IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1876

BILLY LEON KEARSE,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (Criminal Division)

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Billy Leon Kearse, was the defendant at trial and during the collateral litigation. He will be referred to as "Kearse". Appellee, the State of Florida, prosecution below will be referred to as "State". References to records follow:

1. Record on Direct Appeal - "1R" for case number 60-79037;

2. Record from the re-sentencing - "2R-R" for the record documents and "2R-T" for the transcripts in case number SC60-90310;

3. Postconviction record in case number SC05-1876 - "PCR";

4. Initial Brief in the instant matter - "IB".

Supplemental records will be designated by the symbol "S".

STATEMENT OF THE CASE AND FACTS

On February 5, 1991, Defendant, Billy Leon Kearse ("Kearse"), was indicted for the January 18, 1991 first-degree murder of Fort Pierce police officer Danny Parrish, and possession of a firearm by a convicted felon. The indictment was amended on May 8, 1991 to include a robbery with a firearm count. Trial commenced October 14, 1991 ending with the jury convicting Kearse of armed robbery and first-degree murder, and he was sentenced to death. Kearse v. State, 662 So.2d 677, 680 (Fla. 1995) ("Kearse I").

On direct appeal, Kearse raised 25 issues, however, only

seven went to the guilt.[1] This Court found the following facts:

> After [Fort Pierce police officer] Parrish observed Kearse driving in the wrong direction on a one-way street, he called in the vehicle license number and stopped the vehicle. Kearse was unable to produce a driver's license, and instead gave Parrish several alias names that did not match any driver's license history. Parrish then ordered Kearse to exit the car and put his hands on top of the car. While Parrish was attempting to handcuff Kearse, a scuffle ensued, Kearse grabbed Parrish's weapon and fired fourteen shots. Thirteen of the shots struck Parrish, nine in his body and four in his bullet-proof vest. A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female drive away from the scene, and called for assistance on the police officer's radio. Emergency personnel transported Parrish to the hospital where he died from the gunshot injuries.
>
> The police issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo. By checking the license plate that Officer Parrish had called in, the police determined that the car was registered to an address in Fort Pierce. Kearse was arrested at that address. After being informed of his rights and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop.

Kearse I, 622 So.2d at 680. Although affirming the convictions, the sentence was vacated. Id. at 685-86.

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[1] "11) the giving of the State's special requested instruction on premeditated murder over defense objection; 12) instructing the jury on escape as the underlying felony of felony murder; 13) the denial of defense challenges for cause of prospective jurors; 14) the admission of testimony regarding the purpose of a two-handed grip on a gun; 15) the denial of defense motions to suppress evidence on the basis that Kearse's warrantless arrest was not based on probable cause; 16) the instruction on reasonable doubt denied Kearse due process and a fair trial; 17) the admission of hearsay evidence during the guilt phase" Kearse, 622 So.2d at 681.

Based on a unanimous death recommendation:

> The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse v. State, 770 So.2d 1119, 1123 (Fla. 2000) ("Kearse II").

Kearse appealed raising 22 issues.[2] On June 29, 2000 the

[2] (1) the court's refusal to return venue to the county where the offense occurred; (2) the denial of Kearse's objection to a motion to comply with a mental health examination; (3) the denial of Kearse's motion for a continuance; (4) the proportionality of the death penalty; (5) the trial court's evaluation of the mitigating circumstances in the sentencing order; (6) the trial court's failure to evaluate the nonstatutory mitigating circumstance of emotional or mental disturbance; (7) the denial of Kearse's motion to disqualify the prosecutor; (8) the denial of Kearse's motion for a mistrial based on the prosecutor's comments during argument; (9) the trial court informed the jury that Kearse had been found guilty in a previous proceeding, but that the appellate court had remanded the case for resentencing; (10) the denial of Kearse's motion to interview jurors in order to determine juror misconduct; (11) pretrial conferences were conducted during Kearse's involuntary absence; (12) granting of the State's cause challenge to Juror Jeremy over Kearse's objection; (13) denial of Kearse's cause challenges to Jurors Barker and Foxwell; (14) Kearse's compelled mental health examination constituted an unconstitutional one-sided rule of discovery; (15) the compelled mental health examination violated the ex post facto clauses of the United States and Florida Constitutions; (16) the compelled

sentence was affirmed. Kearse II, 770 So.2d at 1119.

Next, Kearse petitioned the Supreme Court for certiorari review raising three issues addressed to the compelled mental health examination. (PCR.6 727-94). Certiorari was denied on March 26, 2001. Kearse v. Florida, 121 S.Ct. 1411 (2000).

On October 3, 2001, Kearse filed an unverified, unsworn "shell"[3] postconviction motion. The State, on November 15, 2001, responded noting the motion did not comply with the dictates of Florida Rule of Criminal Procedure 3.851 governing motions filed on or after October 1, 2001. On November 26, 2001, the court dismissed the motion without prejudice.

Not until March 5, 2002, did Kearse seek reinstatement of his motion noting there had been an error by Federal Express in delivering the documents, thus, implying the pre-October 1, 2001 rule applied. The request was treated as a rehearing and dismissed as untimely, but Kearse was given 60 days to comply

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mental health examination violated Kearse's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (17) victim impact jury instruction was vague and gave undue importance to victim impact evidence; (18) the trial court gave little weight to Kearse's age as a mitigating circumstance; (19) the trial court should have merged the "committed during a robbery" aggravating circumstance with the other aggravators; (20) the court should not have considered the "committed during a robbery" aggravating circumstance; (21) the admission of photographs of the victim; and (22) electrocution is cruel and unusual punishment. Kearse II, 770 So.2d at 1123.

[3] Pleadings noting that the underlying facts are unavailable commonly are referred to as "shell motions."

with rule 3.851(e)(1). Instead, he appealed, however, before this Court could rule on the State's Motion to Dismiss,[4] on June 10, 2002, Kearse dismissed the appeal and on June 13, 2002, this Court denied, as moot, the Motion to Dismiss. On June 21, 2002, Kearse resubmitted his "shell" motion. The State's motion seeking dismissal was denied.

Public records litigation continued for two years, January 30, 2002 through December 2003, with the court making various rulings. On December 17, 2002, the court granted Kearse leave to amend his motion, and on March 1, 2004, the final pleading was filed. The State responded, agreeing to a hearing on some claims. After the August 18, 2004 Case Management Conference, a hearing was granted on Claims IIA(1) ¶¶4-6; (3)¶8; (7)¶¶12-13; (8)¶14; (9)¶15; (11)¶¶17-22; (12)¶¶23-24, and (13)¶25; Claim IIC(2); Claim IID;[5] Claim III; and Claim IV.

The evidentiary hearing was held April 18 - 21 and May 25, 2005, during which Kearse presented Robert Udell, Esq., five experts, and several lay witnesses. The State presented Dr. Martell. On September 6, 2005, the court denied postconviction relief, and this appeal followed. (PCR.37 5703-40).

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[4] On May 21, 2002, Kearse filed a rule 3.851 motion. It was dismissed without prejudice to refile after resolving the appeal.

[5] The court re-numbered the sub-claims (parenthetical numbers), but referenced Kearse's paragraph numbers.

SUMMARY OF THE ARGUMENT

Claim I - The court's factual findings following the evidentiary hearing are supported by substantial, competent evidence and its legal conclusion that counsel did not render ineffective assistance comports with the law under Strickland. Counsel professionally prepared for and challenged the State's case in both phases. Kearse received the constitutionally required assistance.

Claim II - The court correctly denied the claim of newly discovered evidence related to Dr. Martel, which came into existence after Kearse had been re-sentenced, and arose from a collateral New Mexico case.

Claim III - Kearse was not denied access to public record to which he was entitled. The materials were not public records and did not contain exculpatory evidence.

Claim IV - Kearse's claim that his trial was unfair due to uniformed officers in the courtroom during his second penalty phase is unpreserved. The same challenge made with respect to the guilt phase is legally insufficient and procedurally barred. Kearse's challenges to the summary denial of ten claims has been waived under Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). The court correctly resolved the issues, put its reasoning in writing, and supported such with record citations. The requirements of the law were met and relief must be denied.

ARGUMENT

CLAIM I

THE COURT PROPERLY DETERMINED COUNSEL RENDERED EFFECTIVE ASSISTANCE DURING THE GUILT AND RE-SENTENCING PHASES (restated)

Kearse maintains the court, following an evidentiary hearing, should have found defense counsel, Robert Udell ("Udell"), rendered ineffective assistance during the initial guilt phase and second penalty phase. It is Kearse's claim Udell did not conduct a thorough investigation and approached the trial with a defeatist attitude. Specifically, Kearse points to Udell's (1) comments made before trial and in prefacing certain motions; (2) preparation and examination of defense mental health experts; (3) alleged failure to investigate and present evidence that the victim, Officer Parrish ("Parrish"), had difficult dealing with the public and had negative remarks in his personnel file; and (4) alleged failure to prepare lay witnesses to testify.[6] Following an

[6] Kearse offers that counsel's deficiency may be attributed to his failure to request co-counsel for the second penalty phase and points to Udell's argument presented when seeking co-counsel in the original trial. (IB at 13 FN 5). Kearse gives no further argument on this, thus, it is not clear what deficiency/prejudice is alleged. Failure to fully address an argument necessitates that the matter be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). Moreover, Udell did seek, but was denied co-counsel for the first trial, thus,

evidentiary hearing, the court determined ineffectiveness under Strickland v. Washington, 466 U.S. 668 (1984) was not proven. Its factual findings are supported by the record and its legal conclusions comport with the law. This Court should affirm.

The standard of review for claims of ineffectiveness of counsel following an evidentiary hearing is *de novo*, with deference given the trial court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as "mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions

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ineffectiveness has not been shown. (1R 39, 63-65; 2464-67). Further, Kearse has not shown that co-counsel could have been obtained for a single phase/new penalty phase. See Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994) (noting "Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein"); Lowe v. State, 650 So.2d 969, 974-75 (Fla. 1994) (announcing decision to appoint co-counsel is not a right but is a privilege, subject to the court's discretion."); Cummings-El v. State, 863 So.2d 246, 250, n.6, 258 (Fla. 2003).

> of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005).[7]

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, Kearse bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the

[7] See Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000).

deficiency. See Strickland 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Overview - In order to understand the denial of relief of Kearse's claims of ineffectiveness after an evidentiary hearing, an overview of Udell's actions and the evidence is required.

Following Udell's appointment on January 23, 1991 (1ROA 2442), he moved for, and was granted the appointment of a mental health expert and private investigator. (1R 2451-52, 2455, 2457-58, 2462-63, 2474). Udell sought co-counsel for the original trial, but, that request was denied (1R 2464-67, 2472). He filed motions seeking to have the death penalty and related statutes declared unconstitutional, and to amend the jury instructions. (1R 2207-14, 2216-24, 2225-47, 2497-98, 2523-25, 2555-57, 2560-61, 2573-81, 2611-35, 2616, 2623, 2631, 2633-35, 2637). Udell moved to suppress Kearse's statements, items of physical evidence, and to preclude use of a prior conviction for sentencing. (1R 68-177, 2207-14, 2538-41, 2542-45, 2546-49, 2565-66). The record showed Kearse was stopped by Parrish for driving the wrong way down a one-way street. Although Parrish gave Kearse, who did not have his driver's license, ample opportunity to produce his true name, Kearse gave several alias which did not match licensing records, thus, necessitating Parrish to arrest Kearse. During the attempted arrest, a scuffle ensued, during which Kearse took control of Parrish's gun and fired fourteen shots; four hit Parrish's vest and nine entered his body killing him. This encounter was observed by Rhonda Pendleton ("Pendleton") and overheard by Bruce Heinnson, who reported seeing a dark blue vehicle occupied by a black male and female fleeing the scene. Based on the information Parrish

collected before the shooting, the police reported to the address where the car was registered, and arrested Kearse at the scene. After waiving his rights, Kearse confessed to shooting Parrish. (1R 1028-29, 1093 1128, 1135, 1138, 1140, 1153-54, 1186-87, 1190-91, 1196-97, 1204-05, 1219-21, 1224-31, 1248, 1251-59, 1285-87, 1294-1304, 1310-17, 1387-95, 1400-02, 1426-36, 1452-53, 1457-70, 1485-99, 1537-60, 1600-04, 1617, 1627-29; S1R for confessions).

Following affirmance of the conviction, but remand for re-sentencing, Udell again represented Kearse and re-challenged the application of certain aggravating factors, jury instructions, and the admission of physical and confession evidence (2R-R 9-18, 42-46, 469-86; 2R-T 1133, 1739-40, 2532-37). He also obtained private investigators, mental health experts, and a crime scene expert. (2R-R 491-93, 507-08, 518-24, 534-36, 589; 2R-T 6-7, 69-79, 153-67; S2R-T 2-32). Udell objected to the compelled mental health examination or to use the information gathered during it. (2R-R 538-39, 544-73, 584-86; 2R-T 170-88, 211-16; S2R-T 2-32).

In the second penalty phase, the State offered testimony to support the first-degree murder and robbery of Parrish for which Kearse was convicted[8] and such established four aggravating

[8] This again showed that Parrish had stopped Kearse for a traffic violation, during which Kearse claimed he did not have

factors merged into two: "felony murder" (robbery); "avoid arrest;" "hindering law enforcement;" and "victim was law enforcement officer engaged in his official duties." These were based upon evidence that Kearse wanted to avoid returning to prison, and killed Parrish while being detained following a traffic infraction. (2R-T 1156-57, 1167, 1337-42, 1421-22, 1436, 1439, 1467-93, 1521-22, 1524-26, 1529-30, 1532-36, 1558-65, 1669-73, 1638-41, 1644-45, 1650, 1677, 1682-90, 1708, 1711-12).

The defense mitigation case consisted of Kearse testifying along with school officials, family members, a friend, and mental health professionals. These witnesses discussed Bertha Kearse's drinking while pregnant with Kearse, Kearse's difficult family life, the school designation that Kearse was learning disabled and emotionally dysfunctional. The jury heard that Kearse confabulated when discussing the crime, suffered from Fetal Alcohol Effect, had brain dysfunction, concentration, and behavioral problems, and was indecisive, insecure, and

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his driver's license and gave false names to the officer. Eventually, a fight ensued for Parrish's gun, and once Kearse gained control, he fired 14 rounds, some of which were discharged after Parrish had fallen. Kearse fled with Pendleton, and hid the car and gun at Derrick Dickerson's home. Later that night, Kearse was arrested at Dickerson's where the gun and car were recovered. He confessed, and made admissions to others that he killed Parrish in order to avoid returning to jail. (2R-T 1156-57, 1163, 1170-74, 1189-90, 1210-17, 1237-40, 1282, 1292, 1331-33, 1337-42, 1364-68, 1405-06, 1412-16, 1421-22, 1467-93, 1521-25, 1532-35, 1557-75, 1584, 1603-04, 1635-41, 1644-45, 1650, 1677, 1682-90, 1696-98, 1708-12).

defensive, with a tendency to be hyperactive and react without thinking. Dr. Petrilla offered two statutory mental mitigators applied: (1) extreme emotional disturbance at the time of the crime and (2) substantially incapable of conforming his conduct to the requirements of the law.[9] Pendleton, whom the defense was able to locate even though the State had failed, testified Kearse did not kill Parrish to avoid arrest. (2R-T 1757-72, 1777-78, 1782-83, 1793, 1797, 1811-12, 1816-28, 1833, 1851-55, 1859-71, 1933-34, 1939, 1942-45, 1948-49, 1951-59, 1968-69, 1971-74, 1979-85, 1990, 1997-2003, 2014-20, 2023-28, 2031-33, 2037-40, 2047, 2052-56, 2061-63, 2075-79, 2086-87, 2095, 2113-14, 2121-24, 2134-, 2136-38, 2144-51, 2153-59, 2170-99, 2200-03, 2227-33, 2239, 2247-51, 2254-71, 2287-95). Based upon the above, the jury rendered a unanimous death recommendation (2R-R 575), which was affirmed. Kearse II, 770 So.2d at 1123.

A. **Udell's comments during the guilt and second penalty phases** - The court found:

> ... no prejudice to the outcome of the proceeding due to Udell's comments to the press in light of Udell's advocacy and the evidence developed at trial that

[9] Dr. Martell, the State's mental health expert in forensic neuropsychology, rejected the notion Kearse was confabulating, instead finding he was a pathological liar with an antisocial personality disorder, and concluded that neither mental mitigator applied, there was no evidence of a severe mental or emotional disturbance, and Kearse was malingering. Also, Dr. Martell refuted that Kearse suffered from Fetal Alcohol Effect. (2R-T 2355, 2357-58, 2369-76, 2380-83, 2388-89, 2412).

> Kearse killed an officer, who was performing his lawful duties at a traffic stop, during the course of which Kearse grabbed the officer's gun and shot him 14 times. This was confirmed by physical, eye-witness testimony, and Kearse's confession. (record citations omitted).
>
> ...
>
> In addition, Kearse claims that Udell repeatedly qualified his motions indicating that the arguments were not the most compelling. ... The Court has reviewed the context of Udell's arguments on the motions and finds Udell's arguments to be candid representations to the trial court made outside of the presence of the jury, not fatalistic comments concerning the outcome of the case. Thus, the Court finds no deficient performance or counsel in Udell's representation on the motions and no prejudice to the outcome of the proceeding in light of the overwhelming evidence presented at trial, *supra*.

