this was a fact about which Mr. Kearse "already knew." The reason that the court below did not cite any part of the record is that there *is* no part of the record to support this factual assertion.[24]

In her Facebook post, Matthews wrote that "[e]very day . . . the back of the courtroom was filled with Leo's from every city and county in the state . . . They would stand there for several hours, never wavering." (WR 747). The lower court failed to engage at all with

[24] To the extent that the lower court's order could be viewed as an implicit determination that Mr. Kearse's counsel were not diligent in failing to discover the facts regarding this issue at an earlier time, an evidentiary hearing is required. Due diligence "does not require the maximum feasible diligence, but only 'due,' or reasonable diligence." *Aron v. United States*, 291 F. 3d 708, 712 (11th Cir. 2002). *Accord Holland v. Florida*, 560 U.S. 631, 653 (2010). "Due diligence does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Id.*

Matthews's actual social media statements concerning the law enforcement presence in the courtroom at Mr. Kearse's resentencing, opting to ignore them and parrot back the unsupported factual statements made by the state that the "record" established the presence of uniformed law enforcement officers from around the state, and that Mr. Kearse "knew" it at the time. But Mr. Kearse's allegations in his Rule 3.575 motion must accepted as true if the court does not grant a hearing. *See Joe v. State*, 305 So. 3d 561, 562 (Fla. 4th DCA 2020); *Gray v. State*, 72 So. 3d 336, 338 (Fla. 4th DCA 2011). By not accepting Mr. Kearse's allegations as true, the lower court abused its discretion.

2. Lack of "sworn" allegations

As an independent reason for denying Mr. Kearse's motion, the court found that the motion did not contain "sworn allegations." (WR. 958) (quoting *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001)). This legal conclusion is based on a misreading of *Johnson*, a case pre-dating the enactment of Rule 3.575. As this Court has explained, "Rule 3.575, which became effective in January 2005, establishes the procedure for seeking juror interviews where a party has reason to believe that the verdict may be subject to legal challenge." *Israel v.*

State, 985 So. 2d 510, 522 (Fla. 2008). Before Rule 3.575 was adopted, the Court did require an attorney to make "sown allegations," *id*. at 523, but after Rule 3.575 was adopted in 2005, it did away with that requirement. Mr. Kearse's motion fully complied with the rule. *See Israel*, 985 So. 2d 510; *see also Pozo v. State*, 963 So. 2d 831, 835 (Fla. 4th DCA 2007) (Rule 3.575 "does not require the filing of sworn affidavits in order to interview a juror, and in this respect the rule digresses from prior case law. . . [a]ll that is required under the rule is a statement of the reasons why the verdict may be subject to challenge") (citing *Johnson*, 804 So. 2d 1218); *Gray v. State*, 72 So. 3d 336, 337 (Fla. 4th DCA 2011) ("Disparity from previous case law, Rule 3.575 does not require the filing of sworn affidavits in order to interview a juror").

3. Inhering in the verdict

The lower court also abused its discretion in denying Mr. Kearse's motion to interview Matthews because "[t]he fact that Matthews believed her decision was a hard one, but proper, does not show misconduct or prejudice, and is not subject to a juror interview." (WR. 959).

While Mr. Kearse agrees that this Court has held that juror

interviews are not permitted relative to any matter that inheres in the verdict itself or relates to the jury's deliberations, *Reaves v. State*, 826 So. 2d 932, 943 (Fla. 2011), Mr. Kearse was not requesting to interview Matthews on any impermissible matter or an issue that inhered in the verdict. Mr. Kearse's constitutional claim is not premised on Matthews's voluntary disclosure about how the difficulty or propriety of her decision, nor is his claim one of juror misconduct, as Mr. Kearse made clear at the case management hearing. (WR. 901-02).

To establish a claim of undue external influence on a juror or jurors, a defendant must show actual or inherent prejudice. *See Woods v. Dugger*, 923 F. 2d 1454, 1459 (11th Cir. 1991); *Shootes v. State*, 20 So. 3d 434, 438 (Fla. 1st DCA 2009); *Ward v. State*, 105 So. 3d 3, 5 (Fla. 2d DCA 2012). The actual prejudice test requires a defendant to show "some indication or articulation *by a juror or jurors* that they were conscious of some prejudicial effect." *Shootes*, 20 So. 3d at 438 (emphasis added). Inherent prejudice is shown if a defendant establishes "that there was an unacceptable risk of impermissible factors coming into play. *Id.* "The appearance of a 'considerable number' of police officers in unform may present such

an unacceptable risk of impermissible factors." *Id.* at 439 (quoting *Woods*, 923 F. 2d at 1459).

The information Mr. Kearse is seeking from Matthews does not inhere in her verdict but is required to assess either actual prejudice (articulation by a juror that "they were conscious of some prejudicial effect) or inherent prejudice ("unacceptable risk of impermissible factors coming into play") to establish a claim of undue external influence. As this Court has explained, "any jury inquiry is limited to allegations which involve an overt prejudicial act *or external influence*," *Reaves*, 826 So. 2d at 94; this is precisely the situation in Mr. Kearse's case, and the lower court erred in concluding that the information Mr. Kearse was seeking information that inhered in Matthews's verdict.

