IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1876

BILLY LEON KEARSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

PAUL KALIL
Florida Bar No. 0174114
Assistant CCRC-South

CAPITAL COLLATERAL REGIONAL COUNSEL - South
101 NE 3rd Avenue
Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.850 relief following an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R1. _____" -- record on direct appeal to this Court of Mr. Kearse's guilt and first penalty phase proceeding, Case No. 79-037;

"R2. _____" -- record on direct appeal to this Court of Mr. Kearse's second penalty phase proceeding, Case No. 90-310;

"R2-T. _____" -- transcripts of Mr. Kearse's second penalty phase proceeding;

"PCR._____" -- record on instant appeal to this Court;

"PCR-T._____" -- transcripts of Mr. Kearse's postconviction proceedings;

"Supp. PCR._____" -- supplemental record on appeal to this Court;

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Kearse has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Kearse, through counsel, accordingly urges that the court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Nineteenth Judicial Circuit in and for St. Lucie County, Florida entered the judgments of conviction and sentence of death at issue. On February 5, 1991, Mr. Kearse was charged by indictment with one count of first-degree murder of Fort Pierce Police Officer Danny Parrish and one count of possession of a firearm by a convicted felon. On May 8, 1991, the indictment was amended to include one count of robbery with a firearm. (R1. 2428-32).

Mr. Kearse plead not guilty and was tried by a jury. Attorney Robert Udell represented Mr. Kearse at his trial and penalty phase. The jury rendered verdicts of guilty on the murder and robbery counts. (R1. 1864-5). After the first penalty phase, the jury recommended death for the first-degree murder conviction by a vote of eleven to one. (R1. 2361, 2671).

On November 8, 1991, the Honorable Marc A. Cianca imposed a sentence of death[1] for the murder of Officer Parrish and life imprisonment for robbery with a firearm. (R1. 2395, 2671). On direct appeal, this Court affirmed Mr. Kearse's convictions but vacated the death sentence and remanded for a new penalty phase before a jury. Kearse v. State, 662 So. 2d 677 (Fla. 1995).

The second penalty phase was conducted on December 9 through 19, 1996. The State presented testimony to establish that the murder was committed in the course of a robbery and that the murder was committed to avoid arrest and hinder the enforcement of the laws, and the victim was a police officer.

Mr. Kearse presented several witnesses at the second penalty phase. Psychologist Fred Petrilla testified that he had spent more than 20 hours evaluating Mr. Kearse, performing a battery of neuropsychological tests including intelligence, reading, spelling and math testing, the Halstead-Reitan neuropsych battery, the Wechsler Adult Intelligence Scale-Revised ("WAIS-R"), The Minnesota Multiphasic Personality Inventory ("MMPI") and projective tests. Dr.

[1] At the first sentencing phase Judge Cianca found four aggravating circumstances: 1) the murder was committed while the defendant was engaged in a robbery; 2) the murder was committed to either avoid arrest or hinder the enforcement of laws; 3) the murder was especially heinous, atrocious, or cruel (HAC); and 4) the victim of the murder was a law enforcement officer engaged in the performance of his official duties. The judge found two statutory mitigating circumstances: the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.. The judge also found three nonstatutory mitigating circumstances: the defendant's impoverished and culturally deprived background; the defendant was severely emotionally disturbed as a child; and the defendant's IQ is just above the retarded line. However, the judge determined that none of the mitigating circumstances "are substantial or sufficient to outweigh any aggravating circumstance."

Petrilla also met with Mr. Kearse's mother, Bertha, and took histories from her and others. (R2-T. 2147).

Dr. Petrilla opined that the killing of Officer Parrish was committed while Mr. Kearse was under extreme emotional disturbance, and that Mr. Kearse "most definitely" could not conform his conduct to the requirements of the law. (R2-T. 2204).

Neuropharmachologist Dr. Jonathan Lipman testified that he personally evaluated Mr. Kearse, interviewed his mother, reviewed records and consulted with neuropsychologists. Dr. Lipman opined that Mr. Kearse has suffered from neurodevelopmental problems since before age 12 and, while Mr. Kearse does not meet the diagnostic criteria for Fetal Alcohol Syndrome ("FAS"), he does suffer from the related disorder, Fetal Alcohol Effect ("FAE"). As Dr. Lipman explained:

> In Fetal Alcohol Syndrome the bones in the face are unusually small and therefore the features of the face tend to gravitate to the center, there is no filtrum above the nose. . . The ventricles of the brain [are] usually abnormal in shape and size. The child is almost always brain damaged. Many of them die in the womb, some of them die shortly after birth, and a smaller number, those would be lesser degrees of damaged survive actually into adulthood, although they are retarded
>
> * * *
>
> In Fetal Alcohol Effect there is no distinction in the bones of the face. The child is underweight at birth, often born premature, and remains small through the early years. . .which is consistent with the record of Billy Kearse

(R2-T. 2249-2251).

Dr. Lipman explained that FAE is a recognized disorder studied worldwide, although it was only recently understood at the time of his testimony. (R2-T. 2303). He based this his diagnosis on Mr. Kearse's history of pre-natal exposure to alcohol, his hyperkenetic activity, low birth weight, small size, hyperactivity and educational subnormalality, all of which are consistent with pre-natal alcohol exposure.

Dr. Lipman requested that brain scans be performed. While the brain scans did not support a specific diagnosis, they did indicate ventriculomegaly, an

enlargement of the left ventricle of Mr. Kearse's brain, which was consistent with his neuropsychological test results and findings of developmental brain dysfunction. (R2-T. 2255). Dr. Lipman opined that all of the records and tests confirmed "pervasive developmental abnormality" with very early onset. (R2-T. 2260). FAE subjects are hyporesponsive to stress (R2-T. 2263), and Mr. Kearse most likely misunderstood Officer Parrish's instructions when he effectuated the arrest. (R2-T. 2269). Mr. Kearse, while not psychotic, shows psychoticism under stress, detachment, and withdrawal. (R2-T. 2300-2303).

Pamela Baker testified that she is a licensed mental health counselor with a masters degree in mental health counseling who works with mentally handicapped individuals. Her findings supported Dr. Lipman's opinion that Mr. Kearse suffers from what is commonly termed "brain damage." (R2-T. 2209-11, R. 2123-5). Ms. Baker testified further that Mr. Kearse was diagnosed as severely emotionally handicapped in 1981, and continued to function "at a retarded level." (R2-T. 2033), and she described Mr. Kearse's impoverished, abusive and deprived background. (R2-T. 2052 - 60). Ms. Baker indicated that Mr. Kearse showed signs of Post Traumatic Stress Disorder, but Mr. Udell did not investigate this further. (R2-T. 2019). In addition to the expert mental health testimony, Mr. Kearse offered evidence to support non-statutory mitigation.

The State offered only one expert witness to rebut the mental health mitigation presented by Mr. Kearse. Daniel Martell, Ph.D. testified, inter alia, that Fetal Alcohol Effect is not a mental disorder (R2-T. 2370), that Mr. Kearse does not suffer from "brain damage" (R2-T. 2376), that Mr. Kearse is an antisocial personality (R2-T. 2389) and a "pathological liar" (R2-T. 2401), and that Mr. Kearse's history of emotional problems and poor academic performance resulted not from brain dysfunction, but from Mr. Kearse's "personal choice." (R2-T. 2395).

The jury again recommended death. (R2-T. 575) . The Honorable C. Pfeiffer Trowbridge sentenced Mr. Kearse to death (R2. 706-9), finding two aggravating factors: (1) the murder was committed in the course of a robbery, and (2) the murder was committed to avoid arrest and victim was a law enforcement officer (merged). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." (R2. 708.). The court also found as nonstatutory mitigation that Mr. Kearse exhibited acceptable behavior at trial, and that he had a difficult childhood that resulted in psychological and emotional problems. (R2. 709). Judge Trowbridge relied on Dr. Martell's testimony above that of the defense experts in rejecting mitigation claims:

> The evidence does not establish that 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 disagreed, the Court finds that any mental or emotional disturbance was not extreme.

(R2. 708).

In a 4-3 opinion, this Court affirmed the death sentence. Kearse v. State, 770 So. 2d 1119 (2000).

Postconviction counsel for Mr. Kearse filed a "shell" Motion for Postconviction Relief before the "new" Rule 3.851 took effect on October 1, 2001. (PCR. 14-68).[2] On March 1, 2004, Mr. Kearse filed his Amended Motion To Vacate Judgments of Conviction and Sentence. (PCR. 1458-1572). The Court conducted a Case Management Conference/Huff Hearing[3] on August 18, 2004. On August 23, 2004, the Circuit Court entered its order granting an evidentiary hearing on several claims and denying a hearing on others. (PCR. 1660-1663).[4]

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[2] As detailed in Mr. Kearse's "final" Amended Motion to Vacate, Mr. Kearse verified the "shell" motion, under oath before a notary public, in the presence of Counsel, on Wednesday, September 26, 2001. The entire Motion and Verification were sent via Federal Express on September 27, 2001 for delivery to the Clerk of the Circuit Court on September 28, 2001. The postconviction record indicates that Mr. Kearse's Motion arrived at the Clerk of the Circuit Court on October 3, 2001. Counsel's investigation into the cause of the delay revealed that Federal Express was two days late in shipping the package. Federal Express claimed that the delay resulted from counsel addressing the package to ZIP Code 34954, the Clerk's post office box, rather than 34950, the street address, though the address itself was accurate. (PCR. 1461).

On November 16, 2001, the State filed a responsive pleading to Mr. Kearse's Rule 3.850 Motion claiming that the motion was not properly verified. (PCR. 421 -548). On November 26, 2001, Judge Robert R. Makemson summarily dismissed Mr. Kearse's Rule 3.850 Motion without prejudice to refile. (PCR. 834-836).

On March 5, 2002, counsel for Mr. Kearse filed a Motion for Reinstatement of Petition Under Rule 3.850, demonstrating that Mr. Kearse's Motion for Postconviction Relief was properly verified. (PCR. 989-997). The State responded. (PCR. 1000-1006). On March 22, 2002, Hon. Marc A. Cianca denied Mr. Kearse's Motion for Reinstatement, but allowed sixty (60) days for Mr. Kearse to file his Rule 3.850 Motion. (PCR. 1015). The same day, Mr. Kearse filed a Notice of Appeal to this Court of the Circuit Court's Order denying Mr. Kearse's motion for reinstatement. (PCR. 1017-8, SC02-716). That appeal was voluntarily dismissed on June 13, 2002. (PCR. 1108; SC02-716).

[3] Huff v. State, 622 So. 2d 982 (1993).

[4] The Circuit Court adopted its own numbering for the claims raised in Mr. Kearse's final 3.850 Motion. The court granted a hearing on Claims II(A)(1) ¶¶4-6, II(A)(3) ¶8, II(A)(7) ¶¶12-13, II(A)(8) ¶14, II(A)(9) ¶15, II(A)(11) ¶¶17-22, II(A)12 ¶¶23-24, and II(A)(13) ¶25 (regarding ineffective assistance of counsel); Claim II(C)(2) ¶31 (re: violations of Brady v. Maryland, 373 U.S. 83 (1963)); Claim II(D) (re: newly discovered evidence); Claim III and IV (re: Ake v. Oklahoma, 470 U.S. 68 (1985), and ineffective assistance of counsel at penalty phase).The Circuit Court denied an evidentiary hearing on all remaining claims and sub-claims, including Claim I (re: public records); Claim II. (A)(2) ¶7 (re: ineffective assistance of counsel ("IAC") for failure to adequately cross-examine and/or impeach state witnesses with inconsistent prior testimony), Claim II (A)(3) ¶8 (re: IAC at the Motion to Suppress hearing; Claim II(A)(4) ¶9 (failure to cross examine witness); Claim II(A)(5) ¶10 (IAC for failure to impeach state witness); Claim II(A)(6) ¶11 (re: IAC for failure to consult crime scene and firearms expert); Claim II(A)(8) ¶14 (re: IAC for failure to prepare witnesses/eliciting inadmissible testimony); Claim II(A)(10) ¶16 (re: IAC for failure to argue Mr. Kearse's age as a statutory mitigating factor); Claim II(A)12 ¶¶23-24. (re: IAC for

The Honorable Marc A. Cianca conducted the evidentiary hearing on April 18 - 21, 2005, and May 25, 2005. In addition to trial counsel, Robert Udell, Mr. Kearse presented several expert and lay witnesses at the hearing. The State called one witness, psychologist Daniel Martell, Ph.D., who had evaluated Mr. Kearse in 1996 and testified for the State at Mr. Kearse's second penalty phase.