(PCR.37 5710-12). Not only are the court's findings supported by substantial, competent evidence, but the law was applied properly based upon the following analysis.

When Udell's comments are considered in context, and in conjunction with the work done by him and evidence/law governing the matters, it is clear the comments did not fall below the professionalism standard and/or no prejudice resulted as defined by Strickland. To understand the challenged comments and the claim that such evinced ineffective assistance, they must be placed in context and this Court must consider Udell's explanation/rationale for his remarks. **Udell's comment to the press and subsequent apology** were explained before the 1991

trial and in the evidentiary hearing.[10] **Prefacing his Motion in Limine argument as "a bit of a stretch."** (IB 14 n. 6)[11] **The**

[10] Before the 1991 trial, Udell gave an interview to a reporter and made comments about the case which he believed were off-the-record. Nonetheless, the remarks were printed in the Stuart News, but not in the Indian River County paper, the county where the case was tried. Udell recognized the comments may be seen as either his "throw[ing] in the towel", or as "statements made in frustration at the situation" facing the defense. Udell apologized to the court, State, Kearse, and Bertha Kearse. He also discussed the matter with Kearse and inquired, along with the court, as to whether Kearse wished to remain with him or have other counsel. Kearse was informed he would not be rushed to trial should he request new counsel. Kearse asserted he had confidence in Udell and wanted him to remain. (1R 207-16; PCR.46 762-63; State's Ex. 5). In 1991, Udell advised the court:

> Judge, for the record, my ninety-some odd witnesses have been deposed. We have twenty-some odd people under subpoena, potential defense witnesses, in both the guilt phase and penalty phase. I've been working on this case for months. I counted up, I have over 400 hours expended on behalf of Mr. Kearse. I have filed every single motion that might conceivably be filed in this case.
>
> I am prepared to go forward. I do not believe that there's anything that should have been done on behalf of Mr. Kearse to date that hasn't been done.

(1R 211-12). During the evidentiary hearing, Udell explained he had been misquoted, but apologized for the matter getting into the paper. He acknowledged it was not the "smartest thing" he had done, and that while his assessment of the case was that there was a good possibility of conviction and death sentence, he should not have said that to a reporter. Nonetheless, the record shows he fought for Kearse. (PCR.46 762-63).

[11] Udell argued in support of his Motion in Limine that a "brother officer" should be barred from testifying as to Parrish's identity because the "brother officer" equates to a brother, i.e., blood relation. Udell stated: "... the law says the State cannot call a family member to identify the victim and

comment "I assume the Court will deny that" (1ROA 1357; IB 14, n.6)[12] when referring to a Motion for Mistrial has been taken out of context by Kearse. In moving for a judgment of acquittal on the grounds the State had not proved premeditation, **Udell**

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that they're supposed to call somebody else if they can. It's our position that calling Sergeant Lasenby, a brother officer, is the functional equivalent of calling a family member to identify the victim's body." (1ROA 1119-20). To date, Kearse has not cited a case which supports the defense position offered in the motion in limine. The State submits, and the court agreed, it is "a bit of a stretch" to equate a blood-relative to a co-worker who is commonly referred to as a "brother officer." Moreover, that which Udell feared, namely, that Officer Lasenby would break down on the stand, did not come to pass. As such, the record reflects that a person who knew the victim, but was not related to him, identified the victim for the jury. Such complies with the law. See Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981) (noting deceased victim's family member should not testify to victim's identity if credible non-family member is available). Cf. Rodriguez v. State, 2005 Fla. LEXIS 1169 (Fla. 2005) (finding no ineffectiveness where deceased victim's sister-in-law permitted to identify victim's jewelry without defense objection).

[12] Begining at page 1350 of the 1991 transcript, Udell objected to the State requesting a transcript of Kearse's confession be provided to the jury, but not admitted into evidence. Udell objected to the transcript because there were a number of notations of "cannot understand", "um," and "uh-huh." It was Udell's position it did not reflect Kearse's statement accurately. He preferred the jury rely upon the audio-tape, not a transcriber's interpretation. The court rejected Udell's argument and ruled the transcript could be used, but would not be placed in evidence, and the meaning of individual responses could be argued by counsel through witness examination. By way of clarification, Udell inquired: "Judge, so I don't have to stand up and do this again later, at this time you've noted my objection. we're moving for a mistrial. I assume the Court will deny that. They are going to attempt to, I assume, offer in the transcript of the second statement." (1R 1350-58). Clearly, the court had just denied the motion, and Kearse has not offered an argument for a mistrial which Udell should have made. Udell was merely stating the obvious.

stated: "I'll make [the motion] so somebody doesn't argue I didn't make the motion later on, but I don't believe that has any grounds or any merit to it." (1ROA 1650; IB 14-15, n. 6).[13] Kearse complained that Udell offered **'I'm not even sure its necessary'** for him to move for a judgment of acquittal or directed verdict (R. 1743; IB 14-15, n. 6).[14] Two months prior to the second penalty phase, Udell advised the court he had two cases scheduled for trial before Kearse's, and needed a 30 to 60 day continuance. Udell stated: **"We're not trying to delay what may be the inevitable" and "I don't think anybody can say on**

[13] This motion was made outside the presence of the jury and Udell was noting he was making the motion to escape a later claim of ineffective assistance of counsel. The evidence at trial was that Kearse wrestled Parrish's gun from him and shot the officer 14 times. Udell's assessment of the merit to the motion was correct as the shooting of the officer 14 times, in and of itself, supports premeditation. In fact, this Court's rejection of the use of the word "murder" in the expanded premeditation instruction was based in part on the evidence of fact premeditation presented. The opinion can be read to support that premeditation was proven. See Kearse I, 662 So.2d at 682. See also, Hutchinson v. State, 882 So. 2d 943, 955-956 (Fla. 2004) (affirming denial of judgment of acquittal in part of on grounds multiple gunshots which required separate trigger pulls for each showed premeditation); Tillman v. State, 842 So. 2d 922, 926 (Fla. 2d DCA 2003) (finding lack of evidence of premeditation in part because there were not multiple gunshot wounds and that was no evidence of animosity between the victim and defendant). Cf. Phillips v. State, 476 So. 2d 194, 195-96 (Fla. 1985) (affirming first-degree premeditated murder conviction where victim shot multiple times).

[14] Undesigned counsel has been unable to locate the quote attributed to Udell; it is not located on the page referenced by Kearse. Irrespective of this, the State submits that there is no evidence that absent such comment, Kearse would have been acquitted or received a life sentence.

this record that this is an obvious ploy by the Defense to put off the inevitable." (2ROA-T 137, 141).[15]

Contrary to Kearse's position, the comments, none of which were made in front of the jury, did not deprive him of a vigorous, constitutional defense. Kearse has not alleged he was precluded from seating an impartial jury, nor has he shown that the result of the proceedings would have been different, had the comments not been made. Instead, Kearse challenges Udell's alleged attitude toward the case. The question is not what Udell's attitude was at the time, rather, it is whether Udell's representation met the constitutional standard under Strickland. That is judged not by supposition as to how counsel "felt" about the matter, but by Udell's actions and the reality of the case.

Kearse did not show what else Udell could have done that he did not do in defending against the conviction or sentence. Given the evidence of Udell's preparation and arguments outlined above, even absent the comment, a conviction and death sentence would have been obtained.[16] Moreover, merely because Udell was

[15] In context, it is clear Udell was not being fatalistic, but merely trying to fend off an anticipated state argument. Nothing more or less can be read into the comments.

[16] The record establishes Udell had mental health experts and investigators appointed. He sought suppression of physical evidence, Kearse's statements, and prior convictions. Further, he moved to have the death penalty statute declared unconstitutional and to preclude use of certain aggravation. He cross-examined witnesses, argued against the felony murder

being candid with this Court, i.e., admitting there was no case law supporting his position, does not equate to deficient performance, in fact, such is expected of officers of the court. Further, Kearse has not shown that premeditation was not proven by the State. See Kearse I, 662 So.2d at 682 (affirming conviction for first-degree murder); Hutchinson v. State, 882 So. 2d 943, 955-956 (Fla. 2004) (affirming denial of judgment of acquittal in part of on grounds multiple gunshots which required separate trigger pulls for each showed premeditation).

Without question, whether or not Udell commented to the press, noted he had a "bad case", or prefaced various motions with comments indicating the arguments were not the most compelling, the evidence was overwhelming against Kearse, and there is no reasonable probability that absent Udell's comments,

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theory, as well as premeditation, and asserted there had been no robbery. (1R 68-177, 1648-50, 1708-09, 1777-83, 1785-1812, 1829-39, 2207-14, 2216-24, 2225-47, 2451-52, 2455, 2457-58, 2462-63, 2474, 2497-98, 2523-25, 2538-41, 2542-45, 2546-49, 2555-57, 2560-61, 2565-66, 2573-81, 2611-35, 2616, 2623, 2631, 2633-35, 2637). Given the court's ruling, and in spite of defense arguments to the contrary, the evidence developed at trial was that Kearse killed an officer, who was performing his lawful duties at a traffic stop, during the course of which Kearse grabbed the officer's gun and shot him 14 times. This was confirmed by physical evidence, eye-witness testimony, and Kearse's confession. See Kearse v. State, 662 So.2d 677, 680 (Fla. 1995). (1R 1028-29, 1093 1128, 1135, 1138, 1140, 1153-54, 1186-87, 1190-91, 1196-97, 1204-05, 1219-21, 1224-31, 1248, 1251-59, 1285-87, 1294-1304, 1310-17, 1387-95, 1400-02, 1426-36, 1452-53, 1457-70, 1485-99, 1537-60, 1600-04, 1617, 1627-29; S1R for confessions).

and candid representation to the court, that the result of the trial or penalty phase would have been different.

Udell's conversational style with mental health experts (IB 15-17) was also challenged by Kearse and rejected by the court as it found no ineffectiveness in Udell's preparation and presentation of mental health experts. (PCR.37 5726-36). Kearse pointed to Udell's decision to tell the jury he **does not understand the mental health "psychobabble" testimony**. As Udell explained, the decision to tell the jury "**I have no idea what the mental health experts are talking about**" is a strategy to connect with the jury and say he is no smarter than the jury. However, Udell, a well seasoned, assured the court he was familiar with mental health testimony, he knew the jargon, and had two experts teaching him. This was also a way of telling the jury that if it were going to credit Dr. Martell, it would also have to give credit to Dr. Petrilla. Udell did not go to trial uneducated. Udell employed mental health experts before 1996. He also considered that he was arguing to Indian River County jurors and that typically, juries from that area do not like mental health testimony as mitigation. They see it more as an excuse, therefore, Udell was trying to tell his jury that there was value to the testimony in this case. (PCR.46 758-61). Given the numerous mitigation witnesses and mental health testimony from the defense experts, the State's rebuttal mental

health expert, and overwhelming aggravation in this case, Kearse has not shown that but for his counsel's strategy to use a conversational style when examining defense experts, a life sentence would have resulted. Kearse has not carried his burden under Strickland, and the denial of relief should be affirmed.

B. **Udell's preparation of and for mental health experts's** - In denying these claims, the court quoted extensively from the State's post-hearing memorandum of the evidentiary hearing facts (PCR.37 5726-36), and found:

> In bringing these claims, Kearse fails to acknowledge the extensive mental health mitigation prepared and presented on Kearse's behalf. Udell retained psychologist, Dr. Fred Petrilla, to prepare mental health mitigation in both penalty phases. In addition, Udell retained neuropharmocologist, Dr. Jonathan Lipman to assist defense counsel in the second penalty phase. At Dr. Lipman's direction, Kearse underwent three brain scans - MRI, PET, and SPECT. In making his mental health findings, Dr. Lipman consulted and relied upon clinical psycologist, Dr. Alan Friedman; neuropsychologist, Dr. Lawrence Levin; and neurosurgeon, Dr. Bennet Blumenkoff. In addition, Udell utilized licensed mental health counselor, Pamela Baker, to prepare and present mental health mitigation for Kearse's childhood.
>
> Udell used family and school psychological history to give support to mental health experts' testimony about brain dysfunction, emotional disturbance, Fetal Alcohol Effect, and confabulation. However, the mental health experts did not find Fetal Alcohol Syndrome, organic brain damage, or mental retardation. Further, Udell used the testimony of Kearse's teachers and counselors to neutralize psychiatrist, Dr. Angelina Desai's childhood diagnosis of conduct disorder, and to demonstrate the neglect and difficulties of Kearse's childhood.

In analyzing Claims III and IV, the Court adopts and incorporates relevant portions of the State's summary of testimony presented at the penalty phase and Udell's comments concerning the second penalty phase developed at the evidentiary hearing to evaluate Kearse's claims of ineffective presentation of mental health mitigation.

> Having fully litigated the first penalty phase, Udell was reappointed for the re-sentencing. In preparation for it, Udell relied upon and updated the investigation from the first penalty phase, rehired Dr. Petrilla, whom he had used in the first trial, and contracted with Dr. Lipman, a neuropharmacologist to add new mental health mitigation. (PCR 134). He also called Kearse, Rhonda Pendleton, Kurt Craft, Sharon Craft, Peggy Jacobs and Ernest Jacobs (Kearse's aunt and uncle), Danny Dye, Bertha Kearse (mother), Betty Butler (Kearse's aunt), and Pam Baker. Udell's 1996 investigation/preparation entailed talking to family members including Kearse's mother, aunts, and uncle. While it is his standard procedure to talk to grandparents and siblings, Udell does not recall if he did, but he believes Kearse's siblings were too young to be of assistance at the time. (PCR 134-35). Udell contacted Dr. Lipman, and at his request, obtained MRI, SPECT, and PET scans of Kearse, however, they turned out not to be helpful to the defense. (PCR 135). Udell used Kearse's family and school/psychological history as mitigation as well as to give support to the mental health experts' testimony about brain dysfunction, emotional disturbance, Fetal Alcohol Effect, and confabulation.
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> ... The school officials, Kurt Craft, Sharon Craft, and Danny Dye testified. (2ROA 1753, 1762, 1820). Kurt Craft reported that in 1983-1984, Kearse had learning disabilities, was emotionally dysfunctional, and had been placed in a class for "severely emotionally disturbed" children. (2ROA-T 1757-61).

Sharon Craft reported Kearse had repeated the First and Second grades twice, was severely emotionally handicapped, and was placed in a special program. Ms. Craft had no contact with Kearse's mother, Bertha Kearse ("Bertha") and considered him a neglected child who came to school hungry and dirty. He received poor grades, had difficulty concentrating, and was hyper-kinetic. In the Seventh grade, Kearse functioned at the Third grade level, and dropped out of school the next year. (2ROA-T 1765, 1769-72, 1777-78, 1782-83). Kearse was caught fighting and stealing; his records revealed he was angry and disruptive. One teacher noted Kearse liked to "play dumb" and work as little as possible. He was "street-wise", establishing the leadership role with peers, and inclined to talk back to his teachers. (2ROA-T 1793, 1797). Danny Dye noted Bertha was uninterested in her son and neglected him. He was small and dirty. (2ROA-T 1822-28).

Kearse's family members testified. Peggy Jacobs, Kearse's aunt reported that Bertha drank excessively when pregnant with Kearse and was 15 or 16 years-old when she gave birth. (2ROA-T 1811-12). Ernest Jacobs added that Kearse would sneak out at night, and once was found sleeping under a car. (2ROA-T 1816-19). Another aunt, Betty Butler, confirmed Bertha's drinking and testified that Bertha beat her son because she had trouble keeping him in line. He developed later than his peers, slurred his speech, and had difficulty learning (2ROA-T 1979, 1981, 1983, 1985). Bertha smoked and drank a lot during her pregnancy and could not afford prenatal care. (2ROA-T 1971, 1974).

... In 1981 when Kearse was eight years-old, Pamela Baker ("Baker"), a licensed mental health counselor, had contact with him

regarding a complaint that he was ungovernable and beyond his parent's control (2ROA-T 1990, 1997-2001). Kearse was placed in the "Suspected Child Abuse and Neglect" program ("SCAN Program") and his mother enrolled in the in-home parenting program, but her participation was superficial. (2ROA-T 2002-03, 2018). Bertha Kearse "whipped" her son daily; she had "given up" and had little interaction with her children. (2ROA-T 2004, 2014). Baker added that Kearse left his home because of his mother's drinking and fighting with her boyfriend. He wished to remain at the youth home because he was fed better there. The SCAN case closed in a year because no evidence of abuse was found. (2ROA-T 2016-20, 2054-55).

About the same time as the SCAN investigation, Kearse began to commit crimes, petty thefts, and burglaries; however, there was little aggressive behavior in the crimes. When he was in special education classes, between 1982 and 1987, he committed no criminal offenses (2ROA-T 2023-26). The 1982 psychological evaluation noted Kearse "listened to his mind" which indicated there may be auditory hallucinations. (2ROA-T 2027-28). The records showed that when Kearse was in Fourth grade, he operated at a retarded level and was severely emotionally handicapped. He had a 69 IQ at the age of 12, and quit school at 15 years-old. However in jail, he learned how to read and write. (2ROA-T 2031-33, 2037, 2039-40, 2052).