ARGUMENT III

The Lower Court Abused Its Discretion In Denying Kearse's Access To Public Records In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

Mr. Kearse has the duty to seek and obtain all relevant public records in his case, and all records that are reasonably calculated to lead to the discovery of admissible evidence, as the failure of

collateral counsel to do so will result in a procedural default assessed against his client. *Porter v. State*, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation rests with the State to furnish the requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). This Court has held that when the State's failure to disclose public records results in a capital postconviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the postconviction motion should be denied or dismissed. *Id.* at 481 ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act.").

A. Kearse's Public Records Litigation Under Warrant

Mr. Kearse focuses his argument on the denial of three Rule 3.852(i) demands filed on Monday, February 9, 2026, requesting communication between three state agencies and Juror Matthews.

Counsel discovered Juror Matthews's social media comment, wherein she voluntarily discussed having been impacted by uniformed officers in the courtroom during Mr. Kearse's resentencing, on Tuesday, February 3, 2026 at 10:42 p.m., which was after the public records demands were filed pursuant to the

court's scheduling order. While the content of Juror Matthews's post became the basis for a new claim establishing Mr. Kearse's death sentence was obtained in violation of the United States Constitution, it did not immediately necessitate demanding additional public records.

After the public records hearing which was held the following afternoon, Wednesday, February 4, 2026, counsel revisited Juror Matthews's comment and discovered it had been deleted. In scrolling the post, counsel saw that the victim's widow, who is an employee of the SLCSO had responded to many of the comments directly before and after Juror Matthews's comment.[25] Counsel also discovered that one of the Assistant Attorney's General on this case had commented on another post regarding Mr. Kearse's execution warrant, on the same social media platform. This became the basis for requesting additional public records solely as to Juror Matthews from SLCSO, SAO19, and the AG. On Monday, February 9, 2026, Mr. Kearse requested the following records:

[25] Mr. Kearse's team also noticed that at least one other employee from the SAO19 had reacted to the original Slcscanner post at issue with the "Care Emoji."

> All 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 [relevant agency] [. . .] and Claire H. Matthews, WF, DOB: 12/17/1959.

(WR. 596, 579, 589). Mr. Kearse identified current or former employees of the AG to include "attorneys, investigators, and victim advocates," of SAO19 to include "prosecuting attorneys, investigators, and victim advocates," and SLCSO to include "officers, investigators, and victim advocates." (WR. 596, 579, 589).

The AG objected that the demands were untimely because they were filed outside of the scheduling order, overly broad, and did not relate to a colorable claim. (WR. 801). SLCSO and SAO19 objected, both arguing that the demands were untimely, because Mr. Kearse could have investigated this issue after his resentencing, and that the records requested did not relate to a colorable claim. (WR. 821, 838).

The lower court denied Kearse's access to the public records, ruling that the demands were untimely because they were made outside of the scheduling order, and that the demands "are overly broad and are not reasonably calculated to lead to a colorable claim of relief given their speculative nature." (WR. 958).

The lower court erred in denying access to the files and records in Mr. Kearse's case to which all other individuals are able to routinely obtain and that he is being deprived of his rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

B. "[A]ccess to public records is an essential ingredient in any meaningful postconviction review." *Sims v. State*, 753 So. 3d 66, 71 n.10 (Fla. 2000) (Anstead, J., concurring).

Article I, section 24, of the Florida Constitution codifies the fundamental right of access to public records for "[e]very person"—"regardless of whether that access is sought by a death row inmate, a disinterested citizen or a member of the media." Art. I, § 24(a), Fla. Const.; *Sims v. State*, 753 So. 3d 66, 71 (Fla. 2000) (Anstead, J., concurring). While this "'self-executing' right to open records is enforced through the Public Records Law, chapter 119 of the Florida Statutes" for all other citizens, *Rhea v. Dist. Bd. Trs. of Santa Fe College*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), this Court promulgated Rule 3.852 to govern the production of public records for capital postconviction defendants. Fla. R. Crim. P. 3.852(a).

Rule 3.852, however, "was never intended to, and, indeed, [can]not, diminish a citizen's constitutional right to access to public records." *In re Amends. to Fla. R. Crim. P.–Cap. Postconviction Recs. Prod.,* 683 So. 2d 475, 477 (Fla. 1996) (Anstead, J., specially concurring); *Sims*, 753 So. 3d at 71-72 (Anstead, J., concurring). Rather, the rule was designed "[b]ased on the broad public records production authorized under chapter 119," and meant "to promote the prompt and efficient processing of capital cases in a fair, just, and constitutionally sound manner." *In re Amends. to Fla. R. Crim. P. 3.851, 3.852, et. seq.*, 797 So. 2d 1213, 1216-17 (Fla. 2001).

"[A]ccess to public records is an essential ingredient in any meaningful postconviction review," *Sims*, 753 So. 3d at 71 n.10 (Anstead, J., concurring), and in safeguarding a death-sentenced individual's due process rights under both the federal and state constitutions. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Rule 3.852 was not created to preclude access to records or hinder a capital postconviction litigant from thoroughly investigating their case. The rule was created to eliminate undue delay while still "maintaining quality and fairness." *Amendments to Fla. R. Crim. P.*, 797 So. 2d at 1216.