After presenting evidence, the State and Mr. Kearse provided written memoranda to the circuit court. (PCR. 5560-5702). On August 20, 2005 the circuit court entered its order denying relief. (PCR. R. 5703).

This appeal follows.

SUMMARY OF ARGUMENT

Argument I: The Lower court erred in denying Mr. Kearse a new trial and/or penalty phase where trial counsel rendered constitutionally ineffective assistance to Mr. Kearse in his guilt and penalty phase proceedings. Trial counsel failed to adequately prepare for mental health testimony of state and defense witnesses, failed to investigate the police officer victim's conduct and history of difficulties dealing with the public, failed to adequately prepare lay witnesses, including Mr. Kearse, for their testimony. Mr. Kearse was prejudiced as a result of counsel's failings.

Argument II: The trial court erred in denying Mr. Kearse a new penalty phase after Mr. Kearse presented newly discovered evidence to impeach the state's sole mental health expert. The newly discovered evidence establishes that the state's mental health witness is financially and philosophically beholden to prosecutors, biased, and lacked credibility.

Argument III: Mr. Kearse was denied his rights to due process and equal protection as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, because certain files and records pertaining to Mr. Kearse's case in the possession of state agencies, including Fort Pierce Police Department and the Office of the State Attorney have been withheld in violation of Chapter 119, Florida Statutes and Fla. R. Crim. P. 3.852.

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conceding aggravating factors without Mr. Kearse's consent); Claim II(B)1 ¶26 (re: judicial error/denial of cause challenge); Claim II(B)(3) ¶28 (re: judicial erro/rejection of mental health mitigation); and Claim II(C)(1) ¶¶29-30 (re: violations of Brady v. Maryland, 373 U.S. 83 (1963)); Claim V (introduction of non-statutory aggravators); Claim VI (re: pre-trial publicity, venue and events in courtroom denied Mr. Kearse a fair guilt- and penalty phase trial).

Counsel for both parties agreed that Claim VII (re: Ring v. Arizona, 536 U.S. 584; 122 S. Ct. 2428), and Claim VIII (re: the sentence rests upon an automatic aggravating circumstance), are legal claims for which evidentiary development was not necessary.

Argument IV: The lower court erred in summarily denying several of Mr. Kearse's claims. The record and files do not conclusively show that Mr. Kearse is not entitled to relief. Mr. Kearse has plead facts which, at the very least, entitle him to an evidentiary hearing on these claims.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. KEARSE A NEW TRIAL AND/OR PENALTY PHASE WHERE TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE TO MR. KEARSE IN HIS GUILT AND PENALTY PHASE TRIAL PROCEEDINGS

A. Introduction

The United States Supreme Court has recently reaffirmed the right of a capital defendant to the effective assistance of counsel. In the case of Wiggins v. Smith, 123 S. Ct. 2257 (2003), the Court emphasized the principles set forth in Strickland v. Washington, 466 U.S. 558 (1984), when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984)(citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

Wiggins v. Smith, 123 S. Ct. 2527, 2535. The Supreme Court further held that counsel has "[A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 668. (citation omitted). Mr. Kearse has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). See also Id. at 1515. ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000)("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court

has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

(Wiggins v. Smith, 23 S. Ct. 2527, 2538 (2003)).
Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id. at 2539, citing Strickland, 466 U.S. at 690-691.

The applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice, as Wiggins makes clear:

> Counsel's conduct … fell short of the standards for capital defense work articulated by the American Bar Association. (ABA) --standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. . (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41, p. 93 (1989)). (emphasis added).

Wiggins v. Smith, 123 S. Ct. at 2536-2537)(emphasis added).

Both the record of Mr. Kearse's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsel made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient with

regard to both investigating and presenting mitigation, and challenging the State's case.[5]

B. Deficient Performance

Trial Counsel's attitude toward this case and his client (and even some of his own witnesses) are apparent from the record. The trial began with trial counsel apologizing to the Court, the State, and his client for stating to the press that he fully anticipated Mr. Kearse being found guilty of first degree murder. On the weekend before the trial was to start, The Stuart News and the Port St. Lucie News reported:

> LAWYER EXPECTS CLIENT TO GET DEATH SENTENCE
>
> The attorney for Billy Kearse, who goes on trial today, says he expects the jury to convict his client of first-degree murder and recommend the death sentence for the shooting death of a Fort Pierce police officer.
>
> "You'll have an all-white jury hearing (that) for the silliest reason, he put 13 bullets in a white cop," said Robert Udell, Kearse's court-appointed attorney.

(R1. 208).

Even before the trial began, Mr. Udell indicated that he had given up all hope for his client. Rather than vigorously advocate his client's position, Mr. Udell repeatedly qualified his motions and arguments.[6] Counsel's professional performance mirrored his personal attitudes toward his case and client.

The ABA Guidelines in effect at the time of Mr. Kearse's trial required that:

> Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, Guidelines 11.4.1(d)(7), 11.8.6(b)(8), and must

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[5] Many of trial counsel's failures may be attributed to his failure to request co-counsel for the second penalty phase. Mr. Udell argued vigorously that the ABA Guidelines and the standards of representation for counsel in death penalty cases, as well as the circumstances of this case, necessitated co-counsel. Despite assuring counsel and Mr. Kearse that he would appoint a second-chair attorney (R1. 2), the trial court eventually denied Mr. Udell's request (R1. 40). Counsel failed to request co-counsel when he was re-appointed to try the second penalty phase.

[6] For example, in arguing a motion in limine, Mr. Udell represented to the Court that it's a "bit of a stretch, I understand that" (R1. 1119). Later in the guilt phase Mr. Udell moved for mistrial and argued that "I assume the Court will deny that" (R1. 1353). At the close of the State's case, Mr. Udell made a motion for judgment of acquittal regarding the premeditated murder, based on the argument that "I'll make motion regarding premeditation 'so somebody doesn't argue I didn't make the motion later on, but I don't believe there are any grounds to it'" (R1. 1650). Later, Mr. Udell made a motion for mistrial, judgment of acquittal, and directed verdict, then told the Court "I'm not even sure its necessary" (R1. 1743). At the second penalty phase, when arguing his motion for continuance, Mr. Udell boldly stated that he has "other cases to try", the witnesses from first penalty didn't want to get involved with this case, but he was not trying to delay "the inevitable" (R2-T. 133).

> be able to zealously challenge the prosecution's evidence and experts through effective cross examination. Utilization of experts has become the rule, rather than the exception, in proper preparation of capital cases.

(ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)).

Mr. Udell's lack of basic knowledge of psychological and psychological issues in capital cases is apparent from the trial record and evidentiary hearing. Mr. Udell's "confusion" is the result of Mr. Udell's lack of preparation as evidenced by the following:

> Q. Now apparently Dr. Petrilla's neuropsych, which one is the personality test: that's WAIS-R?
> A. MMPI.
> Q. MMPI, sorry. Apparently in '91 when Dr. Petrilla did it, his score that he used Halstead Reitan norms?
> A. That's not correct.
> Q. What norms did he use in '91?
> A. Halstead Reitan has nothing to do with MMPI.
> Q. I'm sorry. Who's Mr. Heston and colleagues?
> A. Dr. Heston I believe is here in Florida and he's one of several people who recognize the limitations of the Reitan norms for the battery, and it's the most widely used battery in the country, and they set out to do a large scale national norming study to provide more sensitive norms across age, sex, and education.
> Q. On the MMPI?
> A. No, on the Halstead Reitan.
> Q. On the Halstead Reitan test?
> A. That's correct.
> Q. The Halstead Reitan test tests what?
> A. Brain damage.
> Q. Okay, I was confused. And Dr. Petrilla when he did that Halstead Reitan test in '91 used Halstead Reitan norms to test him on, right?
> A. Yes, he did.

(R2-T. 2474, 2476).

Mr. Udell's ignorance was further demonstrated during closing argument:

> And even if you consider just psycho babble, and quite honestly, I don't know if you have any idea what these people are talking about. I've been doing this for years and I have no idea what they're talking about. WAIS-R, WISC-R, V.O.D.S. Test, F levels, K level -- I mean do you really know what any of that meant?

(R2-T. 2268).

At the evidentiary hearing, Mr. Udell testified that, although he recently had tried a penalty phase case just months before, he did not know the difference between a psychologist and a psychiatrist:

> Q: Do you know the difference between the two?
> A: One gets paid more money than the other.
> Q: Anything else?
> A: [Yes.] Being a psychologist appears to make you sound like you know what you're doing more than a psychiatrist -- I'm sorry, it gives you a -- it means you've studied more years. One's a doctor, one's not. One's a Ph.D., one's a medical doctor.

(PCR-T. 539). Nor did he know the difference between two common testing instruments, WAIS-R and the MMPI (PCR-T. 543-4). Mr. Udell had little understanding of one of the most crucial mental health issues in the case, Fetal Alcohol Syndrome/Effect. At the evidentiary hearing he testified,

> Udell: I just remember Dr. Lipman said I can't -- based upon what I have to find to find that diagnosis, it's not there. So I said, well, let's give it some other term, and he said fine, we'll call it fetal alcohol, and he used the other one, syndrome versus effect.
> Q So was it your term, fetal alcohol effect, is that a term that you came up with?
> A No. I know I didn't. Dr. Lipman did.

(PCR-T. 541-2).

Mr. Udell's testimony shows not only ignorance of these concepts, but almost contempt for them, which is reflected in his performance as set forth below.

1. Failure to Adequately Prepare Defense Experts

Trial counsel failed to prepare his own mental health experts in several respects. First, Mr. Udell did not provide his experts with the information

necessary to support their opinions to the jury and sentencing judge. Second, Mr. Udell failed to prepare his experts to rebut the claims of the State's expert as required by the ABA Guidelines. In addition, Mr. Udell improperly attempted to introduce the opinions of a psychologist through his expert neuropharmacologist, even though the psychologist was available to testify. Mr. Udell's deficiencies cannot be attributed to a reasonable strategic decision. More likely, they result from his miscomprehension of mental health evidence. In any event, because of Mr. Udell's deficiencies, the defense experts' credibility and competence were maligned before the jury and sentencing judge.

Mr. Udell was deficient in failing to provide materials and information to his experts. Dr. Lipman's credibility was greatly undermined by Mr. Udell's failure to provide him with the statement of Rhonda Pendleton, the sole eyewitness to the events for which Mr. Kearse was sentenced to death. Mr. Udell only provided an "investigation report," which he generated and gave to Dr. Lipman by telephone. (R2-T. 2318). Dr. Lipman did not receive the reports or testimony of the officers who took Mr. Kearse's statements on the night of his arrest. Dr. Lipman admitted that his only knowledge of the crime "was based entirely on my interview with him. I didn't have any other explanations of what happened," and that the additional information would have been helpful to him. Dr. Lipman was certain that he asked Mr. Udell for asked for "everything," including witness statements, but Mr. Udell never provided them. (R2-T. 2340, 2341). Dr. Lipman testified further that "I would prefer to have all the information I can have, and if [trial counsel] were trying to save me the effort of reading it, then don't try." (R2-T. 2333, 2334).