Baker never believed Kearse would kill; he was not mean or violent, but would get into fights. At times, he bullied others, pushing and shoving them; he threatened the school faculty because he wanted out of school (2ROA-T 2047, 2086-87). In 1981, Dr. Kushner did neurological and neuropsychological testing which revealed

problems related to brain damage. Kearse had poor short and long-term memory, motor skills, and planning. His verbal comprehension was poor and he was unable to do abstract thinking; his mental age was less than his chronological age, and the Weschler test put Kearse's IQ at 78. (2ROA-T 2121-24, 2134).

While in jail, Kearse confided to Baker that as a child, he had been forced to walk the neighborhood naked; and he had been tied to a bed and beaten with extension cords and cloth-wrapped hangers. Bertha physically abused her boyfriend and drank heavily on the weekends. Kearse started drinking at four or five years of age, smoking marijuana at age 12 or 13, and smoking cigarettes at 14, but he did not do other drugs. (2ROA-T 2056, 2061-63, 2113-14). Kearse was beaten by gang members, robbed, hit by a car twice, fell out of a window hitting his head, and nearly drowned three times. (2ROA-T 2075-76). He was sexually molested at the age of 12 by a person four years older; and at 16, he lost his virginity to a 31 year-old woman. (2ROA-T 2078-79). Kearse exhibited symptoms of panic attacks and conduct disorders. (2ROA-T 2077-78, 2095).

Dr. Fred Petrilla, a licensed clinical psychologist, evaluated Kearse in 1991 and again in 1996. (2ROA-T 2236). In 1991, Dr. Petrilla met with Bertha Kearse, ,spent about 20 hours with Kearse and administered several neuropsychological tests. The 1991 testing indicated Kearse was not mentally retarded, but had brain dysfunction, auditory, concentration, and behavioral problems in addition to cultural deprivation. (2ROA-T 2138, 2144, 2146-47, 2153-59, 2170-74, 2177-87). In 1996, the neuropsychological testing appeared to be normal, however, when reviewed in conjunction with the prior testing and records, it showed moderate brain dysfunction in the left hemisphere which had

existed at least since eight years of age. Kearse was indecisive, insecure, and defensive, with a tendency to be hyperactive and react without thinking. (2ROA-T 2175-87, 2190-97). No malingering was detected, although the indicator scale was elevated (2ROA-T 2188-89, 2192-99, 2227-33). After reviewing all of his testing, along with Kearse's prior evaluations, background information, school records, and Dr. Kushner's 1981 files, Dr. Petrilla concluded Kearse suffered a long-term disability; the dysfunction was developmental in nature and long-standing. It was his conclusion that two statutory mitigators existed: (1) Kearse was suffering under extreme emotional disturbance at the time of the crime and (2) due to his emotional disturbance, he was substantially incapable of conforming his conduct to the requirements of the law. (2ROA-T 2200-03).

Dr. Lipman, a neuropharmocologist, testified that he met with Kearse and his mother in addition to reviewing school records ordering brain scans and consulting with other experts. (2ROA-T 2239, 2247). His evaluation and review revealed that Kearse had neurodevelopmental problems from an early age and such was due to Bertha Kearse's alcohol abuse during pregnancy causing Kearse to suffer from Fetal Alcohol Effect ("FAE") a milder form of Fetal Alcohol Syndrome. Kearse did not meet all the criteria for the syndrome as he did not have the typical facial/physical characteristics associated with the syndrome. However, he did suffer from FAE as evidenced by Kearse's hyperactivity as a child, impulsivity, under-weight at birth, small during early childhood, and educationally sub-normal. Kearse had a pervasive developmental disability from infancy. (2ROA-T 2247-51). The testing Dr. Lipman ordered, in consultation with Dr. Blumenkoff, established damage to Kearse's left brain, although such was not

diagnostic. One of the effects of alcohol ingested in utero, is brain dysfunction. The school and psychological records support the finding of FAE and are consistent with the findings of Drs. Petrilla and Petrilla/Kusher. All showed a pervasive developmental abnormality from a very early onset. (2ROA-T 2254-63).

Kearse discussed the murder with Dr, Lipman, and based upon these discussions, Dr. Lipman believed Kearse was confabulating, i.e., he was rationalizing what happened, but at the same time believing what he was reporting. As such, what Kearse was saying was untrue, but because he believed it to be true, he was not lying. Dr. Lipman did not believe everything Kearse was telling him about the murder as he had irrational elements to his story, however, he was not lying; he was confabulating. Kearse was filling in the gaps in his account with what seemed reasonable to him, and had become "memory." (2ROA-T 2263-68). Dr. Lipman concluded that what Kearse was reporting was "pure impulsiveness" and rationalizations. Kearse's actions show there was no careful forethought; he was just exploding. It was Dr. Lipman's opinion Kearse consciously did not think that the only way to avoid arrest was to kill Parrish. (2ROA-T 2265-71).

Also reviewed by Dr. Lipman was the testing done by the State's expert, Dr, Martell, and the MMPI results obtained by Dr. Petrilla and Dr. Kushner's 1981 report. As part of that review, Dr. Lipman consulted with Drs. Friedman and Levine (2ROA-T 2287-90). He opined that Kearse had a verbal memory disorder and was not malingering on the MMPI (2ROA-T 2292, 2295).

The State's witness, Dr. Martell, as qualified as an expert in forensic neuropsychology. (2ROA-T 2345). Upon Dr. Martell's review of all materials generated in the case, he concluded that neither

mental mitigator applied, there was no evidence of a severe mental or emotional disturbance, and Kearse was malingering. (2ROA-T 2355, 2357-58, 2369-70, 2412). Kearse did not meet the criteria for a panic disorder, and Fetal Alcohol Effect is not a mental disorder. Moreover, the profession is trying to eliminate the term Fetal Alcohol Effect because the symptoms can occur naturally (2ROA-T 2370-72). While Dr. Lipman noted that Kearse had a low birth weight and developed more slowly to support the FAE finding, Dr. Martell's review of the records showed Kearse had a normal birth weight, walked and talked at an early age, and had no abnormal developmental features, thereby, undercutting the FAE conclusion. (2ROA-T 2374-75).

Dr. Martell agreed Kearse was weak in some areas, but overall, there was no brain damage and his brain scans were normal (2ROA-T 2376). Contrary to Dr. Petrilla's conclusion, Dr. Martell found the testing showed Kearse was mildly impaired in attention concentration, but most areas were normal. When Dr. Petrilla tested Kearse, the results showed moderate to severe depression, and depression can affect IQ because the subject is apathetic. Such may account for Kearse's low verbal IQ inattention, and lack of concern. (2ROA-T 2380-83).

It was Dr. Martell's conclusion that Kearse had a conduct disorder, and that he made a choice not to apply himself in school because he did not want to be there. (2ROA-T 2386). Such conclusion is in agreement with Dr. Desai who had evaluated Kearse in 1983, and the records bear out Dr. Martell's conclusion. (2ROA-T 2387-89). Based on this, Dr. Martell found Kearse to have an anti-social personality disorder. (2ROA-T 2388-89). Kearse also met six of the seven criteria for sociopathy and scored within the range for psychopathy. Neither

sociopathy nor psychopathy constitute extreme mental or emotional disturbance. There is no history of Kearse having a severe mental disorder. (2ROA-T 2399-2402). The MMPI test had elevated levels in the F-scale indicating malingering. From the 1991 MMPI results, Dr. Martell found psychopathic deviance, antisocial tendency, and mania. (2ROA-T 2402-04). There was a much greater effort in 1996 by Kearse to fake his test results. The MMPI indicate extremely disturbed paranoid schizophrenia, but there is no evidence of such behavior. Hence, Dr. Friedman's conclusions upon which Dr. Lipman relied are incorrect. The tests are not valid. (2ROA-T 2404-11).

According to Dr. Martell, the statutory mental mitigation did not apply because Kearse knew he committed a traffic infraction and might get arrested; he lied to escape the consequences. Further, he consciously shot the officer after obtaining his gun and continued shooting even after Parrish had fallen. Kearse took the gun from the scene because his prints were on the weapon, and left the scene with his headlights extinguished, later hiding the gun and car. When confronted by the police, Kearse lied (2ROA-T 2412-20). Instead of finding "confabulation", Dr. Martell concluded Kearse was a pathological liar. (2ROA-T 2424).

...As part of his preparation of the school educators and Pamela Baker, Udell sent them their prior testimony. His strategy behind calling Kearse's teachers and family was to have them put everything about Kearse into context. Udell used the teachers to educate the jury, and as surrogates if the mental health experts were not believed, the teachers could say "forget the mental health experts, we are on your level, this is a good kid." (PCR 131, 158-59). The educators noted Kearse had attended a center for emotionally disturbed youth, had learning

disabilities, and was emotionally disturbed. They also noted that Kearse was small for his age which supported the FAE finding of Dr. Lipman. The teachers noted Kearse had failed in school and had difficulty functioning at his correct age level. Both the teachers and family discussed Kearse's home life and the fact he was neglected. (PCR 138-41). The family reported Bertha Kearse's drinking during her pregnancy and afterwards. Again, this went to the FAE finding and other emotional problems. (PCR 141-47, 149-50).

...Udell did not recall whether he had birth records or not, but would be surprised that he did not get them in light of the fact the defense was seeking a FAS or FAE finding by Dr. Lipman. (PCR 127). Also obtained were Kearse's school records, which included health and mental health records done by the school. Udell had the records from the juvenile system. He supplied the mental health experts, Drs. Petrilla and Lipman,FN7 with the reports/evaluations of prior mental health examinations completed by Drs. Desai and Linda Petrilla. Udell researched Kearse's prior criminal history and corresponded with Benjamin Robinson, the Superintendant at the Bell Avenue Youth Detention Center. (PCR 131-33, 137-38, 147, 150). From these records Dr. Petrilla was able to find Kearse had brain damage and Dr. Lipman found FAE. (PCR 150).
FN7. Dr. Lipman was hired because the defense was not successful in the first penalty phase, therefore, Udell wanted to add something to the presentation. (PCR 134).

Dr. Petrilla had worked with Udell on other capital cases and had testified for Kearse in the first penalty phase. The doctor was supplied with Kearse's criminal/social history documents, eye-witness statements, and prior psychological examinations by other experts, as well as all prior

> testimony from the experts and educators. (PCR 153-53, 155-56, 158-59). Udell's correspondence and communications with Dr. Petrilla showed that they exchanged thoughts about the case with Dr. Petrilla giving Udell suggestions. Udell wanted Dr. Petrilla to explain Kearse's juvenile offenses and show that they were petty, thus, allowing the jury to find the mitigator of "lack of prior significant criminal record." Before making this decision, Udell weighed it against opening the door to less useful information. Ultimately, the juvenile record was used because Dr. Petrilla could explain that the crimes were minor/petty. (PCR 152-56).
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> State's Post-Hearing Memorandum, pages 64 - 76.

As to Kearse's specific claims of ineffectiveness, it is apparent from the record that Udell knew or anticipated the substance of Dr. Martell's testimony despite not having deposed Dr. Martell. Udell cannot be held responsible for the ruling just weeks before commencement of the second penalty phase compelling the State's mental health examination of Kearse. The ruling resulted in the late disclosure of the State's mental health expert, Dr. Martell. The record reflects that Udell requested but was denied a continuance to depose Dr. Martell.

And although there was no evidence that Udell conducted a deposition of Dr. Martell, at the evidentiary hearing Udell stated that he already knew was Dr. Martell was going to say regarding "which mitigating factors didn't exist." (PCR 337-38). Udell was unable to recall the specific circumstances under which he obtained information on the substance of Dr. Martell's testimony but concluded that he most likely acquired details of Dr. Martell's report through discussions with the prosecutors and through Udell's familiarity with the work of Dr. Martell's partner, Dr. Dietz. In support of Udell's explanation, it is evident to this Court from Dr. Petrilla's and Dr. Lipman's testimony during the second penalty phase that Udell anticipated that Kearse's personality

profile would be at issue, Particularly with respect to any indication of malingering. Also, it is apparent that Udell knew the childhood diagnosis of conduct disorder would be problematic where Udell determined it would be effective strategy to present the testimony of teachers and counselors to provide alternative explanations for Kearse's childhood conduct. Thus, the Court finds Udell's strategy to proceed without deposing Dr. Martell reasonable under the circumstances.

As to Kearse's claims that Udell was ineffective for failing to adequately prepare Dr. Lipman, the Court finds that Kearse fails to meet the burden of proving ineffective assistance of counsel. At the evidentiary hearing it was established that Dr. Lipman did not have access to a transcript of Rhonda Pendleton's eye-witness testimony. However, Dr. Lipman testified that he was provided the substance of Pendleton's observations of Kearse during the traffic stop but that this method of receiving information was inferior to receiving a transcript of the testimony and having an opportunity to interview Pendlton with respect to Kearsed demeanor at the time of the murder. (PCR 481-82). Even if Udell failed to provide the transcript and Dr. Lipman was not provided the opportunity to interview Pendleton, the Court finds no prejudice where Kearse does not demonstrate how Dr. Lipman's opinion would have changed and how that change in opinion would have mitigated to a life sentence.

In addition, Kearse challenges Udell's examination of Dr. Lipman concerning his reliance on other mental health experts. Kearse contends that Udell improperly exposed the weakness in Dr. Lipman using another doctor's work. The Court evaluated this claim in the context of Dr. Lipman penalty phase testimony. The Court finds that Udell was clarifying Dr. Lipman's consultation with other experts in response to the State's bench challenge that Dr. Lipman was practicing psychology without a license. Further, the Court finds no bar to Dr. Lipman testifying to the other mental health experts upon which he relied. Although Kearse can point to examples where these experts could have been more authoritative in delivering their opinions first-hand, the record is replete with expert opinion contradicting Dr. Martell's testimony.

Consequently, the Court construes this claim as more of an expression of Kearse's dissatisfaction with the trial performance of Dr. Lipman under pressure of effective cross-examination.

Next, Kearse cites to Udell's cross examination of Dr. Martell as evidence that Udell was inadequately prepared to present a case of mental mitigation . Kearse contends that Udell should have attacked Dr. Martell's method of conducting the compelled mental health examination of Kearse, should have called Dr. Alan Freidman to testify directly to rebut Dr. Martells opinion that Kearse was malingering, and should have enabled Dr. Lipman to perform a qualitative analysis of Kearses test results in comparison with published data. The Court finds that even though Udell did not pursue these approaches to undercut Dr. Martell's opinion, there is no prejudice where it is clear from the evidentiary hearing testimony that mental health experts do not agree on a standard method of interviewing, where mental health experts disagree on interpreting testing profiles indicating the possibility of malingering, and where Kearse did not show how a qualitative analysis of Kearse's test results would have been dispositive to the resolution of the disagreements among mental health experts. Therefore, the Court finds no evidence that a different approach to cross-examination would mitigate to a life sentence.

Further, the Court finds no ineffective assistance of mental health experts. Kearse's postconviction mental health experts, Drs. Crown, Dudley, Friedman, and Hyde, offered opinions consistent with Kearse's penalty phase mental health experts, Drs. Petrilla and Lipman, despite Dr. Dudley's disagreement with the diagnosis of conduct disorder made by Kearse's childhood psychiatrist Dr. Dedai. These expert opinions were based on facts cumulative to evidence presented in the second penalty phase with the exceptions of a reference to an affidavit by a relative that Kearse had an odd shaped head at birth, and self reports by Kearse that he experienced nightmares and had some different sexual experiences as a child. No birth records or additional medical records were produced during the postconviction proceeding to establish Fetal Alcohol Syndrome,

> organic brain damage, or mental retardation. And even though Kearse challenges the propriety pf Dr. Petrilla's administration of the MMPI personality test, postconviction mental health expert, Dr. Crown developed a personality profile of Kearse consistent with Dr. Petrilla's personality profile using a different test instrument. Therefore, the Court finds no basis fo a claim of ineffective assistance of mental health experts.

(PCR.37 5726-36).

The court conducted an exhaustive review of the record, and its findings and conclusions are supported by that record as well as the law. The State submits that Udell, a seasoned capital defense attorney,[17] considered all aspects of the mental health case and made strategic decisions[18] there from which met the constitutional requirements outlined in Wiggins; Ake v. Oklahoma, 470 U.S. 68 (1985);[19] and Strickland. These strategy

[17] By Kearse's re-sentencing, Udell had been practicing criminal law for approximately 16 years, and capital litigation for about 11 years. He had done more than 80 homicide trials, most of the capital cases prosecuted in the Nineteenth Judicial Circuit and attended the "Life Over Death" and Death is Different" seminars as well as watching other capital cases tried in the circuit to stay abreast of issues. (PCR.44 495-99; PCR.45 603-09).

[18] See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient.")

[19] Jones v. State 845 So.2d 55, 67-68 (Fla. 2003) is instructive.

> *Ake* requires that a defendant have access to a "competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." ... This Court has stated that one of the most compelling indications for

decisions included Udell's preparation of Dr. Lipman,[20] his

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granting an evidentiary hearing on an *Ake* claim occurs when one or more of a defendant's mental health experts "ignore[s] clear indications of either mental retardation or organic brain damage." *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987). In *Mann v. State*, 770 So.2d 1158 (Fla. 2000), the appellant (Mann), who had been sentenced to death for a capital murder, claimed that he was entitled to an evidentiary hearing on his postconviction *Ake* claim. In upholding the denial of the evidentiary hearing, we stated:

... The mental health evaluation detailed above is substantially the same as that provided Jones in the instant case. Specifically, Dr. Krop testified during Jones's re-sentencing that he administered a battery of tests similar to those detailed in Mann.[25] Equally important, Dr. Krop related not only that Jones suffered from no severe brain damage, but also that brain damage did not contribute to his actions on the day of the murders. Furthermore, he stated that Jones has an IQ of 107. Thus, the record refutes any suggestion that Dr. Krop ignored the type of serious brain damage or mental retardation we detailed in *Sireci*. An evidentiary hearing on this portion of the *Ake* claim was properly denied.