The setting of an execution date does not vitiate these fundamental rights, as "[t]he language of section 119.19 and of rule 3.852 clearly provides for the production of public records *after* the governor has signed a death warrant." *Sims*, 753 So. 3d at 70. "It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provides shall be exempted from its operation." *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122, 202 (1819) (per Marshall, C.J.) "[T]he courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 58 (1868); *see also Kungyz v.United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (calling it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.").

"[E]xecution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), and the need for absolute transparency is at its apex when the State "tinker[s] with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1130

(1994) (Blackmun, J., dissenting). Precluding access to records is antithetical to "[o]ur system of open government [that] is a valued and intrinsic part of the heritage of our state." Florida Office of the Attorney General, Government-in-the-Sunshine Manual, p. xii (2025 ed., Vol 47).

i. The Lower Court Erred In Determining The Demands Were Untimely.

The lower court denied Mr. Kearse's access to the requested records, in part, because the demands were filed outside of the scheduling order and "[a]t no time did the Defendant seek leave of Court to file the late demand." (WR. 957). The court's finding, in a single sentence, demonstrates the cruelty imbedded in the State's fire-drill approach to warrant litigation, and resultantly supports Mr. Kearse's argument that he has been denied due process and a meaningful access to be heard during this shortened warrant litigation period.

Mr. Kearse alerted the lower court in *seven* separate pleadings that his lead counsel was placed in an untenable situation when counsel's father was transferred to hospice care with less than 48

hours to file Mr. Kearse's Rule 3.851 motion.[26] The lower court premised its ruling denying these critical public records on counsel's failure to move for leave of court to file pleadings outside of the scheduling order after counsel repeatedly alerted the court that his personal situation strained the bounds of his ethical obligations to ensure Mr. Kearse received due process and a meaningful review. Counsel told the court that he could not effectively represent Mr. Kearse under these circumstances. It is unfathomable that the lower court would deny Mr. Kearse's demands for counsel's failure to move for leave of court to file additional public records demands in these circumstances.

Notwithstanding, Rule 3.852(i) does not contemplate a time frame for filing and Mr. Kearse showed good cause to request the records when he did. The demands for public records were filed 4 days after counsel learned Juror Matthews's comment was deleted. Kearse made his demand for additional records well within the year

[26] CCRC-South filed five pleadings in circuit court explaining lead counsel's circumstances and expressing concerns as to Mr. Kearse's access to effective representation. Mr. Kearse also served the lower court on the two pleadings filed in this Court.

contemplated for newly discovered evidence claims.

The court's rigidity in only considering litigation that strictly adheres to the scheduling order is incongruent with the real-life logistical demands of warrant litigation. Counsel is not in control of newly discovered evidence and these proceedings are not static. *See State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001) (evidence unknown at trial as to Mr. Mills' culpability in relation to a codefendant, was discovered during warrant proceedings, would have been admissible at trial, "if only for impeachment," and "would have probably produced a different result at sentencing").

Counsel had no way of knowing that Juror Matthews would make the comment on social media and no way of knowing that she would remove her comment. Counsel learned of Juror Matthews's comment after the public records demands were filed and learned that the post had been deleted, *while in the midst of making imminent end-of-life care decisions about his father*, after the public records hearing was held. Counsel requires time to assess new information and make decisions about the litigation strategy, all while working on the other various moving parts of warrant litigation. Moreover, as has been thoroughly documented throughout these proceedings,

Juror Matthews's social media comment and subsequent removal came about just as lead counsel became unavailable, and has remained so since. As other attorneys, with less knowledge about the case, were tasked with assisting, they required adequate time to assess the newly discovered information.

Although this Court granted Mr. Kearse's request to modify the scheduling order by 72-hours so that he would have additional time to file his claims, the lower court pushed Mr. Kearse's deadline only 48 hours. The court then gave itself an additional 24 hours to its final ruling that was not provided in its original scheduling order. Mr. Kearse timely filed his Rule 3.851 motion simultaneously with the demands for public records the following day. Under this Court's modified scheduling order, there remained seven days for circuit court proceedings to address Mr. Kearse's records demands.

Capital litigants are permitted to raise newly discovered evidence claims and to challenge their convictions and death sentences when a new right is established for the very reasons Mr. Kearse has presented. As is the case here, the court is now aware that Mr. Kearse's death sentence was obtained in violation of the Eighth Amendment and he falls within a categorical bar to execution.

ii. The Lower Court Erred in Denying Kearse's Demands as Overly Broad and Vague.

In conformity with established Florida case law, Kearse identified, with as much specificity as possible, the records requested. *See Jimenez v. State*, 265 So. 3d 462, 473 (Fla. 2018) (comparing *Muhammad v. State*, 132 So 3d 176, 201 (Fla. 2013)). Kearse's demands identified records specific as to a single person.

