IN THE SUPREME COURT OF FLORIDA
CASE NO. SC2026-2601

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

REPLY BRIEF OF APPELLANT

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February 19, 2026

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ARGUMENT IN REPLY

Mr. Kearse can provide reply to the Answer Brief only as to Argument I. Mr. Kearse has previously criticized the "fire drill approach" to reviewing his claims that is the consequence of the unduly accelerated scheduling orders issued by lower court and by this Court.[1] This is not an actual "fire drill." Fire drills are practice runs to prepare for an unanticipated emergency. But this is not a practice run. This **is** an emergency.

Mr. Kearse does not waive his ability to fully respond to all the arguments contained in the State's 15,527-word-long Answer Brief, containing *7 singe-spaced pages of authorities* it relies on, served at 4:54 p.m. on Wednesday, February 18, 2026. He is not choosing to not file a comprehensive Reply Brief to address all of the State's arguments, and he does not rest on his Initial Brief to serve as a reply because the State makes arguments that it did not make below. Mr. Kearse's counsel just cannot do so in 21 hours, particularly where

[1] *See Jimenez v. State,* 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., concurring in part and dissenting in part).

he must also file a reply to the State's response to his habeas petition in those same 21 hours. *See* Case No. SC2026-0250.

Mr. Kearse is entitled to proceedings that meet constitutional scrutiny, even under warrant. The United States Supreme Court has long held that if the adversarial process in a criminal trial "loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The Reply is not a pro forma pleading, Mr. Kearse must respond to the State's substantive arguments. The State's habeas response is 41 pages, the Answer Brief is 76 pages, and the Response to Mr. Kearse's Motion to Stay, which raises a new argument not raised below, is 8 pages not including 38 pages of attachments.

> While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.

Id. at 656-57 (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

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.

The campaign of misdirection undertaken by the State in the lower court about the nature of Mr. Kearse's claim and the law attendant to that claim[2] continues in this Court, but it takes a few detours (not entirely unanticipated ones) when attempting to respond to Mr. Kearse's Initial Brief. But unlike most detours, which will get you to the destination in an albeit circuitous manner, the State's arguments here are circular and lead nowhere. This Court is left with no choice but to follow one direction: to stay Mr. Kearse's execution and to grant an evidentiary hearing.

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[2] This misdirection and avoidance of caselaw found its way into the lower court's order, which never mentioned much less engaged with the allegations in Mr. Kearse's Rule 3.851 motion and his arguments at the case management hearing. Rather, the lower court adopted the State's arguments and never addressed Mr. Kearse's allegations to the contrary. *See* (Init. Br. at 36-41). This no doubt explains the lack of any meaningful discussion in the Answer Brief about Mr. Kearse's stated concerns with the lower court's disposition of his claim. Rather, the State ignores them.

A. The State seems to get it until it doesn't

At the beginning of its argument on this issue, the State, seemingly aware of the confusion it created below, acknowledges now that it is "crystal clear" that Mr. Kearse's claim is about the fairness of his 1996 resentencing proceeding and not his 1991 trial (Ans. Br. at 20) ("Kearse challenges his 1996 penalty phase based on Juror Matthews's social media post").

But as quickly as it acknowledges that this claim involves Mr. Kearse's 1996 resentencing (it is "crystal clear," the State says), the State boomerangs back to its repeated arguments about Mr. Kearse's 1991 trial. *See* (Ans. Br. at 20) (arguing that Mr. Kearse "*again asserts*" that his *trial* was unfair because of uniformed officers in the courtroom for the re-sentencing") (emphasis added); (Ans. Br. at 22 n.12) (arguing that Matthews's post does not establish actual or inherent prejudice because "[i]t merely reports *what Kearse previously alleged* in his original 2004 postconviction motion, i.e. *officers attended Kearse's trial*") (emphasis added); (Ans. Br. at 25) ("Kearse does not offer what he did to uncover evidence to support *his challenge to the 1991 trial*") (emphasis added); (Ans. Br. at 26) ("anyone sitting in the courtroom *during Kearse's trials* . . . would be

able to see if uniformed officers were present") (emphasis added); (Ans. Br. at 33) ("At best, [Matthews's] post reports *what Kearse already knew*, uniformed officers were in the courtroom and they were from multiple agencies across the state") (emphasis added); (Ans. Br. at 34) ("nothing the juror posted shows any misconduct or extrinsic factual evidence *beyond what was known at the time of trial* and resentencing") (emphasis added); (Ans. Br. at 34) ("Matthews merely acknowledges *what Kearse knew for almost twenty years, there were uniformed officers in the courtroom*") (emphasis added); (Ans. Br. at 35) (Matthews's post "adds nothing *to the rejected claim*") (emphasis added).[3]