Mr. Udell readily admitted at the evidentiary hearing that the statement of Rhonda Pendleton, the only eyewitness, "would be something you'd want [your expert] to see." (PCR-T. 806). Dr. Lipman testified at the evidentiary hearing that all police reports, witness reports and even physical evidence are important to him as a neuropsychologist when consulting on a criminal case. (PCR-T. 954). Eyewitness statements are "particularly important" to him, and if there is only one eyewitness, that statement "would be vital." (PCR-T. 956).

At the evidentiary hearing, Mr. Kearse presented Robert Norgard, Esq., as an expert in criminal defense in capital cases. (PCR-T. 1107). Mr. Norgard offered testimony regarding the community standards of practice among Florida defense attorneys at the time of Mr. Kearse's trial and penalty phase. Mr. Norgard explained that when presenting expert testimony,

> The expert needs to know other relevant material that may come up either on direct examination as a bases to support their opinion, or on cross examination to defend

> their position. I mean, they need to know all of the relevant information in order to render an opinion that would be considered by a court, considered by a jury, and carry weight in terms of what they convey to the jury and the judge.

(PCR-T. 1119-20).

Mr. Udell was also deficient in failing to communicate with his experts and allow experts to communicate with each other. Mr. Norgard testified that such communication was the standard practice at the time of Mr. Kearse's penalty phase, and was to the importance of communication amongst trial counsel and defense experts:

> What I would equate it to, if there's not communication it would be like the story of the blind men who are each touching a different part of the elephant, but not communicating to each other what they've learned, and come up with a completely distorted picture of what they're actually touching, instead of the true picture of what's going on.

(PCR-T. 1125).

At the evidentiary hearing, Dr. Lipman testified to his difficulties in this regard with Mr. Udell and Dr. Petrilla. On November 11, 1996, while preparing for Mr. Kearse's sentencing phase, Dr. Lipman wrote a letter to Mr. Udell informing him that:

> Due diligence requires that either Dr. Petrilla or myself must perform a qualitative analysis of Kearse's neuropsychological test results in comparison with the published data. I must be able to explain how the former conforms to the latter.
>
> * * *
>
> I regret that I'm running out of time in which to offer to help you do this analysis beyond providing the publications, but I cannot let the time evaporate entirely without explaining the weaknesses of my position.

(PCR. 5390).

At the evidentiary hearing, Dr. Lipman explained that the neuropsychological data that had been provided needed to be placed in the context of the published research literature dealing with fetal alcohol effect, and that he required the assistance of a neuropsychologist to do that. (PCR-T. 959). Dr. Lipman testified further that neuropsychologist in these circumstances would be required to consult with a neuropsychologist according to the professional standards under which he practices. (PCR-T. 960). However, because Mr. Udell did not adequately communicate with his experts, the time he spent with Dr. Petrilla was "not very much" and consisted of "a couple of telephone calls with him" from Mr. Udell's office. (PCR-T. 954). After not getting a response from Mr. Udell and being unable to communicate with Dr. Petrilla, Dr. Lipman, out of "exasperation" and a "desire for thoroughness" (PCR-T. 961), contacted two neuropsychologists on his own. Mr. Kearse was at a disadvantage, however, because neither of the neuropsychologists had evaluated Mr. Kearse and "neither of them were invited to do so by the attorney." (PCR-T. 962). Dr. Lipman went so far as to pay one of the neuropsychologist's fees himself. (PCR-T. 951).

Despite Dr. Lipman's efforts, the necessary qualitative analysis was never done. (PCR-T. 961). At the evidentiary hearing, Mr. Udell dismissed Dr. Lipman's written requests as "apparently he's asking me to so something" (PCR-T. 833) and had "no idea" if this qualitative analysis was ever done. (PCR-T. 833-4).

Counsel's performance was also deficient because he neglected to call available expert witnesses, choosing instead to offer expert neuropsychological testimony through his pharmachologist, who has no expertise in neuropsychology. At the second penalty phase, the State's psychologist, Dr. Daniel Martell, refuted Mr. Kearse's experts' opinions regarding mitigating factors. Dr. Martell based his opinions, in part, on three Minnesota Multiphasic Personality Inventory ("MMPI") tests performed by neuropsychologist Fred Petrilla, Ph.D. Dr. Martell, who has never written on or researched MMPI interpretation, concluded that the MMPI results indicated that Mr. Kearse was malingering. Dr. Martell testified that Mr. Kearse's MMPI F-Scale, an indicator of malingering, was the highest he had ever seen and reflected scores that were "totally invalid, uninterpretable, and reflect an attempt on his part to fake crazy in order to avoid responsibility." (R2-T. 2406). Dr. Petrilla also noted the relatively high F-Scale scores when he performed the tests, but recognized that that such a score could result from many other factors besides malingering. (R2-T. 2227-30).

Dr. Lipman, aware of this issue but unable to communicate adequately with Mr. Udell or Dr. Petrilla, consulted with neuropsychologist Alan Friedman, Ph.D., to review the MMPI data. (PCR-T. 950-951). Dr. Friedman testified at the evidentiary hearing to his qualifications and expertise. (PCT-T. 876-74). Dr.

Friedman concluded that Mr. Kearse's high F-Scale scores were not as significant as his F-K Index, which indicates that Mr. Kearse was not malingering. The high F-Scale signifies that Mr. Kearse more likely suffers from emotional and psychiatric problems.

Despite the obvious importance of Dr. 's opinion to support Mr. Kearse's case, Mr. Udell did not call Dr. Friedman to testify. Rather, Mr. Udell relied on Dr. Lipman, a neuropharmacologist, to testify to Dr. Friedman's opinions which were not within Dr. Lipman's area of expertise.

As Robert Norgard, Esq., explained, under the prevailing professional norms at the time of Mr. Kearse's resentencing,

> It would be, I think, extremely improper to allow experts, or try to use experts in an area that's not their expertise for a lot of reasons.
>
> * * *
>
> What they know is based on hearsay, they have absolutely no basis or experience to defend the information they're providing. They're certainly vulnerable to cross examination on that point. The weight that would be given their testimony would certainly be questionable.

(PCR-T. 1125-6).

Mr. Udell's failure to call Dr. Friedman is particularly perplexing because Dr. Friedman was willing and able to appear and testify for Mr. Kearse. At the evidentiary hearing, Mr. Udell reasoned, "if the question is why didn't we call ? The analysis was we'd get the same testimony, same information to the jury through Lipman." (PCR-T. 917). This rationalization belies Mr. Udell's misunderstanding of mental health issues and misuse of his experts. Failing to call Dr. Friedman, and choosing to in stead rely on another witnesses without adequate expertise to relay Dr. Friedman's opinions to the sentencing judge and jury was deficient performance that cannot be attributed to any reasonable strategy.

2. Failure to Investigate and Prepare for Testimony of the State's Mental Health Expert

Mr. Kearse's resentencing phase was to begin on December 9, 1996. On November 30, 1996, Mr. Kearse was notified by the State that Dr. Daniel Martell would be performing a compelled mental examination pursuant to Fla. R. Crim. P. 3.202. (PCR-R475. 575, R2-T. 172). Dr. Martell was scheduled to examine Mr.

Kearse on December 6, 1996. (R2. 538-9). On December 3, 1996, Attorney Udell filed a motion for continuance in order to depose Dr. Martell, investigate his background, and prepare for his testimony. As additional support for the motion, Mr. Udell argued that the time limitations would not permit him to attend the evaluation. (R2. 545-547). Mr. Udell renewed the motion for continuance on at least two occasions during hearings on December 3 and 6, 1996. The circuit court denied the motion for continuance, concluding that Rule 3.202 contemplated timely action by the parties without long delays and ordered the parties to depose the experts during evenings and weekends. (R2-T. 213).

Despite his arguments and the circuit courts admonition, Mr. Udell made no effort to investigate Dr. Daniel Martell, the State's sole mental health expert witness. Mr. Udell did not attempt to verify Dr. Martell's credentials or ascertain what testimony Dr. Martell was going to offer. It is clear from the penalty phase testimony that Mr. Udell had no idea what Dr. Martell was going to say. As a result, Mr. Kearse's expert witnesses were inadequately prepared to rebut Dr. Martell's opinions and trial counsel was unaware of information that would have challenged Dr. Martell's credibility.

At the evidentiary hearing, Mr. Udell testified to the limits of his investigation of Dr. Martell. Mr. Udell admitted that he would have asked around the local legal community about Dr. Martell's reputation, "but that's as far as it would have gone." (PCR-T. 551). Mr. Udell did not obtain Dr. Martell's curriculum vitae to review it prior to his testimony, and made no effort attempt to see whether the information it contained was, in fact, true. (PCR-T. 553). Mr. Udell "would have generally accepted if [Dr. Martell]'s putting it on paper, it's probably true." (Id.).

Mr. Udell did not attend Dr. Martell's evaluation of Mr. Kearse, despite having the opportunity to do so, having argued that it was necessary to do so, and billing 4.5 hours for it. Rather, he left that strategic decision to Dr. Martell, asking if there was any reason, from the State's expert's point of view, that he be present while his client was questioned and evaluated. (PCR-T. 559).

Mr. Udell was aware that Dr. Martell's examination was being videotaped, however he made no effort to obtain a copy of the videotape for his own information, or to provide to his experts to evaluate prior to their testimony. Mr. Udell testified that he "apparently wasn't present. I don't remember getting the videotape. I could have relied upon, you know, the doctor's report." (PCR-T. 560). However, Mr. Udell failed to obtain a written report from Dr. Martell despite his recollection that "the State's experts always do reports … I'd be hard pressed to believe that we got to trial and I didn't ask for it." (PCR-T. 553). Nor did Mr. Udell make any effort to depose Dr. Martell, despite having billed 1.5 hours for

doing so. (PCR-T. 556).

Still, Mr. Udell maintained at the evidentiary hearing that he adequately prepared to challenge Dr. Martell's testimony without a report or deposition "by asking the State Attorney or asking [Dr. Martell], what are you going to say, what's he going to say." (PCR-T. 810). Mr. Udell knew that he "wasn't going to get all fifteen chapters" but was content to get "the chapter headlines, which is, which aggravating factors existed and which mitigating factors didn't exist, or vice versa. . . It's not hard to figure out in many of these cases what an expert's going to say."[7] (PCR-T. 810). According to Mr. Udell, "many of them start -- they sound pretty similar from case to case, they tend to say the same things, they use the same verbiage. (PCR-T. 811).

As Robert Norgard, Esq. testified, the prevailing professional norms at the time of Mr. Kearse's case required trial counsel to investigate and prepare to challenge the State's mental health expert. Trial counsel should investigate the expert's qualifications, as well as findings. (PCR-T. 1131-32). An attorney would "certainly" want to get a copy of the expert's curriculum vitae and research the expert's publications and experience. (PCR-T. 1134). Trial counsel might choose to attend the expert's evaluation of the defendant, but it would be even more valuable to obtain any recording of the evaluation so that defense experts can review it. (PCR-T. 1136). Allowing the defense experts to view the State's expert's recorded examination would benefit the defense experts by allowing them to critique the examination and providing additional information to form their own opinions. (PCR-T. 1136).

Mr. Udell's failure to conduct any kind of discovery regarding Dr. Martell's experience, qualifications, credibility, methods, findings and potential testimony was deficient performance which cannot be attributed to a reasonable strategic decision. Mr. Udell's only justification for this failure was that "the State tried to have [Dr. Martell] examine Billy and we were just not cooperating. We were just saying you can't do that, we're not going to let you do that, let the chips fall where they may." (PCR-T. 553). This purported strategy decision is akin to a child on the playground deciding that he doesn't like the rules of the game so he will take his ball and go home. Frankly, Mr. Udell's testimony and the record reflect that his failures were the result of negligence rather than any decision at all.