The lower court denied Mr. Kearse's demand as overly broad without offering any reasoning. However, because the court cites to *Zakrzewski v. State*, 415 So. 3d 203 (Fla. 2025), Mr. Kearse assumes the court adopted the AG's argument[27] that his demand was essentially an "any and all" demand. (WR. 803). The prohibition of such demands is rooted in the protection against fishing expeditions. Mr. Kearse's use of the word "all" records does not in and of itself categorically turn the demand into an "any and all" demand, and as demonstrated throughout this brief, he has a reasonable belief that the communication exists. If Mr. Kearse did not specifically request all records, the State would use Mr. Kearse's failure to request all

[27] Neither SAO19 nor SLCSO asserted an objection as to breadth of the demand.

records against him in the event the State failed to turn over all records.

The demands pertained only to a limited scope of records. The finality of this proceeding should demand an agency make reasonable efforts and only good faith arguments. Each agency is in the best position to determine whether the requested records exists and can be produced. Kearse was not privy to any communication each agency would have had with Juror Matthews and therefore cannot know the type of communication that was had or the type of public record created to memorialize the communication. Likewise, Kearse cannot know if the agencies communicated with one another about Juror Matthews.

The lower court's ruling that the demands were overly broad is not substantiated by competent evidence, are legally erroneous and should be reversed.

iii. The Lower Court Used An Improper Standard In Determining Kearse's Failed To Assert A Colorable Claim, And In Doing So, Improperly Made Findings As To The Merits Of Kearse's Postconviction Claim.

The requested records relate to colorable claims for postconviction relief and the lower court erred in determining

otherwise. *See Sims*, 753 So. 2d at 70 (noting Rule 3.852 "clearly provides for the production of public records after the governor has signed a death warrant" but not "for records unrelated to a colorable claim for postconviction relief"). A "colorable claim" is "a plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." *Colorable Claim*, *Black's Law Dictionary* (12th ed. 2024).

Whether a claim will succeed on the merits is distinct from whether it is colorable. A claim may be *colorable* despite being *meritless* under current law. Rule 3.852 conditions records production on the former. Thus, a finding that one of Mr. Kearse's claims is meritless would not prevent production unless the claim would remain meritless even assuming reasonable extensions or modifications of current law. *See Tompkins v. State*, 994 So. 2d 1072, 1090 (Fla. 2008) (suggesting lethal injection records could be relevant to colorable claim if change in circumstances since prior denial of lethal injection claim "warrant[ed] the court revisiting its decision"). Furthermore, Rule 3.852 does not limit production to records that are strictly necessary to prove a colorable claim. Rather, the scope of

production encompasses records "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i)(2)(c).

Mr. Kearse's case is distinguishable from other cases this Court has reviewed under warrant wherein the requests concerned records for claims that are not yet cognizable. Kearse asserted a cognizable claim, indeed a meritorious one. Kearse met that portion of the Rule and the inquiry should have ended there.

As outlined in detail erlier in this Brief, Mr. Kearse raised a meritorious and timely challenge to the reliability of his death sentence premised on Juror Matthews's comments. In order to support their objections, all three agencies mischaracterize Mr. Kearse's claim. The AG argues that Mr. Kearse's claim is solely that uniformed officers were in the courtroom. (WR. 804). The AG ignores pages of Mr. Kearse's Rule 3.851 motion where he explains that the presence of the uniformed officers is not in and of itself the catalyst for Mr. Kearse's claim, but the admission of a juror that comments on the impact said uniformed officers had on her personally while was instructed to rule solely on the evidence presented at Mr. Kearse's capital resentencing proceeding.

The lower court's ruling that Kearse's Rule 3.852(i) demands

related to Juror Matthews's comment on social media and curious removal of that post is not related to a colorable claim is incorrect and must be reversed.

C. Conclusion

Records produced under warrant have led to the discovery of exculpatory evidence, claims for postconviction relief, and stays of execution. *See*, *e.g.*, *Jimenez*, 265 So. 3d at 470-71; *see also State v. Mills*, 788 So. 2d at 250-51. The lower court's rote denial of access to the public records Kearse sought rendered Rule 3.852 a hollow exercise on an execution check-list.

Notably, no agency argued that the records did not exist. Not one agency denied contact with Juror Matthews. The curious disappearance of Juror Matthews's comment gives rise to counsel's need to investigate. Moreover, if the State encouraged, instructed, or counseled Juror Matthews on her post, that gives rise to further claims.

The lower court's error in sustaining objections from the AG, SAO19, and SLCSO denied Kearse of his right to a full, fair and meaningful end-stage postconviction proceeding in contravention of his rights under the Fifth, Eighth, and Fourteenth Amendments and

the corresponding provisions of the Florida Constitution and Florida statutory law and rules. The Florida Rules of Criminal Procedure provide for end-stage litigation that encompasses public records requests. Thus, Kearse has a right to have those rules be given meaning and effect. The rules cannot simply be glossed over as window dressing.

ARGUMENT IV

The Lower Court Erred In Summarily Denying Mr. Kearse's Intellectual Disability Claim, Thereby Refusing To Assess His Intellectual Disability Under Sound Clinical And Legal Standards As Required By The Fifth, Eighth, And Fourteenth Amendments.

Mr. Kearse's case lies at the very core of Eighth Amendment jurisprudence establishing the prohibition against the execution of the intellectually disabled. On February 2, 2026, an assessment of Mr. Kearse's intellectual and cognitive abilities using the newest and most accurate instrument available demonstrated that his intellectual functioning is significantly subaverage. This newly discovered fact, coupled with his uncontroverted, lifelong deficits in adaptive functioning, establishes that he is intellectually disabled, an absolute bar to his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. The lower court summarily denied Mr.