[3]The State has a penchant for invoking "twenty years" as mantra, (Ans. Br. at 20, 34), but takes no responsibility for the fact that a significant part of that "twenty years" was devoted to its self-inflicted odyssey in Mr. Kearse's federal habeas corpus litigation. While the State does make passing reference to that litigation, it simply refers to it as litigation concerning an amorphous "timeliness" matter concerning Mr. Kearse's federal habeas petition. *See* (Ans. Br. at 12 n.10). To be clear, Mr. Kearse timely filed his federal habeas petition. After Mr. Kearse's petition was filed, the next half decade of federal court litigation was devoted to addressing the State's unfounded contention that Mr. Kearse's federal habeas petition was untimely because the sworn verification to his initial Rule 3.851 motion was not stapled to the motion itself; this litigation included two separate orders from a federal district court judge dismissing Mr. Kearse's petition and two separate opinions from the Eleventh Circuit Court of Appeals reversing those orders. *See Kearse v. Sec'y Fla.*

This Court cannot meaningfully evaluate the parties' arguments, nor can Mr. Kearse meaningfully respond, when the State continues to refuse to acknowledge what the actual claim is. The State's mystifying insistence that the 1991 proceeding has any bearing on the present claim, which involves Mr. Kearse's *1996 resentencing*, is simply a red herring intended to distract. So too is its insistence that this is claim about "juror misconduct," setting up a straw man only to knock it down. *See* (Ans. Br. at 30) ("Matthews's post does not show juror misconduct"); (Ans. Br. at 34) ("nothing the juror posted shows any misconduct"). While the lower court was seemingly convinced that Mr. Kearse's claim involved the 1991 trial proceeding because the State insisted that it was, *see* (Init. Br. at 40-41),[4] the bottom line is that this issue pertains to the 1996 resentencing.

Dep't. of Corr., 669 F. 3d 1197, 1199 (11th Cir. 2011); *Kearse v. Sec'y, Fla. Dep't. of Corr.*, 736 F. 3d 1359 2363-64 (11th Cir. 2013). Mandate issued from the Eleventh Circuit in 2014.

[4] It is clear that the lower court was led astray, concluding that Matthews's post "adds no support for "*this rejected claim*." (WR 925) (emphasis added). But there was no prior claim concerning law enforcement presence at the 1996 resentencing proceeding. That being the case, there was no such claim to previously reject.

B. The State, not Mr. Kearse, is "parsing" Matthews's words

In an attempt to cabin in Mr. Kearse's claim and make it something it is not, the State contends that Mr. Kearse is trying to "narrow" and "parse" Matthews's words from her social media post, suggesting that the *only* relevant information in her post is the revelation about "the presence of uniformed officers in the courtroom." *See* (Ans. Br. at 26, 33).[5] The only party "parsing" Matthews's words is the State,[6] which completely ignores the other parts of Matthews's post that Mr. Kearse has cited to as relevant to Mr. Kearse's claim, particularly as to the actual/inherent prejudice standard he must meet. While the State is free to argue that Matthews's comments are irrelevant (which it does not do), it is not

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[5] Perhaps the State is attempting to factually reconstruct Mr. Kearse's current issue because this Court has already determined—based on the State's arguments in the first 3.851 appeal—that Mr. Kearse's allegations as to his 1991 trial that there was an overwhelming number of uniformed officers in the courtroom at the 1991 trial were legally insufficient.

[6] For example, the State points to other parts of Matthews's comments where she recalled the difficulty of her job as a juror and how she continued to believe the correct verdict was returned. *See* (Ans. Br. at 32, 24). Those are not statements that Mr. Kearse has ever pointed to as establishing his undue influence claim.

free to reframe Mr. Kearse's issue by deciding on its own what is "relevant" to it and ignoring the rest of her comments.