[7] Mr. Udell's justifications belie not only his ignorance of mental health issues and lack of preparation for Dr. Martell's testimony, but also his ignorance of the State's purpose of calling any mental health expert. Mr. Udell repeatedly asserts that he knew which aggravating factors Dr. Martell was going to testify to. (PCR-T. 560-1, PCR-T. 757, PCR-T. 773-4, PCR-T. 810-11). Clearly, the State's expert was not in a position to testify to the existence of any aggravating factors. The State's purpose in calling Dr. Martell was to rebut the testimony that Mr. Udell was to offer to establish mitigation.

3. Failure to Investigate and Present Evidence of Officer Parrish's Prior Misconduct and Difficulties Dealing with the Public

Trial counsel Robert Udell was deficient in two respects in failing to investigate and present evidence of Officer Parrish's prior misconduct as a law enforcement officer and Officer Parrish's difficulties in dealing with the public. First, Mr. Udell neglected to obtain Officer Parrish's complete personnel file from the Fort Pierce Police Department which indicated numerous deficiencies in Officer Parrish's job performance that were relevant to the issues presented in Mr. Kearse's case. This oversight is inexplicable. Even when specifically advised by his investigator, Mr. Udell failed to obtain the records. (PCR-T. 828). Anne Evans, a retired Washington, DC homicide investigator with 20 years of experience in law enforcement, informed Mr. Udell in writing that Officer Parrish's personnel jacket needed to be obtained from Fort Pierce Police Department. (PCR-T. 1403). Investigator Evans testified that she later "asked Mr. Udell specifically that he needed to get the [personnel] jacket from the police department of the victim's record when he had been employed there … I told him that I thought it was very important." (PCR-T. 1404).

According to Mr. Norgard, in a case involving a police officer victim, even a non-capital battery case, where there are disputed issue of fact over the circumstances of the killing, a defense attorney would "certainly" want to make a public records request for, and review, the officer's personnel file. (PCR-T. 1123). Mr. Udell did have the foresight to request, by letter to the Fort Pierce Police Department, "copies of any and all records . . . concerning any complaints filed against Officer Danny Parrish at any time that he was serving as a law enforcement officer with the Fort Pierce Police Department." (PCR. 2165-6). In response to his request, the Fort Pierce Police Department provided him with copies of six investigation reports regarding citizen complaints filed against Officer Parrish (PCR-T. 516), but Mr. Udell points out that "they gave me only what I asked for" (PCR-T. 517), and he did not obtain Officer Parrish's complete personnel file. In any event, Mr. Udell failed to fully investigate the complaint reports and failed to call any of the complainants to testify, despite his client's expressed wish that he do so. As Anne Evans explained, "Both myself and Mr. Kearse agreed that we felt this information should be presented to the jury during the trial." (PCR-T. 1405).

In trying to explain his purported "strategy decision" to not call these complainants to testify for Mr. Kearse, Mr. Udell blamed the complainants:

> They weren't willing to come forward, and/or what they were willing to say just didn't reach that tipping point where we felt it would help. No doubt, it was a strategy decision and we didn't feel it went - - 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."

(PCR-T. 526-527)

This testimony directly contradicts the evidentiary hearing testimony of Mr. Udell's investigator and several of the complainants themselves. Investigator Anne Evans had testified that she interviewed some of individuals who had run-ins with Officer Parrish and their testimony was something that both she and Mr. Kearse felt should be presented to the jury during the trial. (PCR-T. 1405). She stated that the information was not presented to the jury, and that Mr. Udell had indicated to her that he was not going to be presenting any of that evidence. (Id). Contrary to Mr. Udell's inferences that the defense team ("we") made the decision to not present this evidence, Mr. Udell's decision was entirely against the recommendations of his experienced investigator, and was against the express wishes of his client.[8]

Furthermore, Mr. Udell's claim that the complainants were not cooperating is conclusively refuted by the testimony of the complainants at the evidentiary hearing. Tracey Davis and Eric Jones testified that they were willing and available to testify at Mr. Kearse's 1996 resentencing, had they been called. Ms. Davis was never contacted by Mr. Udell and never summoned to appear, but would have been willing to do so. (PCR-T. 863-864; See also, Defense Exhibit U). Mr. Jones vaguely recalled Mr. Udell visiting him at his place of business. Although he did not wish to testify at Mr. Kearse's trial, he was subpoenaed and did appear at the courthouse to testify as instructed, but was never called as a witness. (PCR-T. 1374). Mr. Jones and his partner, Mark Swesey, subsequently wrote to Mr. Udell, stating:

> We both responded to the summons of November 20 and were at the Indian River Courthouse this morning at 9:00 as ordered. At this time, we were told our presence was NOT required today, but might be required at some future time. It will be incumbent on you to inform us of the date and time we are required in court; please understand that we will need some advance notice.

(PCR-2455). The letter clearly refutes Mr. Udell's claim that the complainants did not want to come forward. Clearly, they had made an effort to cooperate and

[8] Mr. Udell further acted against Mr. Kearse's interests, and without his consent, by conceding the "avoid arrest" and "hindering enforcement of the laws" aggravators in the Defendant's Memorandum Regarding Sentence, and in closing argument. (R2-T. 2634 - 2640, R2. 690).

expressed a continuing desire to do so. Equally apparent is their frustration with trying to communicate with Mr. Udell.

Mr. Udell's strategic choices, made after his less than complete investigation, are reasonable only to the extent that reasonable professional judgment supports the limitations on his investigation. Wiggins, at 2539, citing Strickland, 466 U.S. at 690-691. Mr. Udell admits that "if you're going to tell it to the jury that Danny [Parrish] had been aggressive, it would have been helpful if some of his own people would come and said that, and that we didn't have." (PCR-T. 528-529). Having not obtained the available personnel jacket and conducting a complete investigation of Officer Parrish's conduct, Mr. Udell did not have the information necessary to make a "strategic decision" to abandon this defense.

4. Failure to Prepare Lay Witness Testimony

Trial counsel failed to adequately prepare lay witnesses for their testimony. At the second penalty phase, trial counsel allowed Mr. Kearse to testify to the jury that he already lived on death row at Union Correctional Institution. (R2-T. 1832).[9] As a result, jury was made aware that Mr. Kearse had already been sentenced to death. Similarly, trial counsel allowed Pamela Baker to testify at length to the jury regarding Mr. Kearse's juvenile infractions, which were otherwise inadmissible (R2-T. 2023).[10] Mr. Udell also failed to prepare Mr. Kearse's aunt and uncle, Peggy and Ernest Jacobs. The Jacobs's presented affidavits to that effect (PCR. 5519-5526), and Mr. Udell admits, "I know I didn't spend significant periods of time with any of these people." (PCR-T. 798). In addition, trial counsel was deficient in failing to properly prepare and conduct a thorough cross-examination of Derrick Dickerson and Rhonda Pendleton at the motion to suppress hearing. Mr. Kearse was arrested at the home of Derrick Dickerson, where he was staying overnight with Rhonda Pendleton. In denying relief, the circuit court specifically found that Mr. Kearse was living at his mother's home and did not have a romantic relationship with Pendleton, and that the claim that Ms. Pendleton was dating Mr. Kearse is in contradiction to Mr. Kearse's statement to his trial attorney. (PCR. 5713-14). The lower court's finding is conclusively refuted by the record.

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[9] The lower court blames Mr. Kearse for this error as "Mr. Udell was not expecting Mr. Kearse to answer the way he did." (PCR.). Contrary to supporting the court's ruling, the fact that Mr. Udell did not anticipate what his witness, and client, were going to say on the stand is deficient performance.

[10] This is especially significant in light of the Court's statement to the jury that the appellate court sent the case back for a new trial "only on this issue of sentencing." (R2-T. 422), prosecution's previous comment that Mr. Kearse's case had been sent back "to recommend death" (R2-T. 470), and his comment before the jury to Dr. Petrilla that "at the last hearing you testified. . ." (R2-T. 2217).

At the evidentiary hearing, Mr. Udell was asked if he knew who Rhonda Pendleton was, and he immediately responded that she was Mr. Kearse's girlfriend, but retracted slightly saying "Somewhat girlfriend. Maybe I've got the relationship wrong. They were good friends, I know that" (PCR-T. 530). Mr. Udell admitted to having seen a letter from Ms. Pendleton to Mr. Kearse wherein she expressed her affection for Mr. Kearse and sent "love and kisses." (PCR-T. 768).

The nature of Mr. Kearse and Ms. Pendleton's relationship is relevant to Mr. Kearse's claim that he was an overnight guest at the Dickerson residence. Had Mr. Udell adequately prepared to conduct a thorough and effective cross-examination of Rhonda Pendleton and Mr. Dickerson, he would have proven what Mr. Kearse claimed all along – that Mr. Kearse was, for the night he was arrested, an overnight guest at Mr. Dickerson's home.

Trial counsel's failure to adequately investigate, prepare and examine these lay witnesses at trial, the motion to suppress, and penalty phase cannot be attributed to any reasonable strategy and is deficient performance.

C. Prejudice

In order to demonstrate prejudice, Mr. Kearse must show that "[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A proper analysis of prejudice entails an evaluation of the totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence … may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

1. Failure to Adequately Prepare Defense Experts

The prejudice resulting from Mr. Udell's failure to adequately prepare his experts is best demonstrated by the penalty phase testimony of Dr. Jonathan Lipman on cross-examination:

> Q. Okay. Well, did you read the statement of the girl that was with him in the car? Did you read her deposition or did you read her testimony from the trial in this case as to the events as she described them, did you

read that?
A. Not on that subject as not provided with that. I was in fact provided with an investigation report of her more recent and so-called truthful information of what happened. But no, I didn't read the testimony from that.
Q. You received an investigation report from who?
A. It was from the attorney, Mr. Udell.
Q. And who prepared this report?
A. I got it over the phone, I don't know who prepared it.
Q. And this report was different – you were told that this report –
A. Yeah.
Q. -- contained information different than what she testified to; is that right?
A. Right, but I don't think it provided what she testified to.
Q. Okay. Under oath at the trial in this case you never read that, is that right?
A. I don't think I did.
Q. Okay, that's fine. Did you read the deposition of Co. Mann who was in with the St. Lucie County Sheriff's office as to what the Defendant told him the night of his arrest?
A. I don't remember reading that, no.
Q. Did you read the report or the deposition or the testimony of Sgt. Tedder who was a detective that interviewed this Defendant the night of his arrest?
A. Maybe I should -- those names do not ring any bells. Could I look at my notes?
Q. If you want to.
A. I'll tell you what testimony I did read.
Q. That would be helpful.
A. It will be quicker. The testimony of Danny Dye who is the ex-dean of St. Lucie School; the testimony of Pamela Baker; testimony of Sharon Craft, testimony of Kurt Craft, testimony of Steven Baker, Fred J. Petrilla, Linda Kushner, Dr. Angeline Desai, and that's all.
Q. Doctor does it – does it surprise you to know that