Kearse's claim, finding it untimely, procedurally barred, and meritless. (WR. 926). Reading more akin to a rebuttal brief, the lower court's order ignores Mr. Kearse's arguments contained both in his motion and at the case management hearing, which it was required to accept as true, and suggests or infers conclusions for facts in dispute, all of which require an evidentiary hearing.[28] The lower court's flouting of established Florida law is error and warrants reversal.

A. Standard of Review

Review of the summary denial of this claim is de novo. *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008) (citation omitted). Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000).

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[28] For instance, the court posits that: "Kearse [. . .] also ignores how none of the prior exerts [sic] diagnosed him as intellectually disabled. Rather, his experts and defense witnesses said he had severe learning disabilities, was emotionally disturbed, and had a conduct disorder. There was also speculation that he had brain damage." (WR. 930). The court infers the presence of other disabilities and deficits precluded an intellectual disability finding. They do not.

B. Controlling Law

An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851(f)(5)(A)(i); *see also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) ("[A]n evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"); *Truehill v. State*, 358 So. 3d 1167 (Fla. 2002); *Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). If there is any question whether the movant has met this burden, the Court will presume that an evidentiary hearing is required, *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007), and "where there is no evidentiary hearing held below [the appellate court] must accept the defendant's factual allegations to the extent they are not refuted by the record." *Nordelo v. State*, 93 So. 3d 178, 185 (Fla. 2021) (citing *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999).

C. The Eighth Amendment Precludes the Imminent Execution of Mr. Kearse.

The Eighth Amendment prohibits the execution of persons with intellectual disability, "for to impose the harshest of punishments on

an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 572 U.S. 701, 708 (2014). In 2002, the *Atkins* Court held that the Eighth Amendment categorically prohibits the execution of individuals with intellectual disability but left it "up to the states to determine who" is intellectually disabled under their respective laws. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007) (quoting *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005)). To protect this vulnerable class of defendants, *Atkins* mandated that capital sentencing procedures be consistent with the "evolving standards of decency that mark the progress of a maturing society," 536 U.S. at 312; otherwise, they violate the Eighth Amendment, *see Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325, 332-33 (1976), as do capital sentencing procedures that are inconsistent with the consensus of contemporary practice in the nation. *Beck v. Alabama*, 447 U.S. 625, 635 (1980).

In defining intellectual disability for *Atkins* purposes, Florida Statutes § 921.137(1) provides a three-prong test, requiring "[1] significantly subaverage general intellectual functioning existing concurrently with [2] deficits in adaptive behavior and [3] manifested during the period from conception to age 18." The first prong of the

test is defined by the statute as "performance that is two or more standard deviations from the mean score on a standardized intelligence test . . . ," Fla. Stat. § 921.137, which represents "an IQ of 70 or below." *Cherry*, 959 So. 2d at 713. Mr. Kearse meets all three prongs.

i. Mr. Kearse's Motion Asserting Intellectual Disability is Timely.

Mr. Kearse filed his intellectual disability claim at the first discovery that he met the requirements, using the most up-to-date science. The lower court's finding that Mr. Kearse failed to establish "good cause" as to why the claim is being filed now, and not within a year after the issuance of *Atkins*, illustrates the court's misunderstanding of the history of intellectual disability litigation in Florida. Indeed, the court acknowledged Mr. Kearse's full-scale IQ score of 75 which places him within the intellectual disability range, (WR. 926), yet does not engage with the fact that his score was obtained using an instrument that did not exist when *Atkins* was issued, nor that a 75 would have rendered his *Atkins* claim meritless for more than a decade following the enactment of Florida Rule of Criminal Procedure 3.203 governing intellectual disability claims.

Mr. Kearse obtained a full-scale IQ score of 79 on the WAIS-R[29] before his 1991 trial. He was again administered the WAIS-R in anticipation of his resentencing and received similar scores. Trial counsel presented Mr. Kearse's low IQ scores as non-statutory mitigation, which was found by the trial court. (R2. 591-92; 709).

When *Atkins* established the categorical bar in 2002, the Court left it "up to the states to determine who" met that criteria. *Cherry*, 959 So. 2d at 713. This Court imposed a bright-line IQ score cutoff of 70 to satisfy prong one of its intellectual disability statute. *Id.* The rigid cutoff made Florida an outlier in death penalty jurisprudence[30] and precluded relief for individuals like Mr. Kearse whose full-scale IQ scores fell above the unforgiving cutoff of 70.

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[29] For purposes of intellectual disability determinations, Florida law recognizes only the Wechsler Adult Intelligence Scale (WAIS) and the Stanford-Binet Intelligence Scale. Fla. Admin. Code R. 65G-4.011(1) (2004).

[30] Indeed, between the issuance of *Atkins* in 2002 and 2013, Florida courts had denied **every single** *Atkins* claim presented. John H. Blume et. al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 412 (2014) (noting that of the 24 intellectual disability cases identified, every single case had been denied on the merits).