As Mr. Kearse explained below, Matthews's social post comment was relevant not just for its new revelation about the overwhelming presence of uniformed law enforcement officers from around the state in the courtroom at the 1996 resentencing:

> 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. . . *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 he was loved.

(WR 643; Init. Br. at 43) (emphasis added).

C. Diligence is not a moving target

Two principle problems inhere in the State's discussion of Mr. Kearse's alleged lack of diligence. First is its failure to accept Mr. Kearse's factual allegations as true and its concomitant direct

refutation of those factual allegations.[7] Second is its perception of what "due diligence" requires under the law. Mr. Kearse addresses these below.

Mr. Kearse's challenge to the 1996 resentencing was never previously made, the reason for which is part and parcel of his factual allegation that the information in Matthews's post is new and could not have been previously discovered through the exercise of reasonable, due diligence. Rather than simply cede the point that the information in Matthews's post is new information—or at least accept Mr. Kearse's allegation as true that it is, as the law requires—the State argues it is not new, hypothesizing that Mr. Kearse's collateral counsel "either never investigated or chose to forego the issue" in his initial Rule 3.851 motion. (Ans. Br. at 28). It is of course the State's

[7]Not surprisingly, the State does not remind this Court of its arguments below where it not only directly challenged the facts alleged by Mr. Kearse as to diligence, but it also directly challenged the veracity of Matthews's post itself. *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").

choice to conjure up reasons why it believes this claim was not previously raised but it should not feign fealty to the requirement that it must accept Mr. Kearse's allegations as true only to turn around and openly flout that requirement in the law. *See* (Ans. Br. at 18).

The State believes it is in a better place than Mr. Kearse's collateral counsel to determine the best allocation of their limited resources and limited time in investigating his case in anticipation of the filing of his initial Rule 3.851 motion. For example, it offers the gratuitous opinion that investigating an issue, the existence of which the resentencing record provided no hint, "would not over-tax postconviction counsel." (Ans. Br. at 25). Indeed, the State suggests that this is a matter of "common sense" because it would be "simple," requiring only "the merest modicum of diligence." (Ans. Br. at 24, 26). Of course, the State cites no part of the record to support its hypothesis because none exists. The State cannot make up factual assertions in an appellate brief while at the same time refuse to allow Mr. Kearse to challenge those allegations at an evidentiary hearing, particularly where the law requires that *his* allegations, *not the State's allegations*, be accepted as true in the posture of this case.

After belittling collateral counsel's work ethic,[8] the State conjures a mishmash of investigatory tasks, steeped in hindsight, which it believes Mr. Kearse's collateral counsel could have undertaken because they were, in the State's view, "simple" and not "overly taxing." For example, the State argues that collateral counsel "could have" (but failed to):

- "talk to his client, defense counsel, and other potential witnesses about the case and the atmosphere" (Ans. Br. at 21);
- "investigate whether those officers [who were present in the courtroom at Mr. Kearse's 1991 trial] again showed their support to their fellow officer during a re-sentencing" (Ans. Br. at 24);
- "develop evidence to support his claim through other witnesses" (Ans. Br. at 25);

[8] In his Initial Brief, Mr. Kearse pointed to a repugnant remark made by one of the Assistant Attorneys General in this case at the case management hearing accusing Mr. Kearse's collateral counsel of "waiting" decades "to find a juror" who then made a post after the signing of Mr. Kearse's death warrant. *See* (Init. Br. at 49 n.22). While the State now halfheartedly attempts to argue that the "clear pith" of the comment was something else, the record speaks for itself, and the State does not retract its comments. Rather, it doubles down on them, claiming that "those are the facts." *See* (Init. Br. at 38 n.14). Those are not "the facts." The facts are what Mr. Kearse alleged in his Rule 3.851 motion. The State's counter-factual allegations are not "facts" until they are subjected to an adversarial testing.

- "uncover evidence to support his challenge to the 1991 trial or to discover if the same number of officers returned for the 1996 penalty phase" (Ans. Br. at 25);
- "contact" Mr. Kearse's "family members, friends, and defense experts" who "surely" would have information about the conditions in the courtroom because they "would have been facing the jury and gallery at times as they moved about the courtroom and testified" and "anyone sitting in the courtroom during Kearse's trials, including Kearse himself, would be able to see if uniformed officers were present" (Ans. Br. at 25-26).