none of those people were people whose – who had any testimony regarding the facts of the crime itself?
A. No, I'm sure they weren't there.
Q. So you listened to what the Defendant told you happened in your interview with him at the jail, right, and this was recent. When I say recent, it wasn't back around '91 at the time of the trial?
A. No. No, it was a few months ago.
Q. And from that you determined that he wasn't lying to you as you say today, but what he told you wasn't what really happened but you don't term that a lie because you think that he may actually believe that, is that correct?
A. It was based entirely on my interview with him. I didn't have any other explanations of what happened.
Q. Well, wouldn't that have been helpful to you?
A. Yes
Q. You're forming an opinion and you're telling this Jury that you think that this Defendant, although what he told you wasn't accurate, that he believed that, you don't know what he said before, do you?
A. No, I don't
Q. And you don't think that it would have been helpful or responsible for you to know that before you gave this Jury an opinion?
A. Yes I do.
Q. Well, why didn't you read that stuff, why didn't you ask for it? Did you ask Mr. Udell and did he refuse to give you that information?
A. No, I didn't know it existed.
Q. You didn't think it was important to know whether the Defendant made any statements in this case?
A. No, I did have statement. Just a moment. What I had was summary I was working from. But to answer your question in general, yes, all information is valuable and the more information, the better.
Q. All right. Your experienced in doing this kind of thing aren't you? Aren't you?
A. Yeah, in interviewing?
Q. Yes. And in working on criminal cases, aren't

you?
A. Yes.
Q. You've worked with defense lawyers and I guess prosecutors all over the country, haven't you?
A. Yes, I have.
Q. Have you ever asked them for information have you ever said it would be helpful for me in forming my opinion to know as much as I can about this case, about your client and about the crime?
A. I always say that.
Q. Well, did you say it this time?
A. I did.
Q. Well, did this defense lawyer refuse to give you his information?
A. No, he overwhelmed me with paperwork.
Q. But nothing regarding the crime, right?
A. That may be true. That may be true.
Q. Well, even – And you did review the things he gave you, right?
A. Oh yes.
Q. Did it strike you that, my gosh, there's nothing here that tells me about the crime itself?
A. Yes, it did.
Q. Did you pick up the phone and call him and say, where is the information about the crime, I need that to be able to form an expert opinion? Did you?
A. No, I didn't
Q. And you're still comfortable coming in here and giving this Jury an opinion on what this Defendant believes and doesn't believe not even knowing what he previously told the police?
A. No, I'll never be comfortable –
Q. But you did it, though, didn't you?
A. I gave him my opinion base upon my interview and that has limitations.
Q. But you didn't say , my opinion only limited this case because I didn't get all the information. What if I hadn't asked you this? You would have let this Jury go on believing that you know everything about –

> THE COURT: All right. This is getting argumentative. Get your voice down to a conversational tone and allow the witness to answer the questions, otherwise you're going to be terminated in your cross-examination.
> Q. I'm sorry, Doctor, I'll let you answer these questions as best-
> A. The answer to that is that I thought I had explained to the Jury the limitations of the information upon which I base an opinion. And if I should have somehow emphasized that, I'm very sorry. But my opinion can be no more accurate than the information on which it's based, and that is clear.

(R2-T. 2317, 2324).

In the closing arguments, the State, to Mr. Kearse's prejudice, emphasized that Dr. Lipman was inadequately prepared compared to Dr. Martell:

> How can you believe a man who didn't even review and made no real effort to obtain the records that he needed to review to know what happened in this case, to reach an informed opinion on this case? . . .

(R2-T. 2596).

> Again, I'm not going to go through Dr. Martell's testimony, you heard it and it was the last thing that you heard as far as testimony, and you paid close attention to it. But, Dr. Martell was prepared, Dr. Martell had examined everything that he could possibly get to examine in this case . . .

(R2-T. 2604).

The State argued that Dr. Lipman opined in areas beyond his expertise as evidences by the following:

> And you know, most of his testimony wasn't even in his area of expertise. He is a pharmacologist. His business is to determine the effect of drugs, including alcohol, on a person's brain. The only thing that he was qualified, I guess, to come in here and talk about was whether this Defendant' suffered from Fetal Alcohol Effect. Beyond

> that, everything he said to you was outside of his area. And I submit he tried to put one over on you. Now, again, you use your memory.
>
> But when he testified that first afternoon, when he was asked by the Defense lawyer about his opinion of Dr. Martell's abilities, did you hear him say, well, I talked to Dr. Friedman and he told me this was his interpretation of Dr. Martell? Or, did he sit here and say to you well, I looked it up on the charts or the graphs or whatever it was and I scored it out, use your memory. I submit that until he found out yesterday morning that there was a problem with him testifying where only a psychologist could, he was trying to make you believe that he, that it was his opinion. And then he says finally, oh, I didn't mean to mislead the Jury. I submit to you that as you look at this man's testimony and you look at what he did to prepare and what he didn't do to prepare, that his testimony is just completely unworthy of any belief. The only thing that he testified to that was within his area was this Fetal Alcohol Effect. And you heard what Dr. Martell said about that and we'll get to that in a few minutes.

(R2-T. 2398, 2599).

Mr. Udell testified that he did not bother to call Dr. Alan Friedman because "the analysis was we'd get the same testimony, same information to the jury through Lipman." (PCR-T. 807). Mr. Udell's "analysis" resulted in the State objecting to Dr. Lipman testifying to Dr. Friedman's findings, and the court issued this chilling warning to Dr. Lipman:

> THE COURT: Well, what experts can testify to under normal circumstances is really very, very broad and now we're operating under a proceeding here where the exclusionary rules of evidence are sort of waived, so I'm going to deny the State's objections and motions. I guess maybe this witness ought to be warned that the State Attorney may file criminal charges against him and maybe he ought to claim the 5th Amendment from here on out, I don't know if that's the import of telling him he's

> guilty of a misdemeanor. What he's doing of course only a jury can determine whether you really are guilty of such offense. I don't want to be a part of leading him into being charged with a crime, but anyway, my only point is, I'm going to overrule the State's objection and deny the motion.

(R2-T. 2287).

2. Failure to Investigate and Prepare for Testimony of the State's Mental Health Expert

Trial counsel's failure to investigate Dr. Martell's background, obtain his curriculum vitae, or make any effort to discover Dr. Martell's potential testimony resulted in trial counsel being utterly unprepared to cross examine him. This is evident from the record, as well as the evidence offered at the evidentiary hearing.

Much of Dr. Martell's prejudicial sentencing phase testimony related to his interpretation of Mr. Kearse's MMPI scores. Dr. Martell testified at the 1996 sentencing phase that Mr. Kearse's MMPI score showed "a higher F-scale than I've ever seen." (R2-T. 2405), and indicated that Mr. Kearse was malingering. According to Dr. Martell, a person with such a score, if it were valid and interpretable, would be "untestable" and "uninterviewable" from craziness. (R2-T. 2406). Rather, Mr. Kearse shows "classic faking." (R2-T. 2407). Dr. Martell also criticized Dr. Friedman because he relies on the F-K Index, "which most experts do not." (R2-T. 2407).

Most experts do not have the experience and qualifications of Dr. , either. Dr. Friedman has authored three authoritative textbooks on personality assessment, four chapters of other books specific to MMPI interpretation, and numerous peer-reviewed articles and book reviews. (PCR-T. 882-3). Dr. 's opinions are based on years of experience with the MMPI, conducting research, consulting on forensic cases, conducting interviews, interpreting over 5,000 MMPIs, teaching the MMPI for 25 years as a professor at Northwestern Medical School, reading the literature and writing three textbooks on interpretation of the MMPI. (PCR-T. 934).

At the evidentiary hearing, Dr. Friedman testified that

> "[If Mr. Kearse's is] the highest [F scale] score [Dr. Martell] has ever seen, I can't say why he hasn't seen higher, but I see them this high all the time."

(PCR-T. 912).

Dr. Friedman also relied on Mr. Kearse's F(P) scale, which also indicates that Mr. Kearse was not malingering. Dr. Martell never mentions this scale in his

testimony. According to Dr. , "[P]eople who were up on the literature and following the literature, or who were experts in the MMPI or in forensic using MMPI would have been aware of it." (PCR-T. 932). Had Mr. Udell investigated Dr. Martell's experience, he would have learned that Dr. Martell had never researched or published on MMPI interpretation.[11]

Mr. Udell's failure to prepare his experts is exacerbated by his inexplicable failure to call Dr. , even though he was available to testify, to rebut Dr. Martell's claims.[12] Had Mr. Udell challenged Dr. Martell's dubious testimony with the competent and substantial testimony available from Dr. , the weaknesses in State's sole mental health expert's testimony would have been exposed, and Mr. Kearse's mitigation claims would be unchallenged. As important, Mr. Udell could have consulted with Dr. Friedman to educate himself on the issues regarding the MMPI that needed to be explained properly to Mr. Kearse's sentencing judge and jury.

At the evidentiary hearing, Mr. Kearse presented the testimony of several experts whose findings rebut those of Dr. Martell. All of the experts agreed that Mr. Kearse suffers from cognitive deficits, that Fetal Alcohol Effect is one in a spectrum of disorders related to pre-natal alcohol exposure, and that Mr. Kearse's conduct and MMPI scores are more likely the result of mental and emotional problems than Antisocial Personality Disorder.

Richard Dudley, M.D., is Board-Certified in Psychiatry by the American Board of Psychiatry and Neurology. Dr. Dudley's qualifications are detailed in his evidentiary hearing testimony and curriculum vitae. (PCR-T. 1020-1022; PCR. 5452-60). Dr. Dudley testified at the evidentiary hearing that he performed a complete psychiatric examination of Mr. Kearse, including gathering of his social history and background to determine whether there was any evidence that Mr. Kearse exhibited any psychiatric symptomatology throughout his life. Dr. Dudley's examination also included an assessment of mental status, mood, and memory, and cognitive functioning, difficulties with thought or disturbances of affect. (PCR-T. 1024). Dr. Dudley also testified to Mr. Kearse's deplorable home life and upbringing, in particular, the abuse he suffered at the hands of his mother.

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[11] In fact, Mr. Udell would have discovered that much of Dr. Martell's 1996 curriculum vitae, obtained by collateral counsel, is misleading. Dr. Martell testified at the penalty phase that he was "a clinical assistant professor at U.C.L.A. School of Medicine . . . the Neuropsychiatric Institute which is a special hospital within U.C.L.A. School of medicine." (R2-T. 2350). While it sounds impressive, in fact Dr. Martell's listed academic appointments are not tenured, or even salaried, positions. (PCR-T. 1298). Dr. Martell was not board certified as a neuropsychologist, and had failed to obtain board certification, in part, because of errors he had made in interpreting neuropsychological test scores. (PCR-T. 1295-6).

[12] Significantly, had he adequately prepared for Dr. Martell's testimony, Mr. Udell would have been aware that Dr. Martell performed his own testing specific to malingering intellectual impairments, the Grouped and Ungrouped Dot Counting Procedure, which he did not testify to at the penalty phase (PCR-T. 1300).

In Dr. Dudley's expert opinion, his evaluation, in combination with a history of injuries, indicates cognitive deficits. (PCR-T. 1031). Dr. Dudley opined that Mr. Kearse's cognitive deficits "certainly impaired his decision making, and the impulsivity of his acts. (PCR-T. 1033-4). In addition, Mr. Kearse was symptomatic enough, certainly as a child, to be suffering from Post Traumatic Stress Disorder. Further, Mr. Kearse also exhibited symptoms of Attention Deficit Hyperactivity Disorder and diagnosed substance abuse problems. (PCR-T. 1043-4).

Dr. Dudley had the opportunity to review Dr. Martell's 1996 testimony and data, and the videotape of Dr. Martell's examination of Mr. Kearse. In Dr. Dudley's opinion as a psychiatrist with a clinical practice who regularly consults with patients, Dr. Martell did not ask the necessary follow-up questions regarding Mr. Kearse's running away as a child, academic problems and, significantly, the affect that his childhood problems had on him. (PCR-T. 1056).