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[25] Dr. Krop administered the following tests: Minnesota Multiphasic Personality Inventory (MMPI) (administered twice--updated version in 1991, before Jones's re-sentencing), Wechsler Adult Intelligence, Prescott Attitude Survey, Beck Depression Inventory, Bender Gestalt, Wechsler Memory, Tennessee Self-Concept Scale, and Malin Clinical Multi- Axial Inventory. Dr. Krop described this battery of tests as "psychological and neuropsychological." He did not engage in testing based on alcohol or drug abuse because he saw no indications of a substance abuse problem."

Jones 845 So.2d at 67-68.

[20] The record is confusing on the point of whether Dr. Lipman had Kearse's confessions. Initially he said he had and read them, but could not recall what they contained only later changing it to that he did not know if he had the confessions and that he did not use them in forming his conclusion. (2R-T 2317-20, 2336-38). Nonetheless, Dr. Lipman met with Kearse, knew of his confessions, and could have asked about them. No

decision to allow the doctor to rely on testing by other experts, the conclusion to utilize the "confabulation" defense,[21] the determination that Kearse's PET scan should not be presented,[22]and preparation for Dr. Martell's testimony. Again, this is a reasoned strategic choice. Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) (recognizing "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic

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ineffectiveness of counsel has been shown. Likewise, while Dr. Limpan at one point stated that he was inundated with documentation, he appears not to have received Pendleton's testimony. However, the doctor noted that he did not have this, but admitted to never calling Udell to ask for such materials. (2R-T 2324). Nonetheless, even during the evidentiary hearing, Dr, Limpan did not change his diagnosis, and the evidence of guilt remained overwhelming. Neither deficiency not prejudice have been shown.

[21] As Udell noted, Dr. Lipman's testimony regarding confabulation was utilized to undercut the State's theory that the murder was done to avoid arrest. Udell recognized he had no good alternative given Kearse's internally inconsistent confessions which basically conceded the State's version of events including that Parrish was not aggressive and Kearse was avoiding arrest. Udell made the strategic choice to present the confabulation theory rather than argue Kearse's version at the re-sentencing was true. Kearse's story was rejected because it had no evidentiary support and would have left Udell with no other option than to admit Kearse lied out-right. Udell was able to meld the two versions together and explain away the differences based on confabulation. (PCR.45 646-48; PCR.46 750-57).

[22] Dr. Lipman was used to help Udell decide whether to present the PET scan conducted on Kearse, knowing the State had contracted with Dr. Mayberg. It was determined that the PET scan did not yield anything helpful to the defense, thus, Udell did not present it and the State did not call its expert. (PCR.45 638-41).

decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). See Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated defendant was malingering, a sociopath, and a very dangerous person). See also State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). No deficiency has been established.

Moreover, from the foregoing, it is clear that Udell investigated Kearse's case thoroughly. He contacted family and friends, obtained documentary support, hired mental health professionals to evaluate the defendant, and assisted with developing defense strategies given the evidence and the anticipated response for the prosecution. He also provided his experts with the necessary access to his client, information provided by other experts and/or professionals who knew Kearse, and with background supporting documentation. These experts testified that Kearse was not mentally retarded, but suffered from FAE, confabulated his version of events, was not

malingering, had mild brain dysfunction, auditory difficulties, behavioral problems, and was indecisive, insecure, defensive, with a tendency to be hyperactive and react without thinking. Kearse's expert offered two statutory mental health mitigators applied: (1) Kearse was suffering under extreme emotional disturbance at the time of the crime and (2) due to his emotional disturbance, Kearse was substantially incapable of conforming his conduct to the requirements of the law. Not only did Udell's actions in this case fall within the wide range of professional conduct as defined by Strickland and Wiggins, but the hiring of mental health professionals, Drs. Petrilla and Lipman, and their thorough testing complied with the dictates of Ake v. Oklahoma, 470 U.S. at 76-85 (holding state must provide indigent defendant access to mental health assistance once preliminary showing made that mental health is at issue).

Furthermore, no prejudice has been shown as Kearse has not shown that Udell's experts did not present the available mental health mitigation; Kearse's new experts did not disagree with the findings of the original mental health experts presented at trial. Kearse has not come forward with any testimony which shows prejudice. Kearse's new experts[23] either would support the

[23] Dr. Crown, Dr. Friedman (Dr. Lipman had reported Dr. Friedman's conclusion in 1996), Dr. Dudley, and Dr. Hyde.

findings of Drs. Petrilla or Lipman[24] or would undercut them and detract from the original defense strategy.[25] While the new

[24] Dr. Crown agreed with the findings of the defense experts including those who had evaluated Kearse in grade school or for the prior penalty phase. He was not mentally retarded, but has neuropsychological deficits. Dr. Crown does not disagree with either Dr. Dudley or Dr. Hyde, two of Kearse's new doctors. (PCR.45 671-72, 680-82, 699-700).

Dr. Friedman, a defense clinical psychologist, testified that Dr. Lipman had contracted with him to review this case. He agreed that his report was given to Dr. Lipman, who then testified from that report in Kearse's 1996 penalty phase. In the evidentiary hearing, Dr. Friedman reiterated his 1996 findings that Kearse was not malingering (PCR 403, 413-14, 426-34, 463). Likewise, Dr. Lipman, the neorupharmacologist who testified for the defense in 1996, reaffirmed his prior conclusion that Kearse suffered from Fetal Alcohol Effects and that Dr. Friedman had determined that Kearse had not been malingering. Although Dr. Lipman claims he asked for additional expert assistance, he admitted contracting experts on his own, being overwhelmed by Udell with documentation, knowing what eye-witness, Pendleton, reported and being able to opine about Kearse's conditions. Dr. Lipman averred that he saw nothing new which would change his opinion. (PCR.47 942, 946-49, 951, 965-68, 974) Clearly, these experts offered nothing the 1996 penalty phase jury did not hear and reject.

[25] Dr. Dudley, a psychiatrist hired by postconviction counsel, confirmed Kearse did not have Fetal Alcohol Syndrome, but could have Fetal Alcohol Effect. (PCR.48 1018, 1023-24, 1040-41). He found Kearse depressed, with long-standing cognitive difficulties, symptomatic for Post-traumatic-Stress Disorder ("PTSD"), and appearing to have Attention Deficit Hyperactivity Disorder. (PCR.48 1041-43). While Dr. Dudley found Kearse appreciated the criminality of his conduct, he did not believe Kearse could conform his conduct to the requirements of the law (this mitigator was offered by Dr. Petrilla in the 1996 penalty phase). Provenzano v. Dugger, 561 So. 2d 546 (Fla. 1991) (finding no basis for relief by mere fact that defendant has found an expert who can offer more favorable testimony). However, the doctor admitted Kearse had a history of conduct disorder, and recognized Drs. Desai and Crown had made such a diagnosis. In fact, Kearse had been arrested 13 to 14 times for

doctor's testimony is relatively consistent with the 1996 opinions offered the jury, some of the testimony is in conflict, thereby, adding further support to the the State's expert, Dr. Martell. To the extent the experts disagree with Dr. Martell's conclusions, such does not matter. In fact, even if Kearse had found a new expert to give him additional mental health mitigation, such would not undermine confidence in the proceeding necessitating a new penalty phase. In Damren v. State, 838 So.2d 512, 517 (Fla. 2003), this Court reviewed the defendant's recent discovery of an expert to testify about "potential brain damage" and reasoned that the finding of a new

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such crimes as burglaries and robberies between the ages of eight and eighteen. Dr. Dudley admitted that the nightmares upon which he based his diagnosis of PTSD were self-reported for first time here. (PCR.48 1059, 1062-63, 1071-77, 1097). Such admissions undercut the value of Dr. Dudley conclusions. Further, merely because a new doctor is found, does not call into question the prior representations especially where the new doctor aggress with much of what the original experts offered. See Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (reasoning that first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert); Jones v. State, 732 So. 2d 313, 320 (Fla. 1999)(same); Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990) (same).

Kearse's final expert, Dr. Hyde, a neurologist, noted indicators of brain dysfunction, learning disability, ADHD, and developmental dysfunction. (PCR.51 1441, 1448-52). **He never heard of Fetal Alcohol Effect, but thought it could be a "shorthand" method of discussing the effects of alcohol exposure in utero**. (PCR.51 1455-56). The record reflects much of this was discussed in the 1996 penalty phase. It does not establish prejudice arising from counsel's actions. See Jones, 845 So.2d at 67-68; Damren v. State, 838 So.2d 512, 517 (Fla. 2003); Asay, 769 So.2d at 986; Jones, 732 So.2d at 320.

doctor “does not equate to a finding that the initial investigation was insufficient.” See Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (finding defense counsel’s investigation of mental health mitigation was reasonable and counsel could not be declared incompetent “merely because the defendant has now secured the testimony of a more favorable mental health expert."); Remeta v. Dugger, 622 So.2d 452, 455 (Fla. 1993) (finding sentencing process was not undermined where original mental health expert’s testimony would not have been significantly different irrespective of the new evidence); Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991) (affirming rejection of new mental health opinions where original opinion was unchanged and evidence contradicted new evaluation).

The records reveal, Kearse has not shown either deficiency or prejudice arising form Udell’s representation. All Kearse has offered is disagreement with the strategy Udell followed and disappointment that Dr. Martell’s opinion was relied upon to reject the statutory mental mitigation offered in the second penalty phase. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient."); Occhicone, 768 So.2d at 1048 (opining "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute

ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."); Rose v. State, 675 So.2d 567 (Fla. 1996) (holding disagreement with defense counsel's strategy was not ineffectiveness); Cherry v. State, 659 So.2d 1069 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight). Neither contention gives rise to a basis for postconviction relief. Kearse has not carried his burden under Strickland and Wiggins. Relief was denied properly.

C. **Decision not to present negative aspects of the victim's work history** - In rejecting this claim, the court reasoned:

> Kearse claims that counsel was ineffective during the guilt phase and the second penalty phase for failing to present evidence of Officer Parrish's prior misconduct and difficulties in dealing with the public. Kearse contends that Parrish had a history of dealing with the public in a threatening and erratic manner that could have provoked Kearse during the traffic stop. Kearse avers that had counsel adequately investigate all of the complaints against Parrish and obtained the documentation of Parrish's deficient performance, counsel could have undermined the State's theory that Parrish was killed without provocation during the traffic stop. However, Kearse does not allege any actual provocation by Parrish during the traffic stop. And at the evidentiary hearing, Kearse presented no evidence of actual provocation by Parrish during the traffic stop.
>
> It is uncontested that during discovery Udell obtained copies of citizen complaints filed against Parrish and that Udell did not obtain copies of Parrish's

personnel file or internal affairs file. (PCR 42-44, 48, 50). It is clear from the evidence presented at the evidentiary hearing that Udell decided not to pursue the strategy of vilifying the officer/victim after reviewing citizen complaints, information obtained by defense investigators on the citizen complaints, and interviews with some of the citizens that filed the complaints. Udell compared the strength of citizen complaint evidence against Kearse's confessions and Rhonda Pendleton's eye witness testimony describing Parrish's conduct during the traffic stop where Pendleton testified that Parrish was polite and did not abuse Kearse, and where both Kearse and Pendleton reported that Parrish was going to let Kearse leave on his own recognizance if Kearse would give Parrish his correct name. (1ROA 1458-70; 2ROA-T 1641, 1660-60, 1847; PCR 42-57)

As to the citizen complaints, Udell acknowledged that the complaints revealed that Parrish had been aggressive in the past in dealing with citizens with some racial overtones. However, Udell testified that he made a strategic decision not to use the complaints to vilify Parrish because some complainants were unwilling to testify and the circumstances of the complaints were insufficient to overcome juror sympathy for the officer/victim. Udell reasoned that the jury was likely to look at the complaints as part of an officer doing his job, recognizing that not everyone is going to like a police officer. Udell believed that this type of evidence would backfire especially in Indian River County, a venue based on Udell's experience where the jury would be more sympathetic to the deceased officer. (PCR 52-54, 56-57, 299-305.)

The Court finds Udell's assessment of this complaint evidence credible and reasonable where complaint witnesses, Tracy Davis and Eric Jones, testified at the evidentiary hearing to complaints of Parrish's misconduct during traffic stops, where the complaints were investigated by the Fort Pierce Police Department, where the complaints were determined to be unfounded, and where Davis and Jones ultimately paid traffic citations issued by Parrish without contest. (PCR 375-399, & 880-926.) Further, the Court finds Udell's concern about a lack of credibility of

complainant, Benjamin Lewis, supported by the facts that Lewis was detained by Parrish due to suspicious circumstances and by Lewis' confession that he had been arrested for murder, aggravated assault on a police officer, and convicted of carrying a concealed firearm. And, the Court finds Udell's assessment that the Martin's complaint was weak supported by the fact that the wife admitted that her husband may have provoked an incident involving Parrish at the K-Mart, and where Captain Price had investigated and exonerated Parrish. (PCR 313-315.) Therefore, in light of Udell's consideration of alternatives, and absent stronger evidence of Parrish's prior misconduct and absent evidence that Parrish abused Kearse during the traffic stop in this case, the Court finds trial counsel's strategy not to pursue the victim vilification defense reasonable. *State v. Bolander*, 503 So.2d 1247, 1250 (Fla. 1987.)

During the evidentiary hearing, Kearse sought to admit evidence of Parrish's alleged racial bias in dealing with minority citizens. The Court permitted Kearse to proffer the testimony of CCRC investigators, Stacy Brown and Nicholas Atkinson. The testimony was offered to relate was Pastor Lacy Newton had reported to Atkinson concerning Parrish's alleged racial bias. At the hearing, the Court reserved ruling on admission of the testimony of the CCRC investigators. (PCR 704-05.) The Court now rules that the proffered testimony is inadmissible hearsay in this postconviction proceeding, and thus, the Court did not consider the testimony in ruling on Kearse's postconviction claims. *See Randaoph v. State*, 863 So.2d 1051, 1062 (Fla. 2003) (recognizing there was no error in ruling affidavits os unavailable witnesses were inadmissible hearsay as the rules of evidence apply in such proceedings). *Cf. Kokal v. State*, 901 So.2d 766, 775 (Fla. 2004) (recognizing that rules of evidence apply in postconviction cases).

Lastly, the Court finds no prejudice where counsel failed to obtain Parrish's personnel and internal affairs files. Parrish's personnel records contained evaluations which noted areas that needed improvement including: (1) dealing with the public, although he got along well with fellow officers; (2) knowing rules and regulations; (3) learning to use discretion; and

> (4) noting Parrish was excitable, but anticipating experience would change that. The record contained a one-day suspension of Parrish or leaving his service revolver in his cruiser. An evaluation closer to the time of the traffic stop noted satisfactory job performance. Further, the file contained other positive material concerning Parrish's performance that the State could have used to rebut any claims of misconduct. (PCR 42-57.) Thus, the Court finds no prejudice where counsel failed to obtain and consider these records prior ro making a strategic decision not to pursue a strategy vilifying Parrish.

(PCR.37 5717-19). The court's ruling should be affirmed as Udell's decision not to present such evidence was pure strategy which was developed after an investigation, although not an exhaustive one. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

With regard to the complaints obtained by the defense pre-trial, Udell recognized that they revealed Parrish had a "hair trigger temper" with some racial overtones.[26] In addition to

[26] During the evidentiary hearing, Kearse proffered that testimony of Stacy Brown and Nicholas Atkinson, investigators for CCRC. The court determined that such testimony was inadmissible hearsay. Such is supported by Randolph v. State, 853 So.2d 1051, 1062 (Fla. 2003) (recognizing there was no error in ruling affidavits of unavailable witnesses were inadmissible hearsay as the rules of evidence apply in such proceedings). Cf. Kokal v. State, 901 So.2d 766, 775 (Fla. 2004) (recognizing that rules of evidence apply in postconviction cases). However, even if the evidence should have bee considered by the court, no prejudice can be shown. Irrespective of Parrish's alleged

getting the complaints, Udell corresponded with others to obtain more information about Parrish's aggressiveness. Udell chose not to use this information because, in the end, the witnesses would not come through for the defense; the witnesses, "when push came to shove everybody backed off what they said." They admitted to Udell the incidents were not as bad as initially suggested. While Udell had some witnesses under subpoena, he waited until trial to make the final decision not to call them. Udell also considered the guilt phase evidence,[27] the impact the

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racial feelings, the encounter with Kearse was professional/polite up until the time Kearse took Parrish's weapon and shot him 14 times. Not only did Rhonda Pendleton note that Parrish was not abusive, but Kearse also admitted this. (1R 1458-70; 2R-T 1641, 1660-63, 1847).