The following year after *Cherry*, the WAIS-IV was released. The new edition was based on the most up-to-date norms at its time of publication and was the first testing measure based on "current intelligence theory" and supported "by clinical research and factor analytic results."[31] At the time, nothing alerted counsel that Mr. Kearse should have been reevaluated. Researchers did not yet know that the WAIS-IV was in fact a more reliable and valid testing measure than other instruments, nor that prior measures, such as the WAIS-R, were inadequate in assessing intellectual deficits. The research began surfacing in the mid-2010s.

Second, Florida continued to employ an unconstitutional standard when assessing whether a capital defendant exhibited subaverage intellectual functioning—Florida law did not recognize that IQ tests have "a 'standard error of measurement.'" *Hall*, 572 U.S. at 713. In other words, IQ tests do not reflect *actual* IQ but rather a *measured* IQ score reflecting a range in which an actual IQ

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[31] Gordon E. Taub & Nicholas Benson, *Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion*, J. FORENSIC PSYCH. PRACTICE, 13:27-48, 32 (2013).

somewhere lies. At the time, a score higher than 70 barred "further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 702.

Mr. Kearse cannot be faulted for not seeking additional testing nor for not filing a claim when it was unknown that the WAIS-R was an ineffective instrument which undermined the reliability of Mr. Kearse's 79 IQ score, and the SEM was rigidly absent from any legal assessment by Florida courts in intellectual disability cases. Had he done so, the courts would have denied his claim as meritless. It was not until 2014 that the Supreme Court in *Hall* struck down this Court's use of an unconstitutional assessment in determining intellectual disability. The Court found that such rigidity did not comport with the medical and scientific standards. *Hall,* 572 U.S. at 712 .

Although the WAIS-IV had become the gold standard for assessing intellectual deficits following its release, by the time *Hall* was issued, the test was more than half a decade old. As tests become outdated, they are less accurate in measuring intelligence as compared to the population. Intelligence tests must be re-normed and revised on a regular basis. One of the reasons is that the

population's intelligence increases over time.[32] When a test taker is administered a test with outdated IQ norms, that individual's performance is compared to a historical reference group as opposed to his contemporaries. Because of this, test takers obtain overly high scores. *See Jackson v. Payne*, 9. F.4th 646, 654 (8th Cir. 2021). This norm obsolescence is known as the Flynn Effect.[33] This means that outdated testing methods create risks that capital defendant will obtain a score subject to correction errors.

Recognizing the increasing obsolescence of the WAIS-IV norms and requirement to account for population and demographic shifts, Pearson began developing a new normative sample for the WAIS-5 in or around 2016; however, the development was significantly delayed due to the COVID-19 pandemic. The WAIS-5 was ultimately released in late October 2024. Given the currentness of its normative data, "a full-scale IQ resulting from [a] proper and accurate administration of the WAIS-5 is [now] the best representation of an individual's current

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[32] Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, *in The Death Penalty and Intellectual Disability* 155, 158 (Edward Polloway ed., 2015).

[33] *Id.*

intellectual functioning one can attain." (WR. 649).

> While the publication of the WAIS-5 was a significant advancement in the assessment of intellectual functioning, practitioners did not immediately start using it in clinical or forensic evaluations as soon as the test was released—particularly in cases involving high-stakes decision-making in cognitive assessments like death penalty proceedings.

(WR. 649). As a result, "it took time for the WAIS-5 to be regularly administered" in the field. (WR. 650).

Against this backdrop, the lower court erred in finding that Mr. Kearse could have raised his claim earlier or relied on scores from a test that did not yet exist.

Further, the court's reliance on *Dillbeck* is misplaced. As explained at the case management conference, *Dillbeck* argued that the release of revised "diagnostic criteria for prenatal alcohol effects should establish that the defendant had an intellectual disability-like diagnosis." (WR. 886). The factual distinction in *Dillbeck* is critical. Prenatal alcohol exposure to in and of itself is not a categorical bar to the death penalty, so the new diagnostic criteria did not preclude application of the death penalty. Because intellectual disability is a categorical bar to the death penalty, courts must look to the most

reliable measures to ensure that the assessment is as accurate as possible.

Taking these allegations as true, as the lower court was required to do, Mr. Kearse established that his IQ score meets the criteria for newly discovered evidence and that he had "good cause" for filing his challenge now, under warrant. To the extent that the court relied on disputed facts, the court's findings must be reversed.

ii. Mr. Kearse's Motion Asserting Intellectual Disability is Not Procedurally Barred.

Contrary to the lower court's finding, this Court has not previously assessed Mr. Kearse's intellectual disability as a categorical bar to execution. This Court addressed the proportionality of Mr. Kearse's death sentence in light of his lower functioning and just-over-18 age. Mr. Kearse had not asserted an intellectual disability claim. Indeed, this Court acknowledged this, noting "he presented no evidence at his postconviction hearing that he was [intellectually disabled]." *Kearse*, 969 So. 2d at 991-92. The difference in assessing a proportionality claim and an outright categorical bar due to intellectual disability is more than "slightly nuanced" as the lower court characterizes it. (WR. 929).

As Mr. Kearse argued below, and has explained in this Brief, he did not raise an *Atkins* or Rule 3.203 challenge because at the time, Florida employed an unconstitutional framework in its assessment of intellectual disability, which excluded Mr. Kearse.