In Dr. Dudley's opinion, Mr. Kearse didn't do well in school because if his "multiple psychiatric difficulties that impacted on his ability to perform well in school" and not because he simply chose not to perform. (PCR-T. 1058). In addition, Mr. Kearse's conduct problems, taken in proper context, do not support Dr. Martell's diagnosis of Antisocial Personality Disorder. Rather, "the problems with his behavior grew out of a combination of these difficulties that I've described, and that resulted in his early attachment to a group of kids and -- a group of older kids and following them as part of being accepted and integrated with them. And by a kid who's too young to make reasonable decisions even under the best of circumstances, but is also plagued by these other difficulties." (PCR-T. 1059-60).

Dr. Dudley's opinions were consistent with those of Drs. Petrilla, Lipman, Hyde and Crown. (PCR-T. 1045-6). However, of particular note is Dr. Dudley's additional finding that Mr. Kearse suffers from Post Traumatic Stress Disorder ("PTSD") as a result of the horrific trauma he suffered as a child. (PCR-T. 1043). Pamela Baker had indicated as early as 1996 that Mr. Kearse showed signs of PTSD. (R2-T. 2019). However, Mr. Udell made no effort to retain a psychiatrist or specialist in this major mental disorder. Had he done so, the jury would have had the benefit of this powerful mitigating evidence.

Thomas Hyde, M.D., Ph.D., is a Behavioral Neurologist who evaluated Mr. Kearse prior to testifying at the evidentiary hearing. Dr. Hyde conducted a clinical evaluation of Mr. Kearse from a neurological perspective. The evaluation included the review of background materials, a detailed history, including, educational history, and upbringing, and environment, history, neurological history, past medical history and social history. (PCR-T. 1445). Dr. Hyde also conducted a

detailed neurological evaluation, including a mental status evaluation, cranial nerves, motor, gait, and sensory examination, as well as a very limited general physical examination.

According to Dr. Hyde, the examination revealed a number of significant factors:

> There was evidence from the record that his mother drank heavily during pregnancy, so there's always the factor of in utero exposure to alcohol. From a young age he displayed behavioral problems, as well as educational problems suggesting there may be some developmental brain dysfunction either through in utero factors or due to psychosocial factors, or some combination thereof, and also possibly genetic factors, as well.
>
> As far as acquired issues in addition to in utero exposure to alcohol is a significant history of closed head injury, and the Defendant also used alcohol from a relatively young age which has a deleterious effect on brain growth and development.

(PCR-T. 1447).

* * *

> On mental status testing, [Mr. Kearse] had some deficits on the test of attention. He also had some limited mathematical skills. His proverb interpretation ability was impaired.
>
> His cranial nerve examination was normal.
>
> His motor examination revealed synkinetic head movements with eye tracking, which means he moved his head when you asked him just to move his eyes in tracking an object in his visual field.
>
> He also had one frontal release sign, primitive reflex, which usually disappears after childhood and only is maintained or reappears as a sign of brain dysfunction or damage.
>
> And he had poor complex motor sequencing in his hands bilaterally, which is a subtle neurological sign that you often see in people that have developmental or acquired childhood brain dysfunction.

(PCR-T. 1448-9). In addition, Mr. Kearse's difficulties with simple mathematics indicated there was evidence of a developmental learning disability (PCR-T. 1450), and Mr. Kearse's synkinetic head movements with visual tracking are "the type of findings you would see in people who have had long-standing brain dysfunction, particularly childhood developmentally based brain dysfunction. (PCR-T.1451).

In sum, Dr. Hyde found that Mr. Kearse met the DSM-IV clinical criteria for attention deficit hyperactivity disorder in childhood with residual attention deficit symptoms into adulthood and had abnormalities on examination which would be compatible with developmental dysfunction of the central nervous system. (PCR-T. 1452).

Dr. Hyde reviewed the reports of Drs. Crown and Dudley, and found their opinions to be consistent with his. (PCR-T. 1453). Dr. Hyde's opinions, like those of every other mental health expert involved in this case, differed greatly from those of Dr. Martell. Regarding Mr. Kearse's in utero alcohol exposure, Dr. Hyde, a physician, explained:

> Fetal alcohol syndrome is the far end of the deleterious effect of alcohol on the central nervous system's growth and development.
>
> Certainly, being exposed to alcohol in utero probably is not great for any fetus, but depending upon, as I said before, the duration of exposure, and the amount of exposure, and the vulnerability of the individual to that exposure can have varying effects ranging from no effect, all the way to severe effects on brain growth and development, and it can even produce physical anomalies.

(PCR-T. 1455-6).

Dr. Hyde also reviewed the reports of Dr. Angeline Desai, who had diagnosed Mr. Kearse as a child with "mixed specific developmental disorder" and conduct disorder, which Dr. Martell had relied upon when diagnosing Mr. Kearse as antisocial. Dr. Hyde explained that when considering childhood conduct problems, there can be many factors that can come into play, including environmental and social factors. Attention Deficit Hyperactivity Disorder and Post Traumatic Stress Disorder and a variety of disorders of childhood frequently result in similar symptoms as conduct disorder. (PCR-T. 1458).

According to Dr. Hyde, Dr. Desai's reference to a mixed specific

developmental disorder indicates a developmental disorder of the central nervous system, the brain is not developing normally and, therefore, the individual has cognitive and behavioral problems related to abnormal brain structure and development. (PCR-T. 1458-9). Mr. Kearse's developmental disorder could "absolutely" cause the types of behaviors that would lead to a diagnosis of the conduct disorder. "If you have fairly substantive evidence of developmental brain dysfunction to give somebody the diagnosis of conduct disorder in that context is probably not the most appropriate use of the DSM." (PCR-T. 1459). Simply put, Dr. Hyde agrees that Mr. Kearse "has brain damage" and that "there are other categories in the DSM which better categorize somebody's behavior problems than a personality disorder if they have significant evidence of organic brain dysfunction." (PCR-T. 1461). Dr. Hyde "would not reach a diagnosis of antisocial personality disorder as a good explanation or best fit explanation for Mr. Kearse's neurological and behavioral problems." (PCR-T. 1461).

Like Drs. Dudley and Crown, Dr. Hyde also had the opportunity to review the transcript of the 1996 videotaped examination conducted by Dr. Martell, and was highly critical of his methods:

> My feeling is from the neuropsychologists that I work with in my clinical practice, that they usually conduct their examinations quite differently than Dr. Martell did.
>
> They rely much more heavily on testing batteries. They usually follow a SCID, structured diagnostic interview when trying to reach psychiatric diagnoses. They seem to explore all aspects of possible psychiatric pathology in a greater and more organized fashion.
>
> So I think that the approach that I saw and the information that was provided to me was highly atypical for the neuropsychological -- neuropsychologists that I work with day in and day out in my practice.

(PCR-T. 1462-3).

* * *

> [T]he interview was heavily weighted towards personality disorders and antisocial personality disorder in general, and was not as broad based an interview and examination of the Defendant for looking for all aspects of psychiatric diagnoses.

* * *

> [F]or example, when discussing the, general area of mood disorders, there were just one or two questions relating to suicide, but mood disorders have a whole host and variety of problems.
>
> There's very little exploration of thought disorders, developmental disorders of the central nervous system, attention deficit disorder. It seemed to be relatively skewed toward personality disorder in general, and antisocial personality in particular.

(PCR-T. 1465).

Barry Crown, Ph.D., is a board-certified neuropsychologist. Dr. Crown's qualifications are set forth in his Curriculum Vitae (PCR. 2584-85, PCR-T. 659-64). Of particular import to Mr. Kearse's case, Dr. Crown's practice and experience is not limited to forensics or adults. He maintains a regular diagnostic assessment practice and is a diplomate by examination in child and adolescent neuropsychology. (PCR-T. 662).

Dr. Crown examined Mr. Kearse, conducted several tests, including tests specifically created to detect malingering (PCR-T. 672), and concluded that the profiles generated "indeed, are valid, and they are consistent with earlier evaluations that had been done on Billy Kearse when he was a child." (PCR-T. 673). Dr. Crown also reviewed the data regarding Mr. Kearse's MMPIs. According to Dr. Crown, an MMPI administered to Mr. Kearse would be "highly unlikely" to yield valid results based on Mr. Kearse's level of reading and comprehension. (PCR-T. 686). Mr. Kearse's language and critical thinking are in the range of an 11 year, five month old child. (Id.)

Dr. Crown also explained that Fetal Alcohol Syndrome is a recognized medical disorder, the cognitive sequelae of which are a recognized mental disorder. (PCR-T. 688). Dr. Crown explained,

> [T]he current thinking is that fetal alcohol problems really are on a continuum. I think eventually we'll call them fetal alcohol spectrum disorder. But it moves from fetal alcohol syndrome to fetal alcohol effect, because as we see the neurodevelopment of a lot of these children, we find that as they approach adolescence and move into adolescence and their body grows and changes, that the dysmorphic features, the differentiation particularly in

> facial features tends to disappear or become more and more -- or less noticeable.

(PCR-T. 689-90).

Dr. Crown testified further that Mr. Kearse's history of in-utero exposure to alcohol and evidence suggestive of dysmorphic facial features, specifically a "significantly elongated" head which his mother would massage in an attempt to bring it into proper shape, were consistent with Fetal Alcohol Effect. (PCR-T. 690; see also Defense Exhibit JJ, PCR. 5523-6).

Dr. Crown also reviewed Dr. Martell's test data and a transcript of the 1996 videotaped examination he conducted. (PCR-T. 691). In Dr. Crown's expert opinion as a board-certified neuropsychologist, Dr. Martell's interview was "confrontational" and "involved negative priming, which is a way of manipulating the responses and set of the interviewee, and I believe that it was designed to create the negative set on the part of Mr. Kearse." (PCR-T. 691-2).

Dr. Crown summarized his findings in his report. (PCR. 5344-8). His opinions were consistent those of Mr. Kearse's trial experts, Dr. Fred Petrilla, Dr. Linda Petrilla, Dr. Angeline Desai, as well as the additional experts retained by collateral counsel. Common amongst all of these experts' findings is that Mr. Kearse "has low levels of functioning, and that he is brain damaged." (PCR-T. 682).

The evidence presented at the evidentiary hearing establishes that Mr. Kearse had a wealth of mitigation to offer the judge and sentencing jury. Trial counsel's failure to present that evidence was highly prejudicial. Trial counsel's failures to prepare his experts, utilize them appropriately and educate himself about their testimony resulted in Mr. Kearse being denied effective assistance. Trial counsel's failure to investigate and challenge Dr. Martell's testimony allowed him to decimate Mr. Kearse's mitigation claims. But for counsel's numerous failings, the result of Mr. Kearse's sentencing phase would have been different.

3. Failure to Investigate and Present Evidence of Officer Parrish's Prior Misconduct and Difficulties Dealing with the Public

In his first statement to the police, Mr. Kearse repeatedly described how Officer Parrish became physically aggressive. (R2-T. 1471-1472; 1478). Admittedly, Mr. Kearse gave Officer Parrish several false names. However, Mr. Kearse was cooperative with the officer until the officer attempted to handcuff him and hit him in the face. (R2-T. 1486). Mr. Kearse indicated that he feared Officer

Parrish was going to shoot him, so he grabbed for the officer's gun. (R2-T. 1483).[13]

In closing argument, the State claimed that

> Danny Parrish after much effort not to make an arrest found himself in a situation of having to make an arrest of this Defendant. He had done all he could do to convince this guy to just give me your real name, just tell me you don't have a driver's license, I'll give you a ticket and I'll let you go. That's all he had to do.

(R2-T. 2562).

> He went out of his way, out of his way to give this Defendant a break. And look what he got in return. And to make it worse, this Defendant has the gall to then go on and try to claim that Danny Parrish brutalized him, to try to some way justify what he did out there.

(R2-T. 2583-4). Despite the claim that Officer Parrish was polite and courteous, Rhonda Pendleton testified that he had threatened Mr. Kearse to tell him his real name or he would "haul [his] ass in." (R1. 1463). It is also clear that Officer Parrish, despite his offer of leniency, intended to arrest Mr. Kearse, no matter what, because he had left his citation book in his police car (R2-T. 1235).