[27] During the evidentiary hearing, Udell reiterated that Kearse never had a true claim of self-defense and if he had tried to offer the defense, it "would not fly" as it was not supported by the evidence or jury instructions. Udell considered arguing an "imperfect self-defense," but in analyzing all the evidence, and assuming it would all come into evidence, Udell reiterated that he did not think it would reach the "tipping point" where the information would be helpful in the guilt phase. (PCR.46 777-78). He assessed whether the jury would look at the complaints as part of an officer doing his job, and recognizing that not everyone is going to like a police officer. Had Udell pursued the complaint strategy, he recognized there was a possibility the State would present positive facts about Parrish contained in the personnel file. (PCR.46 777-82). In fact, Parrish's personnel file did contain a Memo of Commendation showing he had stopped a juvenile from committing suicide by diffusing the situation. This type of positive information was something Udell feared and knew would have been admissible. (PCR.46 782-83).

evidence would have on the penalty phase,[28] and that there were reports in the file showing the complaints were unfounded, or the witnesses were of questionable veracity.[29] His final

[28] Udell considered whether this type of evidence would backfire on the defense for vilifying a police officer/victim. Udell recognized a deceased officer is a sympathetic character, and in making this decision, he considered the venue of the case. He recognized that the decision might be different in New York, Boston, Philadelphia, or even West Palm Beach. However, the case was in Vero Beach, Indian River County and he did not feel he had enough evidence to go forward to convince such a jury to think ill of Parrish. (PCR.46 777-80). Moreover, Rhonda Pendleton, the eye-witness/friend riding with Kearse, testified that Parrish was polite. Also, there was evidence the State could offer to show that Parrish was going to let Kearse leave on his own recognizance, if he would give his correct name. Pendleton testified that Parrish went back and forth to his cruiser, told Kearse he would let him go if he would just give his correct name because he did not want to do the paperwork for a suspended license. She averred Parrish did not abuse Kearse. In fact, Kearse confirmed Parrish told him he would let him go with just three tickets if he would give his correct name. (1R 1458-70; 2R-T 1641, 1660-63, 1847).

[29] Likewise, Udell voiced concern that if he called Benjamin Lewis to testify about a complaint filed against Parrish, the evidence would show that when Parrish stopped Lewis, he was carrying a large black bag and wearing gloves. Also, the evidence revealed that Lewis told Parrish it was none of his business, and confessed he had been arrested for murder, had shot at an officer, but missed. Such was confirmed by the 911 Operator when Parrish asked for verification. He learned Lewis had been arrested for murder, aggravated assault on a police officer, and convicted of carrying a concealed firearm. Udell was concerned he would lose the battle as to whether Parrish was a good or bad officer regardless of the truth. (PCR.46 784-86).

Udell testified about the complaint from the Martins regarding an incident at K-Mart involving Parrish. He noted there was nothing so egregious about their complaint, and also recognized Mrs. Martin admitted her husband's conduct was more offensive than Officer Parrish's. Mr. Martin had started to curse and called Parrish a "pinhead." The complaint did not go far enough for Udell to put it on in the penalty phase as

analysis was that the complaints were not beneficial, and would do more harm than help.[30] (PCR.44 525-29; PCR.46 772-76). Udell also reviewed Parrish's personnel file at the evidentiary hearing, and reported that the evaluations had improved to satisfactory regarding dealing with the public. One noted Parrish was an asset to the police department, and that he was always working at 100-percent on the street. The file indicated that Parrish donated time to serve on the Honor Guard. (PCR 310-11). When the value of the evidence contained in the personnel

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mitigating. Moreover, Captain Price had investigated and exonerated Parrish. (PCR.46 786-88).

[30] Udell chose not to call the witnesses because they were unwilling to come forward or what they were willing to say "just didn't reach that tipping point where we felt it would help." Continuing, Udell testified: "No doubt, it was a strategy decision ... if you're going to slam a victim, you'd better be able to pull it off. And the strategy was we just weren't gonna pull it off based on what we had." Udell's decision was based on the "sum total of here's what we've got, here's what we know they're willing to say, and based upon that it just would hurt more than help." As Udell explained, it was not that all witnesses were unwilling to testify, just that their testimony did not reach "the tipping point" to be helpful. He noted that even with the personnel file, he could not say he would have made a different decision. He recognized the difference between a police officer's testimony and that of a witness who had a grudge against an officer (PCR.44 525-29, PCR.45 606-07; PCR.47 772-77). A strategy of vilifying the victim was also undercut by Kearse's confession and Pendleton's testimony, both of which were taken into consideration by Udell. Kearse made a series of statements trying to make Parrish look like the aggressor, but Parrish was not the aggressor. It was Udell's opinion that this type of argument could backfire in a capital case. Vilifying the victim is a strategy he has used, but it works only if the defense has evidentiary support; Udell did not have evidentiary support for the claim. (PCR.46 751-52).

file and complaint reports is considered in conjunction with the negative aspects of the defense witnesses suggesting Parrish was aggressive in their encounters (PCR 309-15, 375-97; 739-74, 864-24), Udell made a reasoned conclusion it would harm the defense more than assist it. Without question, the positive notations in Parrish's file and the criminal and/or belligerent attitude of some of the complaint witnesses created a "double-edged sword" for the defense.

The above evidence supports the court's finding that Udell rendered effective assistance of counsel. He investigated the issue, assessed the merits of using such evidence in light of the facts of the case, the venue in which the case was being prosecuted, and the strength of the evidence to be offered. It also shows that the portion of the personnel file Udell did not obtain would not have altered his strategy and resulted in no prejudice to Kearse. Relief must be denied. See Occhicone, 768 So.2d at 1048 (reasoning "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."); Bolender, 503 So.2d at 1250 (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of

action have been considered and rejected"). Udell fulfilled his professional responsibility by assessing this evidence after investigation, and determining it would not be useful, and even might open the door to evidence which would undercut the marginal value of claiming Parrish was the aggressor.

"Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So.2d at 1048. Kearse's evidentiary hearing presentation of witnesses who would testify about Parrish's aggressiveness does not sustain his ineffective assistance claim as it cannot arise from counsel's failure to present evidence which would have a negative effect on the defense. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient."); Cherry v. State, 659 So.2d 1069 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight). Cf. Carroll v. State, 815 So.2d 601, 614-15 & n. 15 (Fla. 2002); Asay v. State, 769 So.2d 974, 988 (Fla. 2000); Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992); Medina v. State, 573 So.2d 293, 298 (Fla. 1990). Relief must be denied.

D. **Udell's preparation and decisions related to presentation of lay witnesses** - Here, Appellant complins that the court should have found counsel rendered ineffective assistance in preparing or cross-examining lay witnesses: (1) allowing Kearse to mention he lived on death row; (2) having Pamela Baker testify about Kearse's juvenile infractions; (3) Peggy and Ernest Jacobs; (4) Derrick Dicerson and Rhonda Pendleton regarding Kearse's residence and relationship with Pendleton (pg 5713). (IB 33-34). Not only are the court's factual findings supported by the record, but the legal conclusions comport with the requirements of law. This Court should affirm the denial of postconviction relief.

The trial court addressed the challenges to **Kearse's testimony and that of Pamala Baker** together, finding:

> Kearse claims that counsel was ineffective for failing to adequately prepare Kearse and Pamela Baker to testify at the second penalty phase. As a result of counsel's deficiencies, Kearse contends that he improperly disclosed that he already lived on death row and that Baker testified at length concerning Kearse's juvenile infractions, facts that were otherwise inadmissible.
>
> As to Kearse's disclosure that he already lived on death row, the record is clear that Kearse's answer was unresponsive to Udell's question about where Kearse had been incarcerated prior to his 1991 arrest for Officer Parrish. (2ROA-T 1833-34). Thus, Udell was not expecting Kearse to answer as he did. (PCR 296). Therefore, Kearse has failed to demonstrate taht Udell was deficient in preparing Kearse to testify.

> With respect to Baker's testimony about Kearse's juvenile infractions, at the evidentiary hearing Udell explained that the evidence would come in eventually as a result of the State's right to cross-examine on mental mitigation testimony. So, finding Baker to be a good witness in the past and Kearse's biggest advocate, Udell prepared her with her peior testimony, and permitted Baker to testify in narrative form to underlying facts including the juvenile infractions.FN5 Udell determined that it would be better to bring the evidence in on direct examination through a witness favorable to Kearse who could support the testimony of other mental health experts. (PCR 296-99). Thus, the Court finds that Udell considered alternatives and made a reasonable strategic decision in the presentation of Baker's testimony.
>
> FN5 Baker's testimony is summarized in Claims III and IV, *infra*.

(PCR.37 5715-16). Both decisions should be affirmed.

The following exchange took place in the second penalty phase while Udell was questioning Kearse:

> Q: **1991** you were arrested for killing Officer Parrish; correct?
>
> A. That's correct sir.
>
> Q. **Prior to that** you had been in prison?
>
> A. Yes, sir.
>
> Q. Where had you been incarcerated?
>
> A. I've been incarcerated at Rayford. (sic) I went that like in '91. I was incarcerated at FSP, Florida State Prison, back there on death row. We moved from death row over at FSP back in '92. We moved over a unit prior to not having enough space. So they moved us over the U and that's where we basically seated until we're taken over to unit by execution.
>
> Q. I want to back you up. I want to take you to

January, ‘91. January of ‘91 where were you living?

A. I was living at 1611 North 19th Street.

Q. Okay. Was that in Fort Pierce?

A. Yes.

Q. How long had you been living there prior to the night of the incident with Officer Parrish?

A. I would say about a year and a half.

Q. Let’s back up. The incident with Officer Parrish that you’ve heard all the testimony about was January 18th of -- or 19th of 1991, sound about right?

A. That’s right.

Q Okay. And on that night whose house were you at during the day?

A. I was at my mother’s, 1611 North 19th Street.

Q. Okay. Later that day did you go over to the residence where you were subsequently arrested?

A. I went over to Rhonda Pendleton’s house, basically, Derrick’s mother’s.

(2R-T 1833-34) (emphasis supplied). From this exchange, it is clear Udell was asking where Kearse lived **before** the 1991 homicide, **not after** the conviction. Udell was not expecting Kearse to answer as he did. (PCR.46 769-70). Without question, it was Kearse’s error to inform the jury about death row, not Udell’s. Kearse has not shown deficient performance as the court so concluded.

With respect to Udell’s **decision to call Pamela Baker** to testify about Kearse’s juvenile history, Udell explained that he

met with her several times,[31] that the juvenile history testimony was going to be presented eventually, and he thought it better that it come on direct examination. (PCR.46 770-72). Baker testified that at eight years of age, Kearse had stolen a bicycle and had been referred to her. Given the mental mitigation defense, the State was going to be allowed to cross-examine Baker and other experts regarding Kearse's prior troubles as they related to mental problems. Once the mental health experts were presented, Kearse's criminal background was going to be admissible. Moreover, the criminal history, as discussed by Dr. Petrilla could be characterized as "not significant." Udell reasoned that the jury should hear the underlying facts which led to the murder. (PCR 298-99). See Bolender, 503 So.2d at 1250 (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected") Such is a professional, and reasoned strategy which meets the constitutional dictates of Strickland. Kearse has not shown any

[31] Udell met with Baker on several occasions and found Baker to be Kearse's "biggest advocate"; she was a good witness for the defense because she knew the mental health terminology and Kearse's history. Also, Udell provided Baker with her prior testimony, although she was not the type of witness who needed a lot of preparation. (PCR.46 772). A review of Baker's testimony establishes that she was prepared on all aspects of Kearse's life history. (2R-T 1990, 1997-2004, 2014, 2018-20, 2023-33, 2037-40, 2047, 2052, 2054-56, 2061-63, 2075-76, 2086-87, 2095, 2113-14, 2121-24 2134.

deficiency in Udell's performance.

Furthermore, he cannot say that had Udell not prepared Baker or elicited the information from her that he did, a life sentence would have been obtained given the basis for the aggravation found.[32] Clearly, it was Kearse's actions on the

[32] The rejection of the statutory mental heath mitigator of extreme mental/emotional disturbance and ability to conform conduct to the requirements of law were substantially impaired was based on the following analysis:

> Each of these possible mitigating factors must be considered in two ways: first, on the basis of the extensive psychological evidence presented, and second, in light of the evidence regarding the **defendant's conduct at the time of the offense**. There is no doubt but that defendant grew up in bad circumstances. His childhood and early family training were horrible. The evidence does not establish the defendant has organic brain damage from any source including fetal alcohol syndrome. He obviously **has some personality disorders and has indulged in bad conduct all of his life**. While the experts who testified disagree, the court finds that **any mental or emotional disturbance was not "extreme."** The evidence shows that defendant exhibited a clear thinking process throughout the criminal episode. He lied to the officer about his name to the extent that the officer made several attempts to verify it in different forms. When this failed, defendant had presence of mind to take the officer's pistol. He fired fourteen shots in several groups with pauses in between during which the officer begged for his life. He then thought to keep the pistol with his fingerprints on it and to later hide it. He made an effort to conceal the automobile. When questioned after the offense, he led the officers on a wild goose chase for the pistol. **This evidence shows defendant's ability to appreciate the criminality of his conduct, to make conscious choices about the conduct, and to purposely engage in the criminal activities. The Court finds that neither of these two statutory**

night of the crime, irrespective of his mental/emotional disturbance which caused the rejection of the mitigation. Baker's testimony helped other experts support their opinions, however, it was Kearse's actions which undercut the statutory mental mitigation. It has not been shown, as required by Strickland, that absent testimony about his juvenile infractions or prior incarceration of death row, the sentence would have been life. Relief must be denied.

Peggy and Ernest Jocobs - Kearse points to **affidavits Peggy and Ernest** submitted to postconviction counsel to support his contention that Udell did not prepare them correctly. However, Kearse does not follow this up with any discussion of prejudice. As such the claim is legally insufficient under Strickland and both deficiency and prejudice must be proven by Kearse. Moreover, it appears that the affidavits were submitted with respect to the claim that the mental health doctors were not prepared properly, and the court considered these affidavits with respect that claim along with the Fetal Alcohol **Effect** diagnosis. There the court concluded that while the affidavits were new information for postconviction mental health experts to consider, no ineffective assistance of counsel was proven

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mitigating factors has been proven by the greater weight of the evidence.

(2R-R 707-08) (emphasis supplied).

because there were no documents supporting the previously rejected claims of Fetal Alcohol Syndrome, organic brain damage, or mental retardation. The State incorporated and relies upon its argument addressed in Claim IB.

Alleged failure to properly cross-examine Pendleton and Derrick Dickerson - These claims are in part legally insufficient, and meritless as the court found:

> Kearse claims that counsel was ineffective for failing to cross-examine Derrick Dickerson and Rhonda Pendleton at the motion to suppress hearing. Kearse contends that he lived with Derrick Dickerson, had a relationship with Phonda Pendleton, and that the police coerced Dicerson and Pendleton to consent to a search of the residence where Kearse was arrested. Kearse avers that he had a reasonable expectaion of privacy at the Dickerson home and therefore the evidence should have been suppressed.
>
> The record is clear that police arrested Kearse at the Dickerson residence without a warrant. However, the trial court found probable cause for the arrest due to exigent circumstances. Therefore the physical evidence and Kearse's confession remain admissible. *Kearse*, 662 So.2d at 684. Further, th rcord shows that Kearse admitted that he did not live at the Dickerson residence (1718 Avenue K) at the tome of his arrest, Kearse was living at his mother's home (1611 North 19th Street), and Kearse did not have a romantic relationship with Pendleton. (1ROA-T 104, 1484; 2ROA-T 1833-34; PCR 295-96). Thus, Kearse fails to demonstrate deficient performance and prejudice.
>
> ...
>
> Kearse claims that counsel was ineffective for failing to cross-examine Rhonda Pendleton concerning her relationship with Kearse. Kearse contends that Pendleton testified that she was not Kearse's girlfriend. Kearse avers that this testimony was of questionable veracity but fails to allege any facts in

> support of this claim and fails to demonstrate how this testimony could have been used for impeachment purposes. Further, this claim is in contradiction of Kearse's statement to Udell that Kearse and Pendelton were not dating. (2ROA-T 1484; PCR 295-96.) Thus, the Court finds this claim merely conclusory and legally insufficient....

(PCR.37 5713).

Although he had the opportunity at the evidentiary hearing, Kearse failed to present any evidence to support his allegations that he lived with Dickerson at the location of his arrest, had a boyfriend/girlfriend relationship with Pendleton, or that the police coerced Dickerson and Pendleton to consent to the search of the residence. As such, the court cannot be faulted for rejecting this unsupported claim. See Owen v. State, 773 So.2d 510 (Fla. 2000) (affirming denial of relief where defendant waived claim when he failed to produce any evidence in support of claim). Moreover, the record establishes that Kearse lived with his mother on the night of his arrest.[33] As such, neither deficient performance not prejudice resulted as defined by Strickland. The court's ruling should be affirmed.

[33] In the second penalty phase, Kearse admitted he lived at his mother's home (1611 North 19th Street), an address different than the one where he was arrested (1718 Avenue K). (1R 95-96104-09; 2R-T 1833-34).

CLAIM II

KEARSE'S EVIDENCE RELATED DR. DANIEL MARTELL DOES NOT QUALIFY AS NEWLY DISCOVERED EVIDENCE NECESSITATING A NEW TRIAL (restated)

Kearse points to certain orders and correspondence related to an incident that arose out of a United States District Court, District of New Mexico case against Everett Spivey to complain that he has newly discovered evidence that the State's mental health expert, Dr. Daniel Martell was biased in favor of the State.[34] Such evidence, Kearse submits, even if offered only as impeachment, would produce a difference sentencing result and the court erred in not granting relief. The State disagrees.