Likewise, the lower court's finding that Mr. Kearse's claim is untimely because he should have filed a challenge pursuant to *Hall* demonstrates that the court simply adopted the State's argument without having conducted its own analysis. Mr. Kearse's claim is an *Atkins* claim, not a *Hall* claim. And, as this Court has determined, *Hall* claims are no longer retroactively applied to capital postconviction litigants.

iii. Mr. Kearse Meets the Criteria for Intellectual Disability and is Therefore Categorically Protected by the Eighth Amendment from Execution.

Mr. Kearse's claim was supported by an expert report and record evidence of his deficits. The court below "does not dispute" that Mr. Kearse has an IQ score of 75,[34] but ultimately denied his

[34] The lower court's misapprehension of Mr. Kearse's argument further demonstrates a misunderstanding of intellectual disability litigation: "Kearse argues the most recent test administered by Dr. Ouaou, which got Kearse into a range of 70-80, allows him to argue that *Hall* applies . . . ." (WR. 930). Mr. Kearse filed a claim challenging

claim because he has a prior IQ score of 79 from trial, and "[Kearse] ignores how none of the prior exerts [sic] diagnosed him as intellectually disabled." (WR. 927). The court further insinuates that Mr. Kearse could not be intellectually disabled because "his experts and defense witnesses said he had severe learning disabilities, was emotionally disturbed, and had a conduct disorder." (WR. 927). Again, the lower court erred in making factual findings that were clearly in dispute.

a. *Mr. Kearse's Previous WAIS-R Score Does Not Invalidate His Current WAIS-5 Score.*

An individually administered, comprehensive, standardized IQ test establishes that Mr. Kearse has significant deficits in intellectual functioning consistent with being intellectually disabled. "Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and Florida "may not execute anyone in 'the entire category of [intellectually disabled] offenders.'" *Moore v. Texas*, 581 U.S. 1, 18 (2017) (emphasis added) (quoting *Roper v. Simmons*, 543

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his intellectual disability pursuant to *Atkins* and explained how *Hall* was a refinement of how *Atkins* claims are assessed. Mr. Kearse did not assert that *Hall* entitled him to any new review.

U.S. 551, 563-64 (2005)) (alteration in original).

The first prong of the statute, "significantly subaverage general intellectual functioning," is understood as performance that is two or more standard deviations from the mean score on a standardized intelligence test. Because the mean score of an IQ test is 100, a score of "approximately 70" is "consistent with intellectual disability: "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 308 n.3, 309 n.5. *Accord Hall v. State*, 201 So. 3d 628, 634-35 (Fla. 2016). Prevailing clinical standards require application of a five-point standard error of measurement (SEM) to the score due to the "statistical fact" that imprecision inherently exists in IQ testing; therefore, an IQ score of 75 or below is consistent with a diagnosis of intellectual disability. *Atkins*, 536 U.S. at 309 n.5. *Accord Moore*, 581 U.S. at 14 (noting that the SEM "'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score'").

Mr. Kearse's previous WAIS-R score does not render his new score invalid or supersede his current score nor is it determinative of

his intellectual functioning. The court's reliance on Mr. Kearse's outdated scores is improper, particularly when Mr. Kearse made allegations concerning the validity and reliability of those scores. Therein lies a factual dispute requiring evidentiary development. Notwithstanding, Mr. Kearse explained in his motion that the court cannot rely on the score as is. The score must be adjusted for the Flynn Effect. In so doing, the score is consistent with Mr. Kearse's current score. *See* (WR. 615). Moreover, Supreme Court precedent precludes courts from assessing IQ scores in a vacuum. *See Brumfield v. Cain*, 576 U.S. 305, 314-15 (2015); *Hall*, 572 U.S. 701 .

Likewise, Mr. Kearse is entitled to an evidentiary hearing as to the issue of the prior experts. The court is not permitted to read into why the trial and postconviction experts did not diagnose Mr. Kearse with intellectual disability, particularly when the categorical bar issue did not exist at the time of trial, and the postconviction expert admitted he did not conduct the requisite evaluation. (PCR2T. 671-72); *see Brumfield*, 576 U.S. at 321-22 (noting that the court cannot extrapolate findings or testimony from a prior proceeding wherein the defendant "had not yet had the opportunity to develop the record for the purposes of proving an intellectual disability claim").

Moreover, Mr. Kearse also alerted the lower court to *Hamm v. Smith*, No. 24-872, which is currently pending certiorari review at the Supreme Court. The Question Presented in *Hamm* is: Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Akins* claim. This Court should stay Mr. Kearse's case pending a decision in *Hamm*.

b. Record Evidence of Other Mental Health Diagnosis Does Not Obviate a Diagnosis of Intellectual Disability.

The lower court surmised that because prior testimony established that Mr. Kearse exhibits learning disabilities and other deficits, he is not intellectually disabled. Again, this is a disputed fact that requires evidentiary development. Notwithstanding, the court's conclusion is patently wrong. Intellectual disability can, and often does, exist co-morbidly with other limitations.