Despite the parade of things the State says that collateral counsel could have done to discover this information sooner, the State continues to refuse to acknowledge Mr. Kearse's allegation that there is nothing to put diligent collateral counsel on reasonable notice that there might be an issue concerning the overwhelming presence of uniformed law enforcement officers from state-wide jurisdictions present in the courtroom at Mr. Kearse's 1996 resentencing, much less how he could ever ascertain the evidence of actual/inherent prejudice revealed by Matthews. He could not interview Matthews, and even now, with her post having been made, the State still maintains Mr. Kearse cannot interview her. *See* (Init. Br. Argument II). Its counter-factual allegation, imbued with speculation and based solely on hindsight, that "anyone sitting in the

courtroom during Kearse's trials, including Kearse himself, would be able to see if uniformed officers were present," *see* (Ans. Br. at 26), is a legally insufficient response to Mr. Kearse's allegations to the contrary and is inadequate to justify a summary denial of this claim.

Several times the State suggests that Mr. Kearse himself was present in the courtroom and could have been a source of information concerning the law enforcement presence. First of all, as noted earlier, Matthews's post says far more than merely revealing the overwhelming nature of the law enforcement presence at the 1996 resentencing; Mr. Kearse himself would have no information (nor would any defense witnesses, defense experts, or maybe the person selling coffee in the courthouse cafeteria for that matter, be a source of that kind of information) concerning the prejudicial affect that the law enforcement presence had on Juror Matthews or any of the other jurors. That can only be revealed by the juror herself, who did so voluntarily here in a wholly unanticipated way. In any event, this Court has never held that a defendant's personal presence in the courtroom when any error is later discovered must, as a matter of law, defeat a claim of due diligence.

For example, in *Boyd v. State*, 324 So. 3d 908 (Fla. 2021), this Court addressed a claim of newly discovered evidence, raised in a successive Rule 3.851 motion, alleging that one of the jurors at Boyd's trial failed to disclose the fact that her cousin was married to Mr. Boyd's brother. *Id.* at 912. This information was revealed for the first time during that juror's testimony at a federal evidentiary hearing on a distinct juror misconduct claim involving that same juror. Although it resolved the claim on its merits against Mr. Boyd, this Court did find that Mr. Boyd had established the due diligence prong because the claim about the familial relationship between the juror and Mr. Boyd's brother was "first discovered at the federal evidentiary hearing" when the juror voluntarily disclosed it and that "Boyd discovered that information within the year preceding the filing of his [Rule 3.851] motion." *Id.* at 913. There was no argument made by the State that Mr. Boyd's collateral counsel was not diligent in failing to ask Mr. Boyd years earlier about his family tree because Mr. Boyd himself was at the trial and surely would have known who his brother was and who he was married to, nor did the Court so find. It found that the juror's voluntary disclosure of that information at the federal hearing qualified as newly discovered evidence and that Mr.

Boyd had filed his claim within one year of its discovery. Mr. Kearse's claim is no different.

As to the legal standard for diligence, this Court has been clear that the standard for assessing the performance of trial counsel under the *Strickland*[9] standard is the same as the standard for assessing the diligence of collateral counsel. *See Waterhouse v. State*, 82 So. 3d 84, 104 (Fla. 2012). In *Waterhouse*, the Court was faced with the question "whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel" in a case presenting a newly discovered claim involving information from a witness whose name had appeared in the State's pretrial discovery. *Id.* This Court soundly rejected the State's argument that held that "collateral counsel should *not* be held to a higher standard." *Id.* (emphasis in original). As this Court explained:

> Having considered the assertions of the State and Waterhouse, we conclude that collateral counsel should *not* be held to a higher standard [than trial counsel]. *While pretrial resources are unquestionably limited, collateral counsel's resources are also not unlimited.* Thus, *requiring collateral counsel to verify every detail and contact every witness in a police report—even*

[9] *Strickland v. Washington,* 466 U.S. 668 (1984).