In discussing the standard of review for claims of newly discovered evidence, this Court has stated:

> In reviewing the trial court's application of the newly discovered evidence rule, this Court applies the following standard of review:
>
> > As long as the trial court's findings are supported by competent substantial evidence, "this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."

Melendez, 718 So.2d at 747-48 (quoting *Blanco*, 702

[34] Below, Kearse had also argued that the video tape of Dr. Martell's interview of Kearse was newly discovered evidence of bias. Kearse has abandoned that issue here, and thus, it will not be addressed.

So.2d at 1251).

Rogers v. State, 783 So.2d 980, 1003-04 (Fla. 2001). See Lightbourne v. State, 841 So.2d 431, 442 (Fla. 2003) (affirming denial of postconviction relief based on conclusion court's finding defendant had "not established a reasonable probability that a life sentence would have been imposed is supported by competent, substantial evidence.").

In order to prevail on a claim of newly discovered evidence two requirements must be met by the defendant:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." [c.o.]
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [c.o] To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." [c.o.]

Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998). See Melendez v. State, 718 So.2d 746 (Fla. 1998). When considering the evidence the court should take into account whether there would be any evidentiary bars to admission, and whether it was truly material/relevant. Kokal v. State, 901 So.2d 766, 775 (Fla. 2005); Sireci v. State, 773 So.2d 34 (Fla. 2000).

After considering the evidentiary hearing testimony and

evidence, the court denied relief finding:

> Kearse claims that newly discovered evidence of Dr. Martell's conduct in *United States v. Spivey*, ... exhibits bias in favor of the prosecution and renders Dr. Martell's testimony unreliable. To prevail on a claim of newly discovered evidence Kearse must show that the evidence existed at the time of trial but was unknown by the trial court, the defendant, and counsel, and could not have been discovered through the exercise of due diligence. *Wright v. State*, 847 So.2d 861, 887 (Fla. 2003). Both of Kearse's claims fail to meet these requirements.
>
> First, at the evidentiary hearing it was established that the *Spivey* allegations postdated the second penalty phase and the trial court's pronouncement of the death sentence. Further, the evidence showed no resolution of the *Spivey* controversy through judicial or administrative findings of misconduct by Dr. Martell. Thus, Kearse fails to demonstrate that the *Spivey* allegations existed at the time of the second penalty phase, fails to show that Dr. Martell was untrustworthy as a result of the *Spivey* controversy, and fails to allege how the *Spivey* controversy is otherwise admissible to collaterally attack Kearse's judgment and sentence. (PCR 91, 118-19, 800-08, 836-37, Defense Exhibit "BB.")

(PCR.37 5725-26). Such ruling is proper. It cites and applies the correct law to the factual findings made which are supported by the record. This Court must affirm.

Here, Kearse's initial trial was in 1991, his second penalty phase commenced on December 9, 1996, and on March 25, 1997, the sentencing order was entered. (S2R-T 2712-25) Dr. Martell's involvement in the Spivey case began in 1997 and he evaluated the defendant on March 28, 1997. It was sometime between then and March 31, 1997 that the alleged controversy

arose in the case involving Dr. Martell. (PCR.35 5473-80; PCR.49 1264-65). Based upon these dates, Kearse's second penalty phase and re-sentencing had been completed, as such, Kearse has not met the first prong of Jones. The Spivey controversy did not exist at the time of Kearse's trial (PCR.44 564; PCR.45 591-92; PCR.49 1309-10), thus, the Spivey matter does not qualify as newly discovered evidence. Jones, 709 So.2d at 521-22.

Moreover, Kearse was unable to establish that the Spivey matter would be admissible at trial or that if it were admissible, it would result in a life sentence. Dr. Martell was never held in contempt of court or charged with perjury. As such, there would be no basis for bringing in a collateral matter and having a "mini-trial" on the veracity of the allegations and inuendos surrounding the Spivey case. See Fernandez v. State, 730 So.2d 277, 282 (Fla. 1999) (finding evidence that clergy violated oath was inadmissible to attack his credibility).

However, even if this Court reviews the Spivey allegations and their potential impact at trial,[35] it will find there is no

[35] Kearse quotes extensively from Billy Blackburn's affidavit, but fails to even acknowledge that Dr. Martell denied these allegations. Such is an unfair attack upon the witness. Moreover, below, it was the State's position that the affidavit of Billy Blackburn produced by the defense (Defense Exhibit O - PCR.16 2568-83) was hearsay and would not be admissible at trial. (PCR.44 563-73). Nonetheless, the affidavit was admitted over the State's objection (PCR.45 670). While hearsay is

probability the material would produce a life sentence given Dr. Martell's revelation of the facts.[36] There is no merit to the

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permitted in a capital penalty phase, it is limited to those instances where the opposing party has an opportunity to rebut the hearsay evidence. In this case, there would not be a means of rebutting or cross-examining an affidavit. As such, the affidavit would not be admissible at trial as substantive evidence. See Dufour v. State, 905 So.2d 42, 63 (Fla. 2005) (allowing witness to testify about prior violent felony); Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997) (noting "[w]e have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut."); Lawrence v. State, 691 So.2d 1068 (Fla. 1997) (same); Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989) ("While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements."). Moreover, the allegation of bias is so attenuated, there is no showing of bias toward Kearse, that it could not be used as impeachment of Dr. Martell.

[36] Dr. Martell explained:

I was retained by the United States Attorney's Office in Albuquerque, New Mexico, to evaluate Mr. Spivey under an Order from the Court....

This was a capital case, and my examination was done before the guilt phase in anticipation of mitigating evidence at the penalty phase. So the Court's order was that until the defendant opened the door at the penalty phase to his mental state, I was not to discuss my findings or opinions with the U.S. Attorneys....

With that understanding, I went to New Mexico and examined Mr. Spivey. The night before my examination I met with the [female] prosecutors who told me that they were physically afraid of the man, who, . . . despite the fact that Mr. Spivey was crippled and used a crutch, were so disturbed ... they asked the court officer to take the crutch away ... during court proceedings.

I did my examination, and after it was completed I was invited to a dinner at the lead Assistant U.S. Attorney's home with the rest of the prosecution team. At that dinner everyone understood about the Court's Order....

However, I inquired of the U.S. Attorneys, I asked for legal advice about the scope of the Judge's Order and whether...

the Judge's Order preclude me from telling you about an offhand comment ... a defendant like this might have made about one of the prosecutors.

They conferred and advised me that that was not within the scope of the Judge's Order ... And I relayed to them a comment that Mr. Spivey made to me as we were waiting to be released from the room ... that he felt sorry for the prosecutor and thought she was a tortured soul....

Sometime later, the U.S. Attorney sent a letter to defense counsel requesting some additional information . . . . Based on the content of that letter, defense counsel felt that the Judge's Order had been breached.

...the Assistant U.S. Attorney prepared an affidavit for me to sign, stating that I had not divulged information about my findings or opinions. The initial version was overly broad saying we had not discussed anything about the examination. I called her on the phone, said this is overly broad, what about the tortured soul comment?

She revised the affidavit to be specific to did not disclose findings or opinions. I believed it to be true, I signed it.

Subsequent to my signing it and the case moving forward, the first Assistant U.S. Attorney in that office learned that there had been a dinner party, and was quite upset that they had invited me. And he called the U.S. Attorney into his office and she denied that anything had been said.

He then called everyone else into his office who attended from the team, including a DEA Agent. The DEA Agent was present when I made the disclosure and he said, oh, yeah, he told the tortured soul comment.

... So, as I understand Mr. Blackburn's affidavit, he says ... the U.S. Attorney indicated to him that I had made this comment to the DEA Agent. So they never acknowledged that I had made the comment to the AUSA herself, and on that basis they agreed to settle the case. ... And in the process, I think deceitfully, hung me out as a scapegoat.

In response to that, I sent a letter to the Justice Department Office of Professional Responsibility saying I thought I had been unfairly treated in this matter, and asked for an investigation which was conducted, but I've never been told the results of that.

(PCR.49 1274-79). Dr. Martell was never held in contempt of court, nor was there a judicial proceeding or other legal ramifications, regarding the matter Dr. Martell has worked for the United States Attorney every year since then, but he has not

allegations and such would not produce a life sentence on retrial. As Dr. martell explained, he did not believe he violated the court's order, but more important, he was truthful when asked about his actions. The allegations against Dr. Martell do not call into question his impartiality. In fact, during the past few years when hired by the State Attorney for the Nineteenth Judicial Circuit, Dr. Martell has found two defendants insane and another incompetent. Also, since Atkins v. Virginia, 536 U.S. 304 (2002), he has found the majority of the death row defendants he evaluated to be mentally retarded. (PCR.49 1308-09). Relief must be denied.

CLAIM III

THE COURT CORRECTLY RESOLVED ALL OF KEARSE'S PUBLIC RECORDS REQUESTS (restated)

Kearse rises three sub-claims. The first is that the trial court erred in not granting an evidentiary hearing and for resolving the conflict with regard to his request for videotapes in the alleged possession of the Fort Pierce Police Department against Kearse. The second sub-claim is addressed to the court's denial of the public records request for personnel files for three employees of the State Attorney's Office following an in camera inspection. The third, and last, sub-claim challenges

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been called to work on a New Mexico federal matter. (PCR.49 1279-80, 1307).

the trial court's determination that a letter sent by the prosecutor to defense counsel in preparation of the case was work product, thus, not discoverable under public records case law, and further, that it did not contain any Brady v. Maryland, 373 U.S. 83 (1963) material. These claims are meritless as the record reflects the court properly exercised its discretion when denying the request for additional public records, thus, the rulings should be affirmed.

This Court applies an abuse of discretion standard when reviewing a court's determination on public records. Mills v. State, 786 So.2d 547, 552 (Fla. 2001); Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Under this standard, a ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

In rejecting the claim for additional public records from the Fort Pierce Police Department, the court reasoned:

> ... The Court finds this claim legally insufficient. Examination of the record reveals that these records were listed in paragraphs 9 and 11 of Kearse's Notice of Outstanding Public Records filed on June 17, 2003. Subsequent to the notice, the Court conducted four additional public records hearings. Public records held by the Fort Pierce Police Department were the subject of the last two hearings. In the November 13, 2003, hearing, the police department represented that the videotape was not missing, but that the tape had not been listed on the evidence sheet or entered into evidence, thus, there was no videotape to produce. (See November 13, 2003, public records hearing transcript on page 8.) Collateral counsel did not inquire into, or object to this testimony. In

> addition, during the November 13, and December 12, 2003, hearings collateral counsel advised the Court that all of the public records requested, with the exception of one personnel file, had been accounted for or received. An order was entered on December 12, 2003, reflecting collateral counsel's representation of the status of the public records requested. Collateral counsel did not file another notice of outstanding public records and did not move to compel production of any public records. Thus, Kearse fails to demonstrate that the Fort Pierce Police Department withheld public records in violation of Chapter 119, Florida Statutes.

(PCR.37 5708). While there may have been a notation that a VHS tape existed, the court found that based upon the representations of the counsel for the Fort Pierce Police Department, the tape was not in their possession. The court accepted the November 12, 2003 representations of counsel for Fort Pierce that the tape may never have existed due to a malfunction or was not placed in evidence - in any case some 206 photographs existed and were turned over to the defense. (SPCR.2 7-11). At the time, postconviction counsel did not object, and later affirmed that the only outstanding record request was the issue of personnel files for the State Attorney's Office. (PCR.42 361-62). The court resolution should be affirmed.

State Attorney's Personnel files - It is Kearse's position that the court had no option, but to release the records based on his Fla. R. Crim. P 3.852(g) demand. (IB 80). However the rule requires the court find the additional public records requested to be relevant or lead to relevant information and not

be overly broad or unduly burdensome. rule 3.851(g)(3)(C) and (D). The State objected to the request on two grounds: (1) it was untimely[37] and (2) it was not relevant/calculated to lead to relevant information. (PCR.7 925). It reiterated these two grounds when the matter was heard by the court and noted that there had to be a finding that the records request was not overly broad or unduly burdensome; more focus was placed on the relevancy of the records. Postconviction counsel addressed that matter. (PCR.38 8-10, 44-45, 55-57). By an order dated December 20, 2003, the court ordered the State to produce the personnel files for *in camera* inspection to determine whether the files contained evidence reasonable calculated to lead to relevant evidence. (PCR.9 1319). After the *in camera* inspection, the court found nothing relevant in the files, nor anything calculated to lead to relevant information. (PCR.9 1343). Kearse takes issue with the time it took the court to make its ruling and the fact that an *in camera* inspection was held. Kearse's complaint is meritless.

While time limits are set by rule 3.852, for good cause extensions are available. Surely, if the court required more

[37] The State noted that the court could grant an extesion of time beyond the 90 day limit, and postconviction counsel admitted that the requests were filed beyond the time limit, and asked that the time be excused. The vcourt did not deny the motion on timeliness grounds. (PCR.38 8-10, 27, 29, 31-34).

time to rule, and there was no provision that a ruling beyond the stated time limit would be deemed a denial or a default, then the court cannot be faulted for taking the time to consider the matter fully. See Fla. R. Crim P. 3.800(b)(1)9(B). Moreover, Kearse was given added time after resolution of his public records requests to amend his motion, thus, no prejudice arose from the time it took the court to rule. Furthermore, rule 3.852(g) requires that the court make a relevancy finding; it does not set limits on how that determination may be made. The court cannot be faulted for requiring production of the records for review so that a decision could be reached. Kearse has not shown an abuse of discretion.

Here, Kearse claims that the State should have been required to **produce the letter it sent to Udell in preparation for litigation**. It was the State's position that its letter to Udell in preparation for this collateral litigation was work-product exempt from public records disclosure. The court agreed given the nature of the letter and the witness to whom it was given, but upon Kearse's subsequent request, conducted an *in camera* review to determine if the letter was in fact work-product. (PCR.35 5502-06, 5512-15; PCR.46 791-96; PCR.51 1432-40). The letter was characterized as one which was to educate Udell about the issues in the case through review of the transcript and other matters. Such letter contained the

prosecutor's mental impressions of the case. Also, the State noted that the court had reviewed the letter for Brady material and found none. (PCR.51 1435-36). After the *in camera* review, the court affirmed its prior ruling.

This Court should affirm as the letter to Udell was exempt from disclosure under §119.071(1)(d)1, Fla. State (2005)[38] which provides: for the exemption of records prepared in anticipation of litigation; i.e., work-product materials. Udell, the subject of this collateral litigation was listed as a witness for both parties. The adversarial relationship between Kearse and Udell commenced with the filing of the postconviction motion.

In State v. Kokal, 562 So.2d 324, 327 (Fla. 1990), this Court acknowledged that a letter such as provided to Udell (SPCR 27-52-sealed) was not a public record stating: "of course, the state attorney was not required to disclose his current file

[38] A public record that was prepared by an agency attorney ... that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation.... For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents." See State v. Rabin, 495 So.2d 257 (3d DCA 1986) (holding "opinion" work product is nearly absolutely privileged and therefore not subject to disclosure). This Court has upheld the opinion work product privilege respecting letters sent by the prosecutor to potential witnesses. See Reaves v. State, 639 So.2d 1, 6 (Fla. 1994) (finding no error in judge's determination that letters between the prosecutor and an expert witness "that contained work product were privileged and not subject to discovery"). See also Fla. R. Crim.P 3.220(g)(1) (stating "*Work Product*. Disclosure shall not be required of legal research or of records, **correspondence**, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs") (emphasis supplied).

The work product privilege has been recognized for a letter from counsel to a potential witness which contained counsel's theory of the case. The Fourth District Court of Appeal concluded:

> One of the documents is a 22-page summary of testimony that the defendant gave in a co-defendant's case. The other document is a 5-page summary of events, entitled "David Gore Chronology."
>
> Discovery in criminal cases is governed generally by the Florida Rules of Criminal Procedure. ...

> At the same time, rule 3.220(d)(2)(ii) requires the defendant to disclose any "[r]eports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons."
>
> We think that the defendant here has made a substantial showing of the former, i.e., "work product" of counsel, rather than the latter, i.e., reports or statements of experts. The two documents originated from his lawyer, not from his expert witness, and thus clearly fit within the terms, "records, correspondence, reports or memoranda", used in the work product rule. The remaining requirement is whether such correspondence contains the "opinions, theories or conclusions" of the lawyer.
>
> We do not see how they can avoid doing so. The first document, the 22-page summary of defendant's deposition in his co-defendant's case, is probably the model of an attorney's thoughts. A summary of testimony necessarily incorporates the summarizer's thoughts and ideas of what to include and what to exclude, what is important and what is inconsequential, what to emphasize and what to ignore, what is real and what is fanciful. To another lawyer knowledgeable of the case and its issues, this kind of summary declares the workings of the lawyer's mind who prepared it. It could easily be a roadmap of the trial strategy of the lawyer.
>
> So too with the 5-page chronology. The selection of what events to relate to the witness may tell the opposing lawyer more about what the trial lawyer intends to elicit and emphasize than any discovery deposition ever could. The nature of the facts selected, and the peculiar phrasing used in their articulation, open up the trial lawyer's thought processes and mental impressions to his adversary. Indeed, the prosecutor's zeal to obtain the documents betrays more than anything we can say about the importance of them.

Gore v. State, 614 So.2d 1111, 1113-14 (Fla. 4th DCA 1992). See Smith v. State, 873 So.2d 585, 589 (Fla. 3d DCA 2004) (agreeing

with analysis in Gore). Based upon this, it is clear that the trial court did not abuse its discretion in denying production of the prosecutor's letter to Udell.