As demonstrated above, Mr. Udell failed to obtain Officer Parrish's complete personnel file. Prior to the evidentiary hearing, Mr. Udell reviewed specific parts of Officer Parrish's personnel file, including a one-day suspension in 1987 for negligently leaving his loaded service revolver in his squad car; an annual

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[13] Only after Mr. Kearse's mother visited him at the police station and advised him to cooperate fully (R2-T. 1504-1506), and after Mr. Kearse was left in a room with two seasoned officers for a "casual conversation" (R2-T. 1546-1547), his story changed:

MR. KEARSE:	No, I didn't struggle. I moved, and he hit me up under the eye.
COL. MANN:	You moved and the handcuffs touched you in the eye, but you say you don't think-- he didn't intentionally hit you in the eye, the handcuffs just--
MR. KEARSE:	Probably just hit me --
COL. MANN:	Kind of brushed you against the face.
DET. TEDDER:	So, the handcuffs kind of brushed you in the eye?
MR. KEARSE:	Yeah.

(R2-T. 1557; 1569-1570).

performance evaluation in 1988 noting that Officer Parrish has a tendency to get impatient in his dealings with the public and has a tendency to be excited; and, an annual performance evaluation in September, 1990 (four months prior to his death), noting that Officer Parrish has a problem at times with the public on normal, everyday type problems. (PCR-T. 522). Mr. Udell agreed that he could have used this information, which was generated by fellow police officers, at the trial or in the penalty phase to establish mitigation and challenge the state's case. (PCR-T. 523). Mr. Udell readily admits that this failure was prejudicial to his case:

> Obviously, the personnel file with complaints about Danny from law enforcement officers, very helpful, versus just community people who might have a reason not to like Danny or say bad things about him. Obviously, if you're going to tell it to the jury that Danny had been aggressive, it would have been helpful if some of his own people would come and said that, and that we didn't have.

(PCR-T. 528-9).

The prejudice is greatly compounded by Mr. Udell's failure to investigate and present evidence of several formal complaints against Officer Parrish, and others who had been threatened but did not make formal complaints. This evidence would have refuted the State's theory that Officer Parrish was polite and courteous when making the traffic stop.

One complainant was Deputy Tracey Davis, an African-American female and Hillsborough County Sheriff's Deputy of ten years. (PCR-T. 848). Deputy Davis testified that in April, 1990, she lived with her young child on Avenue F in Fort Pierce. (PCR-T.849). One night as she was driving home, Ms. Davis encountered Officer Parrish. As she testified, she was traveling at about 20-25 miles per hour about two car lengths behind a police car which kept braking, causing her to jerk her car to stop in time. (Id). The police car made a sudden stop, causing her to hit her brakes. When the police vehicle pulled off to the side of the road, she went around him to make a turn. Almost immediately, Officer Parrish pulled behind her, put the lights on and followed her to her house. (PCR-T. 851).

Having done nothing wrong, Ms. Davis questioned Officer Parrish as to why he wanted her registration and driver's license. Deputy Davis testified that Officer Parrish at first refused to tell her what her violation was, he searched her vehicle and took approximately 40 minutes to write a citation for tailgating. She testified

further that he spoke rudely, at one point was yelling at her mother, who was in the doorway of the house, while he was still standing by the side of the road. (PCR-T. 849-855). Ms. Davis felt that Office Parrish was racially motivated to stop her:

> I knew what was going on. I just felt like he saw me, I had a hat on my head, it was dark, he couldn't tell who was driving the vehicle at first, and he followed me figuring I was going into a drug area.

(PCR-T. 854-855).

Ms. Davis was so upset by how she was treated by Officer Parrish she felt she had to make a complaint, which she did immediately after the encounter. (PCR-T. 857). She testified at the evidentiary hearing:

> I thought he was very unprofessional. I -- from the get-go I felt that he was harassing me. He couldn't explain anything that he was doing. He felt he didn't owe me any explanation. He talked -- he talked down on me. He was basically belittling me in my mind, and I felt that I deserved better than that. And he worked -- pretty much you work for the people when you're in law enforcement.

(Id.)

When she learned that Officer Parrish been killed, Ms. Davis felt bad about it, but she is not surprised that it had happened. Based on her experience with Officer Parrish, she wasn't surprised to learn he had gotten into an altercation with a civilian. (PCR-T. 864-865).

Ms. Davis was never contacted or subpoenaed by Mr. Udell to testify at either trials in 1991 or 1996, but she would have been available and would have been willing to testify. (PCR-T. 863-864).

Eric Jones, a local businessman and Fort Pierce resident since 1972 (PCR-T. 1354), testified about two separate traumatic encounters with Officer Parrish which occurred on separate days. In the first instance, Mr. Jones had been stopped by another police officer who did not have her ticket book with her and called for assistance. Officer Parrish arrived, got out of his car and immediately became extremely authoritative. Officer Parrish acted in such a manner that Mr. Jones got back in his car as quickly as possible. (PCR-T. 1354-1355). After some time, both officers asked that Mr. Jones sign his ticket. Mr. Jones wanted to open his car door so that the interior light could come on to enable him to read the ticket, but Officer Parrish told him he didn't need to know what the ticket says, just to sign it. (PCR-T-1356). "[H]e was so close to me that I could feel that he wanted me to just do something to provoke him. (PCR-T. 1357). Mr. Jones testified that he

"absolutely" felt threatened by Officer Parrish. "I looked at the ticket, I got back in my car as quickly as I possibly could." (Id.).

When Mr. Jones was allowed to leave, he didn't get more than about a thousand feet down the road when Officer Parrish pulled him over again, this time by with no other officer present. (PCR-T. 1358). By this time, Mr. Jones felt so threatened that he didn't want to leave the safety of his car:

> I rolled my window down about four inches, enough to have him give me a ticket. I didn't say another word to that man. There was no way I was gonna get out of that car again, not without any witnesses being around.

(PCR-T. 1359). Officer Parrish ticketed Mr. Jones again, this time for tailgating. Mr. Jones was so upset by the way that he was treated by Officer Parrish that felt it necessary to write a complaint to the police department, but he did not immediately file it.

Three weeks later, however, when Officer Parrish again stopped him, he decided to file his complaint. As Mr. Jones explained, Officer Parrish was affecting a traffic stop of another vehicle when and he happened to be driving next to him. Officer Parrish saw Mr. Jones, rolled down his window, and yelled at him to pull over. (PCR-T. 1362-1363). Mr. Jones testified, "Well, after the last issue with that man I wasn't dare gonna say not a word. I sat in my car. Just wasn't gonna even do anything to even provoke him to do something with me." (PCR-T. 1363). Mr. Jones felt that Officer Parrish was again harassing him, and was so upset by this encounter that he immediately returned to his office and wrote a second page to his complaint (PCR-T. 1364) and filed his complaint with the Fort Pierce Police Department. Mr. Jones testified to why he felt compelled to do so:

> Well, when you get a gut feeling from someone like Danny Parrish, and he's running around the street with a gun, and just his general demeanor, I know if I felt that way what he was doing with me and, you know, as a taxpayer and a citizen of Fort Pierce, I have a right to do this, to bring this to the attention to the police department. And if something goes on with this individual, at least they cannot say that, well, no one ever warned you.

(PCR-T. 1368). Like Ms. Davis, when Mr. Jones learned that Officer Parrish had been killed in the line of duty, he "wasn't surprised. I wasn't surprised a bit." (PCR-T. 1376).

Mr. Jones said he would not have wanted to testify at Mr. Kearse's trial because he lives in Fort Pierce. (PCR-T. 1375). But he acknowledged that he had expected to testify in the trial in 1996. (PCR-T. 1376).

In addition to the complainants, other members of the community were available to testify at the penalty phase regarding Officer Parrish's difficulties with the public. At the evidentiary hearing, CCRC Investigators Stacie Brown and Nicholas Atkinson testified that they had been contacted by Rev. James "Lacey" Newton, the Parrish family pastor, with information he felt was important to Mr. Kearse's case.[14] Ms. Brown testified that in January, 2003, she received a phone call from a person who identified himself as Rev. Newton and claimed to have information regarding Officer Parrish. As she explained under proffer, Rev. Newton had called trying to reach Mr. Kearse's attorneys,

> And what he told me was that Officer Parish had had some trouble, that he was perhaps racist and used racist terminology. He felt like Danny was someone who would provoke people when he was doing his duties as a police officer. And he said, he told me that he was really concerned that Officer Parrish might get hurt just using this behavior. And he said that he also had talked to a Mr. Flynn from the NAACP about Officer Parrish, and he said also that he had tried to contact the trial attorney.

(PCR-T. 1181-1182).[15] Ms. Brown informed postconviction counsel of the conversation.

Mr. Atkinson, the CCRC investigator assigned to Mr. Kearse's case, testified that in January, 2005, he traveled to Mississippi to personally meet with Rev. Newton. (PCR-T. 1194). Mr. Atkinson testified under proffer that Rev. Newton stated that he is a retired minister with Faith Tabernacle in Fort Pierce and also had a television ministry associated with that church. (PCR-T. 1196). According to Mr. Atkinson, Rev. Newton stated that he was brought up in a law enforcement family and supported the death penalty, but he thought in this

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[14] The lower court permitted the proffer of this testimony but ruled that it is inadmissible hearsay. This was error. Rev. Newton, who currently lives in Mississippi and is elderly and infirm, was not able to travel to Indian River County to testify at the evidentiary hearing. Mr. Atkinson explained that Rev. Newton and his wife are both in ill health and required surgery, Rev. Newton scheduled to undergo a procedure in the coming weeks. Rev. and Mrs. Newton are reliant on each other as caregivers. (PCR-T. 1206). Notwithstanding his unavailability, hearsay evidence is admissible in penalty phase proceedings. The State had ample opportunity to rebut the testimony as they were notified that Rev. Newton was a potential witness and were provided his address (PCR. 1744).

[15] Ms. Brown's contemporaneous notes from that telephone call were proffered into the record. (PCR. 5469-5471).

particular case that he had that the death penalty was not appropriate. (PCR-T. 1197). As Mr. Atkinson explained:

> [Rev. Newton] knew both Officer Parrish's father and Officer Parrish, and he had conversations with them both. And he was concerned because he felt that they were racist, they used racist slurs. They talked in derogatory fashion about black folk. Officer Parrish apparently didn't like black folk coming to the church. ...and he and his father would use the word Nigger, which was very upsetting to the Reverend, he did not like that at all.

(PCR-T. 1199).

Rev. Newton described two aspects of Officer Parrish's personality to Mr. Atkinson, Officer Parrish the person, and Officer Parrish the police officer. "Officer Parrish, the person. He had a hot temper. He was really considered to be a red neck. Bigoted and ignorant were the words that were used." (PCR-T. 1200). The Reverend said that Officer Parrish, the police officer, had a reputation for provoking people at traffic stops. (Id). Rev. Newton also told Mr. Atkinson that one day he saw another parishioner and her 7-year old daughter in tears while being stopped by Officer Parrish, who was threatening to arrest the mother and leave her daughter in the vehicle. When Rev. Newton asked Officer Parrish what was going on, he was told to mind his own business. (PCR-T. 1201). Rev. Parrish shared his thoughts about Officer Parrish's death with Mr. Atkinson:

> He thought of it as a tragic accident. Philosophically, he saw it as inevitable. He said you had to understand, Officer Parrish was in love with the uniform, the badge and the gun, and he pushed every situation, he pushed the envelope in every situation. **He had often spoken to his wife, apparently, and said words to the effect that, you know, one day Danny's going to get killed if he keeps on behaving like this.** And it was a concern to him during the whole time he knew Officer Parrish.