> *where the police report indicates that the witness had no useful information—would place an equally onerous burden on collateral counsel, with little chance of discovering helpful or useful information.*

Id. at 104 (emphasis added) (footnote omitted). *Accord State v. Huggins*, 788 So. 2d 238 (Fla. 2001) (collateral counsel exercised due diligence in raising newly discovered evidence of information from witness whose name appeared in a police report provided in pretrial discovery notwithstanding state's argument otherwise because trial defense counsel is "not required to investigate hundreds of leads provided by the police—including leads that were deemed futile—"in order to satisfy due diligence"); *Mungin v. State*, 79 So. 3d 726, 738 (Fla. 2011) (collateral counsel exercised due diligence in newly-discovered evidence claim arising from information from witness whose name appeared in a police report because "due diligence surely does not require that counsel allocate limited pre-trial resources in investigating a witness that is reported by police to have said something contrary to what the witness now claims").

This precedent is equally applicable to Mr. Kearse's case. The State is dreaming up a parade of investigative avenues which, with the benefit of hindsight alone, it believes were "simple" and not

"overly taxing" that Mr. Kearse's collateral counsel "could have" followed before the filing of the initial Rule 3.851 motion. In other words, the State says that Mr. Kearse's collateral counsel must devote its already onerous and limited resources to chasing every single imaginable rabbit down every single imaginable hole.[10] But that is not the test. Just as with a *Strickland* claim, "every effort [must] be made to eliminate the distorting effects of hindsight" because "it is all too easy for a court, examining [counsel's actions] after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. 668, 689 (1984). Indeed, the Supreme Court later expressed the specific concern about "the potential for distortions and imbalance that can

[10] For example, the State here suggests, with the benefit of hindsight, that Mr. Kearse's collateral counsel could have interviewed family members, or friends, or defense experts who testified at the resentencing, to ask about potential law enforcement presence at the resentencing. But the State makes no suggestion that that would have born any investigative fruit, leaving Mr. Kearse with the same bare allegation of law enforcement presence at the 1996 resentencing that he made in his initial Rule 3.851 motion, an allegation that the State argued at the time—and this Court on appeal later agreed—was conclusory and legally insufficient, warranting a summary denial. *See Kearse v. State*, 969 So. 2d 976, 989 (Fla. 2007).

inhere in a hindsight perspective . . . " *Premo v. Moore*, 562 U.S. 115, 125 (2011).

D. Ineffective Assistance of Counsel Claim

The State argues that Mr. Kearse's allegations in his Rule 3.851 motion about trial counsel's ineffectiveness are "legally insufficient as pled." *See* (Ans. Br. at 28).[11] It never acknowledges that the lower court never addressed this claim, much less determined that it was "legally insufficient as pled." The remedy for such would be granting Mr. Kearse leave to amend the putative pleading deficiency. *See Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) (remedy for a determination that Rule 3.850 motion is legally insufficient "for failing to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion").

[11] Mr. Kearse of course did the best he could under the circumstances. He was under court order to file his Rule 3.851 motion with a strict 25-page limit and thus every word and sentence was at a premium.

E. The Merits

The State does fairly accurately set out the appropriate legal standards for the claim that Mr. Kearse is raising. *See* (Ans. Br. at 30-34). The problem persists, however, in the State's insistence that this is a juror misconduct claim, which it then argues Mr. Kearse cannot establish. *See* (Ans. Br. at 30). Mr. Kearse is not raising a juror misconduct claim, nor is he alleging, or has he ever alleged, that Juror Matthews did anything wrong in posting her comment. It is only the State that seems to level accusations against Juror Matthews, more than insinuating that she is not telling the truth. *See* (WR. 903-04) ("I find it hard to believe that the courtroom was packed with people standing in the back of the room").

In arguing that Mr. Kearse has not established actual or inherent prejudice, it misconstrues the procedural posture here. The Court must assume that Mr. Kearse's allegations are true and then evaluate whether he had made out a prima facie case for relief. The State, however, wants it to accept its contrary allegations as true and then have this Court deny relief based on its own allegations. That is not the standard. Finally, the state points to parts of Juror Matthews's post about how difficult it was to serve as a juror and her

expression that the jury reached the correct determination, *see* (Ans. Br. at 32-33), but those statements are not germane to Mr. Kearse's claim.

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 (4,258).

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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 19, 2026.

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