CLAIM IV

THE DENIAL OF EACH CLAIM WAS WELL REASONED AND SUPPORTED BY THE RECORD (restated)

Kearse asserts two sub-claims in this issue. In his first sub-claim, he maintains that he was entitled to an evidentiary hearing on his allegation that the courtrooms for his first trial and re-sentencing were full of uniformed officers which created hostile atmosphere and interfered with the trial process (IB 87). As part of this complaint, Kearse adds that the court erroneously failed to attach portions of the record to refute the claim, thus, he is entitled to no relief. This claim is in part not preserved, because it was not raised below with respect to officers in the re-sentencing courtroom. With respect to the guilt phase challenge, it is legally insufficient and procedurally barred.

Kearse's second sub-claim lists ten allegations he made in his postconviction motion and notes that these "go to the fundamental fairness of his conviction." (IB 88-89). Without any argument related to any of these matters, Kearse again complains that records were not attached to the order denying relief. Some of these claim were heard at an evidentiary

hearing, while others were denied summarily. In either case, the denial of relief was proper and supported by the record and case law.

A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

Uniformed officers in the courtroom - In his postconviction motion, Kearse maintained that the **guilt phase trial** was tainted by the presence of uniformed officers.[39] While he quotes from

[39] Below, Kearse maintained his claim was incomplete because he was not able to interview jurors. (PCR.10 1502-04). Not only

the re-sentencing record, such was in support of his position that his guilt phase courtroom was hostile. (PCR.10 1505). As such, Kearse's challenge to the **atmosphere in the penalty phase courtroom** is not preserved for appeal; nonetheless, it is legally insufficient.[40] Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (opining "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Rejecting the claim of a hostile courtroom, the court found:

In the second issue, Kearse claims that he was denied

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has he abandoned the claim, having failed to raise it on appeal, but he was not entitled to juror interviews. While the law allows for juror interviews under certain circumstances, Kearse has not met them here. See, Marshall v. State, 854 So.2d 1235, 1240-44 (Fla. 2003) (remanding for limited inquiry on juror misconduct upon finding affidavit reporting racial comments by jurors did not inhere in verdict); Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000) (affirming denial of juror interviews as such were fishing expedition); Mann v. State, 770 So.2d 1158, 1160, n.1 (Fla. 2000) (finding juror interview issue barred citing to Young v. State, 739 So.2d 553 (Fla. 1999)).

[40] Kearse also suggests his sentence is unconstitutional due to the number of uniformed officers in the courtroom during the **second penalty phase** (PCR.10 1505). The State submits that this matter is a constitutional challenge which could have been made at trial and on direct appeal. Consequently, the instant review is procedurally barred. Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992) (finding issues which could have been "litigated at trial and upon direct appeal are not cognizable through collateral attack"); Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990)(holding errors apparent from record are not cognizable in postconviction motion).

> a fair trial due to the presence of uniformed law enforcement officers in and around the courtroom during the 1991 guilt phase. ... However, Kearse alleges no facts to explain the unacceptable risk, the impermissible factors, the threat, or the hostile courtroom created by the mere presence of the officers; and Kearse does not otherwise demonstrate prejudice caused by the conduct of the officers. Further, Kearse did not raise this constitutional challenge on direct appeal. Thus, the Court finds this claim legally insufficient and procedurally barred.

(PCR.37 5737-38). Such ruling is supported by the record. This is a correct application of the law and resolution of the facts.[41]

In the second sub-claim, Kearse states:

Mr. Kearse has plead substantial factual allegations

[41] The claim is legally insufficient. Kearse has not identified in the record any instances where the officers were disruptive or in any way intrusive upon the trial or jury. Venue was changed, and reviewed on appeal. No error was found with regard to such change. See Kearse, 770 So.2d at 1122-24. The pith of his claim is that the mere presence of people in the same line of employment as the victim in the courtroom establishes an unconstitutional atmosphere. Such is a conclusory claim without factual allegations. Hence, it is legally insufficient and should be denied summarily. LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) 1998)(upholding summary denial of motion where there is no factual support for conclusory claim); Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). Furthermore, the trial cited to Kearse's motion and its lack of factual allegations as well as the direct appeal case where the issue was not raised. When summarily denying non-barred claims, the court must either conclude the claim is factually or legally insufficient on its face or "state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). Such was done in this case.

> relating to the guilt and penalty phases of his capital trial including: ineffective assistance of counsel for failure to adequately cross-examine and/or impeach state witnesses with inconsistent prior testimony; failure to cross examine witnesses at the Motion to Suppress hearing, failure to impeach state witnesses; failure to consult crime scene and firearm experts; failure to prepare defense witnesses resulting in inadmissible testimony;[42] failure to argue Mr. Kearse's age as a statutory mitigating factor; conceding aggravating factors without Mr. Kearse's consent; judicial error/denial of cause challenges; judicial error/rejection of mental health mitigation; violations of *Brady v. Maryland*, 373 U.S. 83 (1963); introduction of non-statutory aggravators; and that pre-trial publicity, venue and events in courtroom denied Mr. Kearse a fair guilt and penalty phase trial. These claims go to the fundamental fairness of his conviction.

(IB 88-89). Given Kearse's lack of argument in support of these claims, they should be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). While it is clear that these claims are waived, the State presents the following brief argument in support of the

[42] The State believes Kearse is referring to his complaint that Pamela Baker was not prepared properly for her testimony. As that issue was addressed above in Claim ID, the State reincorporates that argument here and submits that withing the dictates of Strickland, Udell properly prepared Baker and considered her testimony before offering it.

trial court's determination that summary denial was proper.[43]

The claim of **ineffectiveness for failure to adequately cross-examine and/or impeach state witnesses with inconsistent prior testimony** was addressed by the court under "Claim II(A)(2)¶7." (PCR.37 5712). It was the court's understanding the Kearse believed Udell to be ineffective for failing to cross-examine guilt phase eye-witnesses, Rhonda Pendleton and John Boler, during the second penalty phase as their original testimony was read into the record. The court concluded:

> ... Kearse does not explain what the inconsistencies in the testimony are, how the inconsistencies in the testimony are material to the outcome of the proceedings, or how the jury was misled by the reading

[43] To the extent Kearse claims that records needed to be attached to the orders denying relief summarily, the case law is to the contrary. When summarily denying non-barred claims, the court must either conclude the claim is factually or legally insufficient on its face or "state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). See Spencer v. State, 842 So.2d 52, 69 (Fla. 2003); McLin v. State, 827 So.2d 948, 954 (Fla. 2002). Conclusory allegations are legally insufficient on their face and may be denied summarily. Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) (opining "[the] defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy, 547 So.2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing").

> of the testimony. And Kearse does not claim that the testimony was inadmissible.
>
> Further, the record is clear that Udell challenged the unavailability of these witnesses, moved for a continuance to obtain Pendelton's appearance, and objected to the reading of the testimony. All of Udell's challenges were denied. (2ROA 1352-61, 1624-26). Later, Udell found Pendelton and questioned her at length. (2ROA 1930-71). Thus, the Court finds the claim legally insufficient where there is no showing that counsel was deficient or that the proceedings were prejudiced.

(PCR.37 5712). The court explained its rationale and supported it with record citations as required. Such should be affirmed.

This claim is legally insufficient as Kearse does not outline how Udell was ineffective.[44] Also, Udell objected, and asked for a continuance (2R-T 1624-25),[45] thus the matter is barred as it could have been raised on appeal. Kearse cannot use a claim of ineffectiveness to overcome the procedural bar.

[44] Kearse has not alleged Pendleton was in fact available at the time the State read her testimony or that absent Pendleton's re-read testimony, the sentence would have been life. The conclusory statement that Udell should have objected does not meet the pleading requirements necessary to satisfy Kennedy, 547 So.2d at 913.

[45] When the State indicated its next witness was Pendleton, Udell suggested there needed to be a showing of unavailability, and the State countered that prior trial testimony was admissible under §90.804, Florida Statutes or §921.141(1), Florida Statutes which permitted hearsay testimony in a capital penalty phase where the defense had an opportunity to rebut the hearsay. In response, Udell renewed his motion for a continuance which had requested time to obtain Pendleton's appearance. In denying the motion and admitting Pendelton's prior testimony, the court noted that in moving for the continuance, Udell had admitted he could not find Pendleton. (2R-T 1352-61, 1624-26).

Rivera v. State, 717 So. 2d 477, 480, n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as ineffective assistance to overcome the procedural bar or re-litigate and issue considered on appeal). Also, the claim is meritless.[46] Kearse can show neither deficient performance nor prejudice as the testimony was admitted properly. Moreover, Pendleton was eventually found by Udell and questioned at length. (2R-T 1930-71). Nonetheless, a unanimous recommendation for death was rendered by the jury. Consequently, Kearse is unable to prove prejudice under Strickland.

Equally meritless[47] is Kearse's challenge to Udell's decision to **read his own cross-examination of John Boler** when

[46] Udell cross-examined Pendelton in the first trial, had the opportunity to rebut the prior testimony. As such, that testimony was admissible under §921.141. See Lawrence v. State, 691 So.2d 1068, 1073 (Fla. 1997) (finding admission in penalty phase of prior testimony proper even without showing unavailability).

[47] When a witness is declared unavailable under §90.804, the prior testimony maybe read to the jury. Jackson v. State, 575 So.2d 181, 187 (Fla. 1991) (affirming ruling on unavailability and admission of prior testimony where it was shown State had been diligent, but unsuccessful, in trying to find witness). Likewise, even without a showing of unavailability, prior testimony is admissible in a capital penalty phase. Lawrence, 691 So.2d at 1073. At trial, the court determined the State attempted to find Boler, but was unsuccessful. (2ROA-T 1352-61). Thus, the prior testimony was admissible under both sections 90.804 and 921.141, and Kearse has not explained how Udell's reading of his own prior cross-examination in any way was ineffective especially in light of the fact such testimony was admissible.

the witness was declared unavailable and the defense objection to the reading was overruled. This claim is legally insufficient in that it does not identify how the jury was misled or given an incomplete record. It does not allege ineffectiveness in anything but conclusory terms. Kennedy, 547 So.2d at 913. Further, because Udell objected to the reading, this issue could have been raised on direct appeal, but having failed to do so, the matter is barred. Freeman, 761 So. 2d at 1067 (finding bare allegation of ineffectiveness does not overcome irrevocable procedural default of claim); Rivera, 717 So.2d at 480 n.2 (finding it impermissible to recast direct appeal claim as one of ineffectiveness). Relief must be denied.

Kearse's assertion that "failure to cross examine witnesses at the Motion to Suppress hearing,[48] **failure to impeach state witnesses**" was ineffective assistance was summarily denied by the court (PCR.37 5713-14) where in it found:

> Kearse claims that counsel was ineffective for failing to challenge the veracity of State witness, Bruce Heinnsen. Kearse contends that in his deposition, Heinnsen indicated that he had criminal convictions for theft and possession of firearms, yet Heinnsen had also served on a jury. Kearse does not allege any facts to show that Heinnsen was untruthful at deposition or to demonstrate how challenging Heinnsen's testimony at deposition would have changed the outcome of the proceeding. Thus, the Court finds this claim merely conclusory and legally

[48] The issue of cross-examination at the suppression hearing has been addressed in Claim I above and is reincorporated here.

insufficient....

(PCR.37 5713-14). The Court's ruling gives its rationale for finding legal insufficiency and should be affirmed.[49]

The assertion Udell rendered ineffective assistance for his **alleged failure to consult crime scene, firearms, and medical**

[49] In Claim II ¶9, Kearse cited from the original trial (1ROA 1458), contending Udell was ineffective in not cross-examining Pendleton on her representation that Kearse was not her boyfriend. Without explaining what information Udell could have used to impeach Pendleton, Kearse claims such impeachment would have undermined the State's theories of guilt and aggravation. He did not explain this allegation, thus, the court correctly found the matter legally insufficient. Moreover, the record supports summary denial in that Pendleton consistently described her relationship with Kearse as just "friends" and admitted she did not want Kearse to get death (1R 1457-58; 2R-T 1629-30, 1932-34). Kearse failed to allege a factual basis to refute Pendleton's account. Having failed to do so makes the claim insufficient and subject to summary denial. LeCroy v. State, 727 So. 2d 236, 239 (Fla 1998) (upholding summary denial where no factual support provided for conclusory claim). Furthermore, it cannot be said that had the jury heard Pendleton and Kearse had a relationship that it would have acquitted or recommended a life sentence. Such information does not undermine all of the other witnesses placing Kearse at the scene or the aggravation developed in this case. Likewise, it cannot be said that the failure to challenge Pendleton on the subject fell below the standard of professional representation. Kearse has not satisfied the requirements of Strickland. Relief must be denied summarily. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (recognizing that court need not reach deficiency prong if prejudice prong cannot be met).

In Claim II ¶10, Kearse asserted counsel failed to challenge Bruce Heinnsen about his report that he had criminal convictions for theft and possession of firearms, but served on a jury. This claim is conclusory/legally insufficient. Kearse does not explain how that statement in and of itself is untrue or how prejudice arose from the failure to challenge the witness. Legally insufficient claims are subject to summary denial. Kennedy, 547 So. 2d at 913.

examination experts was addressed by the court under Claim II(A)(6) ¶11 and was rejected as legally insufficient because Kearse failed "to allege any facts to show what the defense experts would have found or to demonstrate how the outcome of the proceedings was prejudiced by failure to consult experts." (PCR.37 5714). A review of hte record supports this conclusion.[50]

The challenge to Udell's representation regarding his **alleged failure to argue the age mitigator** (Claim II(A)(10)¶16) was rejected as follows:

> Kearse claims that counsel was ineffective for failing to adequately address and argue the statutory

[50] A review of his postconviction motion) reveals Kearse failed to allege what testimony would have been elicited from these experts if they had been consulted/called and failed to allege how the testimony for the State's expert, Mr. Knight, could have been challenged. Further, Kearse has failed to allege the requisite prejudice, i.e., how the results of his trial would have been different if these experts had been consulted/called. Mere conclusory allegations are legally insufficient and are subject to summary denial. See Reaves v. State, 826 So.2d 932, 936-37 (Fla. 2002) (agreeing "defendant must allege specific facts which, considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant" before evidentiary hearing is required); Kennedy, 547 So. 2d at 913 (same). Moreover, the claim Udell was ineffective for failing to challenge the State's firearm expert, Knight, is meritless. A review of the cross-examination of Knight reveals he was competently cross-examined (2R-T 1504-09, 1618-24). See Adams v. Dugger, 816 F. 2d 1493 (11th Cir. 1987) (holding defense counsel was not ineffective for failing to obtain expert pathologist where defense counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument).

> mitigating factor of Kearse's age at the time of the offense. Kearse admits his biological age was 18 years and 3 months at the time of the murder but contends that Kearse was functioning at a substantially lower age due to his cognitive and emotional imparments.FN6 ... Kearse seeks to preserve the issue ... [based upon] *Roper v. Simmons*, [543 U.S. 551] (2005)....
>
> FN6 Significant testimony was presented at the second penalty phase to demonstrate that Kearse was functioning at a level below his chronological age. See summary of testimony in Claims III and IV, *infra*.
>
> Kearse's claim must be denied for two reasons. First, Kearse has merely recast the issue of age mitigation which was raised and decided on direct appeal as a claim of ineffective assistance of counsel in order to relitigate the claim. This is impermissible in a collateral proceeding. *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995). In addition, Kearse has failed to show prejudice where he was not under 18 years of age at the time of the offense. *Roper*.... Therefore, Kearse's claim is bother procedurally barred and legally insufficient.

(PCR.37 5716-17). The decision is supported by the law and facts.[51]

[51] With respect to the claim of ineffective assistance in the manner Udell addressed the age mitigator, the matter is procedurally barred. It was raised and rejected on appeal and Kearse may not use a claim of ineffective assistance to overcome the bar. Freeman, 761 So. 2d at 1067 (finding bare allegation of ineffective assistance of counsel does not overcome irrevocable procedural default of underlying claim); Rivera, 717 So. 2d at 480 n.2 (same). Kearse has raised a related challenge in Claim II of his habeas corpus petition. Neither claim has merit. The Supreme Court determined that it was a violation of the Eighth Amendment to execute a defendant who had committed first-degree murder **before he turned eighteen years old**. Roper, 543 U.S. at 569-579 (determining "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed") (emphasis supplied). Kearse has not offered any precedent or

The court rejected the issue (Claim II(A)(12) ¶¶23-24) that Udell failed to obtain Kearse's consent before **conceding the "avoid arrest" and "hindering enforecement of the laws" aggravators as required by Ring v. Arizoa, 122 S.Ct. 2428 (2002)** for the following reasons: (1) Ring is not retroactive, thus, such a challenge is procedurally barred;[52] and (2) based on its analysis rejecting the claim of ineffectiveness related to not obtaining all of Parrish's personnel file, no prejudice was found. (PCR.37 5721). The court correctly determined that Ring did not apply. Furthermore, Udell did not concede the aggravation. As he informed the court in the evidentiary hearing, he was arguing the "avoid arrest" aggravator was unproven, based on Kearse's actions, and there should be no doubling of aggravators, as the combined aggravating circumstances were not entitled to much weight.[53] (PCR.46 788-

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rationale for expanding Roper or altering the bright-line rule it put in place. See Hill v. State, 921 So.2d 579 (Fla. 2006) (rejecting suggestion that mental age should be consider under Roper to bar death penalty - reaffirming chronological age is the deciding factor). See alsoMoreeno v. Dretke, 2005 U.S. Dist. Lexis 5165 (W.D. Tex., March 17, 2005) (refusing to extend Roper's bright line rule). Kearse is not entitled to relief.