D. Conclusion

Due process and fundamental fairness are critical to the integrity and reliability of capital litigation. Where the stakes are the highest and the sentence is the gravest our society can impose, courts must be ever vigilant in protecting the procedural rights of those litigants. The shift in the law required by our nation's evolving

standards of decency obligated the lower court to look to established medical and scientific practices and examine Kearse's case in a holistic manner. Mr. Kearse's case must be remanded for an evidentiary hearing.

With the recency of the WAIS-5 and established data obviating any Flynn Effect concerns, this is Mr. Kearse's first opportunity to provide the Court with the most reliable assessment of his intellectual functioning. Mr. Kearse's full-scale IQ score of 75 on the WAIS-5 is derived from the most accurate normative sample currently available, (WR. 650), and conclusively demonstrates that he has "significantly subaverage intellectual functioning" in accordance with prong one of Florida's statute. This new evidence, in conjunction with his innumerable deficits in conceptual and social adaptive behaviors that manifested during the developmental period, many of which were already found by the resentencing court, establishes that Mr. Kearse is intellectually disabled and categorically exempt from execution. Because Mr. Kearse's intellectual disability renders him ineligible for the death penalty under the Eighth and Fourteenth Amendments, relief is warranted. This Court should stay Mr. Kearse's execution, and remand for an

evidentiary hearing, or in the alternative, vacate his death sentence in accordance with *Atkins* and its progeny.[35]

ARGUMENT V

The Lower Court Erred In Denying Mr. Kearse's Constitutional Challenge To The Clear And Convinving Evidence Burden Of Proof In § 921.137(4)

In conjunction with his Rule 3.851 motion's allegations that he is intellectually disabled, Mr. Kearse moved to have the lower court declare unconstitutional the clear and convincing evidence burden of proof set forth in Fla. Stat. §921.137(4). (WR. 792-98). The State moved to dismiss the motion, raising an arsenal of procedural arguments as to why the court should strike or dismiss the motion out of hand. (WR. 832-35). The lower court declined to dismiss the argument as untimely and unauthorized yet determined the motion barred and without merit only because it was "not aware of any legal

[35] A stay of execution to hold a hearing on Mr. Kearse's newly discovered evidence claim based on a result on a new IQ testing instrument is not unprecedented. *Johnston v. State*, SC10-356 (Fla. Mar. 4, 2010) (granting stay of execution and remanding for an evidentiary hearing on Johnston's newly discovered evidence claim relating to mental retardation and the validity of score on the then-newly released WAIS-IV).

precedent that holds Florida's burden of proof under § 921.137(4), Fla. Stat., unconstitutional." (WR. 933).

This issue raises a legal question reviewed by this Court. *See Bakerman v. The Bombay Co., Inc.*, 961 So. 2d 259 (Fla. 2007).

Mr. Kearse submits that the lower court's denial of his challenge to the clear and convincing evidence burden of proof should be reversed. It goes without saying that there is no precedent holding this burden unconstitutional (WR. 933); that is the whole point of Mr. Kearse's challenge. As Mr. Kearse's motion set forth, this Court has never squarely addressed the constitutionality of the burden, disposing of those challenges on other grounds. (WR. 793). However, this Court should use Mr. Kearse's case as a vehicle to finally address this issue once and for all.

Aside from Florida, only Arizona imposes a clear and convincing evidence burden on a defendant seeking to establish intellectual disability. (WR. 793) (citing statutes). Georgia, which used to employ a beyond-a-reasonable-doubt standard for intellectual disability claims, changed its standard to a preponderance-of-the-evidence standard in May 2020 when Georgia's governor signed the legislation to that effect into law. (WR. 793). As such, Florida remains a distinct

outlier in imposing such a high standard of proof for defendants seeking to establish their ineligibility to be executed due to intellectual disability.

Because the lower court failed to engage in any way with Mr. Kearse's actual arguments, it is impossible to explain where it went wrong in its reasoning. Nevertheless, because Mr. Kearse submits that this Court should reverse his intellectual disability claim, *see* Argument IV, it should vacate the lower court's denial of his constitutional challenge and remand it to the lower court to reach the merits while it considers the merits of Mr. Kearse's intellectual disability claim.

In the alternative, and for the reasons set forth in his motion, Mr. Kearse submits that the Court should look to the standard articulated by the United States Supreme Court in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), to guide the Court's assessment of the proper burden to establish a defendant's ineligibility for execution due to intellectual disability. Mr. Kearse urges this Court to rule that the clear and convincing evidence burden of proof is too high, imposes a significant risk of an erroneous determination that a defendant is not intellectually disabled, and violates Due Process and

the Eighth Amendment. Just as "[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability," *Hall v. Florida*, 572 U.S. 701, 723 (2014), so too does a State risk executing a defendant with intellectual disability by requiring proof by clear and convincing evidence. For these reasons, the Court should declare § 921.137(4)'s burden of proof unconstitutional.

CONCLUSION AND RELIEF SOUGHT

Mr. Kearse urges this Court to reverse the lower court, stay his execution, and remand to the circuit court for a full and fair opportunity to be heard at an evidentiary hearing, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND FONT

Pursuant to Fla. R. App. P. 9.045, I hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief complied with the word count (19,537 of 20,000).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading has been electronically filed through the Florida State Courts e-filing portal and served to the parties listed below on February 17, 2026.

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