[52] The found the matter procedurally barred, and that Ring was not retroactive based on Johnson v. State, 30 Fla. L. Weekly S297 (Fla. April 28, 2005) (PCR.37 5738-39).

[53] In arguing to the jury regarding the "avoid arrest", "hindering law enforcement", and "victim was law enforcement officer" aggravation, Udell noted the State had agreed that the factors had to be merged into one and that merely because they had to be merged, they were not entitled to more weight. (2R-T

2638-39). He agreed the State had proven Parrish was an officer, but asserted Kearse did not intend to kill Parrish to avoid arrest. Udell pointed to Pendleton's 1996 testimony to support the assertion. Udell offered there was no forethought, only a realization after the crime. (2R-T 2639-42). When read in context, it is clear Udell was challenging the aggravator. Udell inquired:

> Now I'm not telling you that Billy didn't want to avoid being arrested, your common sense tells you that. All of you, none of us want to be arrested. But the question is, is that why he killed Danny? So Billy lied to Danny, no doubt about it. He didn't want to be arrested.
>
> When ... Billy gives Danny the first phony name and Billy walks back to the car, does Billy turn on the engine and take off? No. Is that somebody's who's so concerned about being arrested that they'll kill? ...
>
> Let's look at what Billy did after the homicide. This is a person again who's so concerned about going to jail that he cold bloodedly killed a police officer in order to avoid it. What does he do after? ... Does he drive to ... Ohio? ... He goes to the exact address that the car's registered to....
>
> ...
>
> The first statement Billy's asked, why did you kill Danny? ... And he says, I thought he was trying to attack me first.
>
> ...
>
> ... And what did Billy tell him? I thought it was him or me. When he went for that gun, I went for that gun....
>
> Now they got a recorded statement from Billy that it wasn't 'cause I was trying to avoid arrest it was, I thought it was him or me.

(2R-T 2643-47). Clearly Udell was arguing against the "avoid arrest" aggravator. Likewise, with respect to the "hindering law enforcement" Udell argued it was part of the "triplicate"

90). Even had Udell not argued as he did, the evidence was overwhelming that Kearse killed Parrish, a law enforcement officer engaged in a lawful governmental activity (traffic stop), for the purpose of avoiding arrest. The result of the trial would not have been different. The aggravators were proven absent Udell's closing argument; a life sentence would not have been obtained. Kearse had not met his burden under Strickland, thus, the denial of relief should be affirmed.

Judicial errors related to denial of cause challenges and rejection of mental health mitigation are barred in postconviction litigation. The court found these issues, raised in Claims II(B)(1)¶26 and (3)¶28, to be procedurally barred and meritless. (PCR.37 5722-23). Both issues could have been raised on appeal, but were not, thus, they are not cognizable on collateral review. Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003). Furthermore, the juror was competent to sit as she had never spoken to or met the police officer witness, who would be

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aggravating circumstance. The evidence was unassailable; Parrish was a uniformed officer conducting a traffic stop. The only available arguments for Udell, considering the aggravating circumstances were being merged, were that the sentencing (life without parole) already accounted for Parrish's status as an officer and that the "triplicate" aggravator was not entitled to much weight because Kearse did not intend to kill an officer. (2R-T 2651-53).

testifying.[54] Likewise, the mitigation finding of the court will not be overturned if supported by substantial, competent evidence, and the weight assigned the mitigation is discretionary. See Kearse II, 770 So. 2d at 1134 (Fla. 2000) (observing whether a particular mitigating circumstance exists and the weight given it are matters within the discretion of the

[54] Juror Matthews explained she had heard about the case from the media and then she heard that a Leo Raulerson was coming to her family's holiday dinner. Raulerson was unknown to Matthews, she knew his father-in-law's half brother and knew he was retired from the Fort Pierce Police Department. Matthews **assumed** Raulerson, who was coming to town to testify in a police officer murder case, was going to be testifying here as there could not be that many cases. (2R-T 866-69). From this exchange, it is obvious Matthews and Raulerson never spoke, and in fact, had not met. This is supported by subsequent questioning where Matthews made it explicitly clear that the information she had about the case came from a newspaper or television news item years previously; she had not heard anything about the case recently. She recognized neither the name Kearse or Parrish. It was merely as voir dire continued that she started to wonder if this was the case she had heard about years before; she heard nothing recently, nor anything about the procedural history of the case. Matthews averred she could set aside any preconceived notions about the case, and decide the matter based upon the facts heard in court and the law given by the judge. She could be fair and decide whether the aggravating circumstances existed to justify a death sentence and consider whether mitigation existed to outweigh aggravation (PP 1007-16). Based upon this, Matthews had no relationship with Raulerson. Further, she agreed she could set aside anything she had heard before and decide the case on the facts and law given in Court. Hence, there was no for cause challenge basis, and such was denied properly. (2R-T 1097-98). A court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion. Kearse II, 770 So.2d at 1122; Castro v. State, 644 So. 2d 987 (Fla. 1994) (excusing juror for cause is subject to abuse of discretion review as court has opportunity to observe and evaluate juror's demeanor and credibility). Relief was denied properly.

sentencing court). The court resolved these issues properly and should be affirmed.

Kearse's **claims under Brady v. Maryland, 373 U.S. 83 (1963)** [55] (Claim II(C)) were rejected for the following reasons:

> Kearse claims that the State knowingly withheld Officer Parrish's misconduct and personnel records....

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[55] In order to prove a Brady v. Maryland, 373 U.S. 83 (1963) violation, Kearse must show: "(1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Rogers v. State, 782 So.2d 373, 378 (Fla. 2001) (citing Strickler v. Greene, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999))." Sochor v. State, 883 So.2d 766, 785, n. 23 (Fla. 2004). A petitioner must show that counsel did not possess the evidence and could not have obtained it with due diligence, **and** the prosecution suppressed the favorable, material evidence. See Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000) Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000); Way v. State, 760 So.2d 903, 911 (2000). "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). "As noted by the United States Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting United States v. Agurs, 427 U.S. 97, 109-10 (1976)) (emphasis supplied). Suppressed evidence is "material" if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." Allen v. State, 854 So.2d 1255, 1260 (Fla. 2003). Prejudice is shown by the suppression of exculpatory, material evidence, that is, where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Stickler, 119 S. Ct. at 1952.

> Kearse's claim fails on two of the three elements [of a *Brady* violation]. At the evidentiary hearing no evidence was offered to show that these records were not accessible to Kearse. In fact, Udell admitted that he could have obtained the records had he not limited his request to the Fort Pierce Police Department to complaints filed against Kearse (sic). Moreover, this Court found in Claim II(A)(11), *supra*, that the absence of these records did not result in prejudice to Kearse. Therefore, Kearse is not entitled to relief on this *Brady* claim.
>
> ...
>
> Kearse claims that the State knowingly withheld Bruce Heissen's statement to the police that Kearse "looked high on cocaine" in violation of *Brady*.... This claims (sic) fails on two of the three elements required for a *Brady* claim. At the evidentiary hearing Udell testified that he did not know if he had seen Heissen's statement, Defense Exhibit "M." However, despite Udell's lack of knowledge, Kearse failed to show how the statement was exculpatory where no evidence has ever been presented that Kearse was under the influence of any substance at the time of the murder. Further, no evidence was presented to show how the outcome of the proceeding was otherwise prejudiced sufficient to undermine Kearse's convictions and death sentence. Therefore, Kearse is not entitled to relief on this *Brady* claim.

(PCR.37 5724-25).

The State incorporates its argument addressed in Claim I to Udell's decision not to present Parrish's complaints file here in support of the fact that the personnel records were not suppressed, Udell could have requested them, but did not, and once fully aired at the evidentiary hearing, it was clear the no prejudice arose from the decision not to present such evidence.

With respect to Bruce Heinnsen, no Brady violation

occurred. Based upon Udell's assessment of his case, and the record evidence, when Heinssen's statement is taken into consideration with the lack of any evidence of intoxication and the offered defense of 12 seconds of rage equating to second-degree murder, it cannot be said that his statement would have altered the outcome of the proceedings. Heinssen's statement cannot "reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict", and as such, Kearse has failed to prove a Brady violation. The court's ruling is supported by the law and evidence.[56]

[56] Kearse has not established that Udell did not have a handwritten note indicating Bruce Heinssen had suggested Kearse "looked high on rock cocaine" at the time of the murder. Udell testified: "It doesn't look familiar, but I can't tell you as I sit here that I did or did not see this, so I don't know." He did admit that if it were not in his file "[m]ore likely than not" he had not received it. (PCR.44 546). Kearse did not prove it was not in Udell's files, hence, Kearse has not shown that the document was suppressed under Brady. However, assuming arguendo that the document was not disclosed, there was no Brady violation as the statement hardly exculpatory, nor had it been disclosed, would have produced a different trial result. As Udell explained, Heinssen had testified that Kearse looked like he had just scored a touch down when he drove away from the murder scene. It was Udell's intent to negate that testimony using Pendleton who refuted Heinssen's characterization of Kearse. She reported that Kearse looked scared and nervous after the shooting; that he was upset. (2R-T 1660; PCR 283). With respect to Heinssen's statement about cocaine, Udell testified:

> Q. And that was one of the ways that Rhonda Pendleton actually helped your case?
>
> A. Correct.

Kearse alleged Udell was ineffective in not objecting to the **introduction of non-statutory aggravation**, the court rejected Kearse's characterization of the State's argument and found Kearse's challenge to the court's sentencing decision legally insufficient.

> Kearse claims counsel was ineffective for failing to object to the introduction of non-statutory aggravating circumstances thereby rendering Kearse's death sentence fundamentally unfair. Kearse contends that the prosecutor's comments characterizing Kearse as a bully who didn't want to work and as lacking in redeeming value amounted to non-statutory aggravating factors. The Court disagrees and finds the argument, when taken in context, fair reply in contradiction of Kearse's evidence of mitigation. (2ROA 2547-2589, 2594, 2612-2615.) *Breedlove v. State*, 413 So.2d 1, 18 (Fla. 1982).
>
> In addition, Kearse claims that the trial court

> ...
>
> Q. But as far as if you -- if you had a statement available to you that Mr. Heinssen had said that Mr. Kearse looked high on cocaine, what would you have done with that?
>
> A. There's no way I could have made that -- well, I guess any good lawyer can take anything and twist is, but it didn't look on the face of it to be anything that would help us.

(PCR.46 756-57). Heinssen's statement is not exculpatory; it does not tend to exonerate Kearse. The statement merely places Kearse at the crime scene. It does not establish that Kearse was not in control of his faculties, but merely characterized how he looked at the moment. In fact, Colonel Mann testified when he met Kearse the night of the murder, he was coherent and not under the influence of anything. (1R 1303-04). Kearse has not come forward with any evidence as to whether he was under the influence of any substance at the time of the crime.

> improperly considered lack of remorse as a non-statutory aggravating circumstance. However, in support Kearse provides an inaccurate citation to the record. Further, examination of the sentencing order reveals no reference to remorse in support of the aggravating circumstances. Thus, the Court finds this portion of hte claim legally insufficient.

(PCR.37 5736-37).

The claim is also procedurally barred as Kearse raised the issue of prosecutorial misconduct at trial, Kearse II, 770 So.2d at 1130, but did not challenge theses statements. Relitigation of the claim under the guise of ineffective assistance of counsel is not permitted. See Rivera, 717 So.2d at 480 n.2; Harvey v. Dugger, 656 So.2d 1250, 1253). Moreover Kearse's one sentence claim that counsel was ineffective for failing to object to the comment is legally insufficient as pled. See Freeman, 761 So. 2d at, 1069-1070 (finding bare assertion of ineffective assistance of counsel is a thinly veiled attempt to have underlying issue resolved on the merits and is therefore improper); Asay v. State, 769 So. 2d 974 (Fla. 2000)(same). Furthermore, when read in context, the argument is proper and was not offering non-statutory aggravation.[57] The statements

[57] A review of closing argument demonstrates that the prosecutor did not offer non-statutory aggravation. After setting forth the facts proven (2R-T 2547-77), the State discussed the applicable statutory aggravating factors along with the relevant facts in support. (2R-T 2578-2585). Following this, the prosecutor's focus turned to the applicability of the proposed mitigation. (2R-T 2587-2589). In response to the defense portrayal of Kearse as someone who had a learning

were merely fair reply to Kearse's claim that mitigation existed. See Breedlove v. State, 413 So.2d 1 (Fla. 1982) (recognizing wide latitude is permitted in arguing logical inferences to the jury); Valle v. State, 581 So.2d 40 (Fla. 1991); White v. State, 377 So.2d 1149 (Fla. 1979); Davis v. State, 698 So.2d 1182 (Fla. 1994); Vining v. State, 637 So.2d 921 (Fla. 1994), The court's decision should be affirmed.

As his final sub-claim, Kearse challenged **pre-trail**

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disability due to an emotional handicap, the prosecutor pointed to contradictory evidence stating:

> Didn't they tr[ied] sic to paint a false picture of who Billy Kearse was? Didn't they try to have you picture poor little Billy Kearse who just couldn't learn. When the documented truth had been brought out only in cross examination was that we learned that Billy Kearse was really a severe bully throughout his time in school. As a little kid, as a middle schooler, and finally as a criminal on the streets. He had no respect for authority throughout his career in school. He threatened the faculty, he didn't want to be in school, and by age 18 had been referred as a delinquent for multiple burglaries, for thefts and for robbery. That it the real Billy Kearse which didn't come out until we cross examined these witnesses.

(PP 2594). The prosecutor then turned his attention to the evidence Kearse offered under the "catch-all" mitigator. Therein the prosecutor properly argued that the evidence did not establish mitigation. The state's message was that Kearse's inability to work or get along with others was of his own doing and not the failure of society or the school system. (PP 2612-2615). It was Kearse alone who was responsible for his actions. Toward that end, the rhetorical question was posed to the jury, "Is there one redeeming value that this Defendant has?" (2R-T 2614 lines 20-21). Following further argument, the question was reiterated. (2R-T 2615 lines 12-13).

publicity, venue, and courtroom events. The State addressed uniformed officers in the courtroom in it response to the first sub-claim of this Claim and will rely on the answer here. In denying relief on the balance of the claims, the court reasoned:

> ... In the first issue, Kearse claims that the trial court erred or trial counsel was ineffective for changing venue of the 1991 guilt phase from St. Lucie County to Indian River County. ... However, Kearse alleges no facts to demonstrate taht the change of venue otherwise prejudiced the outcome of the guilt phase.FN8
>
> FN8 Examination of the record reveals that venue was never raised as an issue on Kearse's first appeal. However, venue was raised on appeal of the second penalty phase where Kearse challenged the decision denying change of venue back to St. Lucie . No abuse of discretion was found in keeping venue in Indian River County. *Kearse*, 770 So.2d at 1123-24 (Fla. 2000).
>
> ...
>
> In the third issue, Kearse claims that the second penalty phase was tainted by juror misconduct. This matter was raised on direct appeal where Kearse challenged the denial of a motion to interview jurors for alleged misconduct. The Florida Supreme Court found that Kearse's allegations did not meet the standard for juror interviews and thus found that the court did not err in denying the motion. *Kearse*, 770 So.2d at 1127-28. Therefore, the Defendant's claim is procedurally barred where the issue was raised and rejected on appeal.

(PCR.37 5737). A review of the record establishes support for the court's factual findings and legal conclusions for both the

venue[58] and juror misconduct[59] issues.

To the extent that Kearse is claiming cumulative error, he is not entitled to relief. Each sub-claim is either legally insufficient, procedurally barred or meritless. Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998); Chandler v.

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[58] Kearse maintained in his motion that the court erred in changing venue to Indian River County, but "[t]o the extent trial counsel so moved, this constituted deficient performance and prejudiced Mr. Kearse." (PCR.10 1504). The claim is legally insufficient as pled give its single-sentence conclusory claim. Moreover, it is procedurally barred as the issues was raised and rejected on direct appeal in Kearse II, 770 So.2d at 1123-24. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000), (noting "one sentence" conclusory allegation of counsel's ineffectiveness is an improper pleading and attempt to relitigate procedurally barred claim.); Rivera, 717 So.2d at 480 n.2 (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance to overcome procedural bar or relitigate and issue considered on direct appeal).

[59] On direct appeal of the re-sentencing, Kearse challenged the denial of a motion to interview jurors as it related to the alleged juror misconduct. Kearse, 770 So.2d at 1127-28 (finding Kearse's allegation of misconduct did not meet the standard announced in Baptist Hospital v. Maler, 579 So. 2d 97, 100 (Fla. 1991), thus, there was no error in denying interviews). Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)

Kearse, 770 So. 2d at 1127-28. Given the prior resolution of this matter, the instant claim should be found procedurally barred.

Dugger, 634 So. 2d 1066, 1068 (Fla. 1994). Moreover, the evidence against Kearse was overwhelming and the death sentence has not been undermined as addressed above. This Court should affirm the denial of postconviction relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to [Counsel], Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on August 17, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on August 14, 2006.

LESLIE T. CAMPBELL