(PCR-T. 1203) (Emphasis added).

Charles Van Pullen testified that he knew Billy Kearse as a friend of his nephew. (PCR-T. 1338). At the time of the evidentiary hearing, Mr. Pullen was incarcerated in Appalachee Correctional Institution with 15 months remaining on his sentence. (PCR-T. 1337). Mr. Pullen testified that he, too, had encounters with Officer Parrish. On one occasion, Officer Parrish mistook Charles for his brother,

Terry Pullen. Officer Parrish had handcuffed Mr. Pullen with his arms around a tree and forced to endure red ant bites. The only way for Mr. Pullen to get away from the ants was to try to climb up the tree while handcuffed but he was not able to do so. Officer Parrish left Mr. Pullen in this position for five to ten minutes. (PCR-T. 1340). He was bitten repeatedly by the red ants, so severely that he developed infection and required treatment and medication. (PCR-T. 1341)

On cross-examination, Mr. Pullen admitted that he had been arrested approximately twenty times in his life, mostly for misdemeanor offenses and violations of probation. (PCR-T. 1346-1347). However, in those twenty encounters with law enforcement officers, Mr. Pullen had never before been handcuffed to a tree, had never been left by an officer to be attacked by red ants, and, except for the incident with Officer Parrish (which was not an arrest), had never felt he was treated so unfairly, disrespectfully or unprofessionally by the police. (PCR-T. 1349-1350).

John Kearse, Mr. Kearse's uncle, also testified to Officer Parrish's reputation in the community. John Kearse testified that Officer Parrish would come to his neighborhood and force him and others to the ground and search them. Officer Parrish would leave, but return a few moments later to search them again. To John Kearse's knowledge, despite Officer Parrish not finding any drugs, he repeated this conduct. (PCR-T. 1216-1217). Mr. Udell had subpoenaed John Kearse to testify in 1996, and he had been transported from Marion Correctional where he was housed at the time. He did not testify, and was told they didn't need him. (PCR-T. 1218).

Finally, Fabian Butler, a cousin of Billy Kearse, also testified concerning an encounter with Officer Parrish. When Mr. Butler was about 16 years old, he was working with a boxing coach at the coach's home, about 3 miles from where Mr. Butler lived. One evening, while walking home, Mr. Butler saw some men that he knew hanging around a street corner. They asked him about his boxing, but Mr. Butler did not want to be associated with them, so he continued towards his home. He got about 10 steps when Officer Parrish pulled up:

> And I mean, I didn't pay him no mind because I wasn't doing nothing wrong, I still had my hands wrapped and my gym shoes on. So when the guy got out, I heard the guy say halt, you know, but I'm thinking he's talking to those guys back there on the corner.
>
> * * *
>
> I kept walking, and I heard him say halt again, and then I

> heard a pistol cock, and I stopped.

(PCR-T. 1235-1236).

When Mr. Butler turned around, he saw Officer Parrish pointing his gun at him. Mr. Butler walked toward Officer Parrish as instructed, and asked what he had done wrong. Officer Parrish "was like be quiet, shut up, don't say nothing. So I didn't say nothing for a minute." (PCR-T. 1237). Officer Parrish also had stopped a man who was riding a bicycle, and another person who had been standing on the corner. Officer Parrish photographed the three young men. (PCR-T. 1238). Mr. Butler testified further that,

> [Officer Parrish] made open threats. He said, you know, I'm the type of officer I'm gonna do bodily harm to you and put in jail and put you in a holding cell and don't let nobody see you until - - what he was saying really was uncalled for because it wasn't even gonna get that far, you know, as far as me being arrested for trying to be disrespectful to him because I understood what he was doing. So after he took the pictures and so forth, you know, then he told me go ahead and get on, so I left going home like I was from the beginning.

(PCR-T. 1238).

In its closing argument in the penalty phase, the state made much of Officer Parrish's status as a police officer:

> A police officer is a symbol of the protection of our society and of order in our society. A police officer wears that shield. Officers wear a badge. What is a badge? That badge is a symbol. Symbolizes the human shield that the police officer is. Human shield that stands between law abiding citizens and people like this Defendant who will commit a crime like this one. That was a police officer is. They are what stands between a lawful society and chaos. The badge doesn't symbolize a heavy-handed show of authority. It symbolizes people who are devoted to serving and protecting the public. Danny Parrish was a true symbol of what a police officer should be . . .

(R2-T. 2583-4).

The testimony offered by these witnesses, combined with the documentary evidence available to Mr. Udell had he sought it, reveal that Officer Parrish was unpredictable, threatening and dangerous when dealing with certain members of the public. At the very least, this evidence would have contributed to Mr. Kearse's mitigation case. There is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

4. Failure to Prepare Lay Witness Testimony

Trial counsel was deficient in failing to properly prepare and conduct a thorough cross-examination of Derrick Dickerson and Rhonda Pendleton at the motion to suppress hearing. Based on the testimony presented at the motion to suppress hearing, the lower court determined that Mr. Kearse and Rhonda Pendleton did not have a romantic relationship. (R1. 204, 1484; R2-T. 1833-34). However, the testimony at the evidentiary hearing does not support the court's finding. Had Mr. Udell adequately cross examined these witnesses, he would have shown that the relationship between Mr. Kearse and Ms. Pendleton and the arrangement whereby Mr. Kearse was staying in the Dickerson home, gave rise to a reasonable expectation of privacy when the police conducted the warrantless arrest and search of the home.

Mr. Udell gave many reasons for his failing to impeach Ms. Pendleton yet it is clear from his responses that he didn't understand the importance of showing her relationship with Mr. Kearse to establish Mr. Kearse's reasonable expectation of privacy (PCR-T. 530-534). It became even clearer on cross-examination when Mr. Udell admitted to having had a letter from Ms. Pendleton to Mr. Kearse where she said "love and kisses" to Mr. Kearse (PCR-T. 768), yet he didn't understand that this would counter Ms. Pendleton's testimony during the guilt phase when she testified that Mr. Kearse was not her boyfriend. (R1. 1458).

It has been long-standing law that the "capacity to claim the protection of the Fourth Amendment depends…upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place" Rakas v. Illinois, 439 U.S. 128 (1978). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. The Fourth Amendment protects people, not places, and protects people in the context of where their expectation of privacy is the highest. Katz v. United States, 389 U.S. 437 (1967).

Overnight houseguests have a legitimate expectation of privacy in their temporary quarters. Minnesota v. Olson, 495 U.S. 91 (1990). "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions

recognized as valuable by society" (Id., at 97).

Mr. Kearse testified that he was going to stay at the Dickerson's home the night of the crime, which was where he was prior to leaving to pick up the pizza and encountering Officer Parrish, and where he had planned to return with Rhonda Pendleton (R1. 153-154). The homeowner, Mr. Dickerson, verified that Mr. Kearse had been an overnight guest previously and had a relationship with Ms. Pendleton (R1. 159-161). But for trial counsel's failings, there is a reasonable probability that the motion to suppress would have been granted.

D. Conclusion

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995). (discussing identity between Strickland prejudice standard and Brady materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

As demonstrated herein, Mr. Kearse was prejudiced by Mr. Udell's numerous failings. But for counsel's failings, the compelling mitigation presented at the penalty phase "might well have influenced the jury's appraisal of [Mr. Kearse's] moral culpability." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000). "[C]ounsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]. Coss v. Lackwanna County District Attorney, 204 F.3d 453, 463 (3rd Cir. 2000). Because of counsel's failings, the sentencer had virtually nothing to weigh against the aggravation and voted 12-0 for death. "Mitigating evidence. . .may alter the jury's election of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

That there were aggravatators presented by the State does not establish lack of prejudice, especially given the circumstances of Mr. Kearse's case. The trial court found only two aggravators, one of which was only technically satisfied. In addition, Mr. Kearse's youth (18 years, 84 days) combined with his mental and emotional impairments -- even Dr. Martell agrees that Mr. Kearse is "on the edge of borderline and low-average IQ (R2-T. 2385) -- and the circumstances of the crime establish prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara,

581 so. 2d 1288, 1289 (Fla. 1991).

This Court can and should also take into consideration that counsel's errors were cumulative. Mr. Kearse did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth amendments. See, Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991); Blanco v. Singletary, 941 F. 2d 1477 (11th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence that he received.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. KEARSE A NEW PENALTY PHASE AFTER MR. KEARSE PRESENTED NEWLY DISCOVERED IMPEACHMENT EVIDENCE

In order for newly discovered evidence to be considered for the purpose of setting aside a death sentence, the evidence "must have been unknown by the trial court, 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. Additionally, the newly discovered evidence must be of such nature that it would probably produce a different sentence." Jones v. State, 709 So. 2d 512 (Fla. 1998). The 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 that evidence which was introduced at trial." Id. at 521.

At Mr. Kearse's second penalty phase, the State called psychologist Daniel Martell, Ph.D., to rebut Mr. Kearse's claims of mental health mitigation. Dr. Martell testified on December 18, 1996. (R2-T. 2345). Mr. Kearse's second penalty phase concluded on December 19, 1996, and Mr. Kearse was sentenced to death on March 27, 1997.

On June 7, 1996, the United States District Court, District of New Mexico, ordered that Everett Spivey, the defendant in a federal death penalty case, undergo a government psychiatric examination. The court entered a clear and unambiguous order that the government's expert was to seal his report and not discuss his examination with any representative of the government until and unless the defendant had been convicted and the case had proceeded to penalty phase. (Affidavit of Billy R. Blackburn, Exhibit "O", PCR-2569-2584). Dr. Martell conducted his examination of Mr. Spivey on March 28, 1997, one day after Mr. Kearse was sentenced to death (Affidavit of Billy R. Blackburn, PCR. 2574).

On March 31, 1997, allegations arose that Dr. Martell had violated the

court's June 7, 1996 order by providing information regarding his evaluation to the government. Counsel for Mr. Spivey requested a Kastigar[16] hearing to determine if Dr. Martell had violated the court's order and to determine what sanctions would be appropriate. (PCR. 2574). Opposing a Kastigar hearing, the government submitted an affidavit from Dr. Martell. In his affidavit, Dr. Martell made the following statements:

> 3. I make this affidavit to reveal the general nature of my communications with Government representatives shortly before and since I examined Mr. Spivey on March 28, and to make clear that I did not disclose any information I received from Mr. Spivey or any conclusions I drew from his examination to any Government representative. I also want to correct factual inaccuracies and erroneous assumptions in Mr. Spivey's motion. . .
>
> 5. On March 28, 1997, after examining Mr. Spivey, I had dinner with members of the prosecution team and others not associated with the case. This was a social gathering. I did not discuss my examination of Mr. Spivey that evening other than to tell Ms. Martinez that Paul J. Kennedy, one of Mr. Spivey's attorneys, had interrupted the examination and told me that I could not video-tape the examination, and that I could not question Mr. Spivey about the crimes charged in this case. During this social gathering, I did not provide Ms. Martinez or anyone else with specifics concerning the type, nature or results of the examination that I conducted on Mr. Spivey. . .
>
> 9 a. Paragraph 6 of Mr. Spivey's motion quotes paragraph 3 of the Court's Order concerning the sealed nature of my examination of Mr. Spivey and the report that I am to file with the Court. To my knowledge, unless Mr. Spivey has discussed the examination with others, Mr. Kennedy is the only person who has any information about any aspect of my examination of Mr. Spivey, and any information he may possess was

[16] Kastigar v. United States, 406 U.S. 441, 92 S. Ct.165 (1972).

> obtained when he interrupted my examination. I have carefully avoided discussing my examination of Mr. Spivey and any conclusions I may have drawn from that examination. . .
>
> 9 c. Paragraph 8 of Mr. Spivey's motion contains three erroneous statements.
>
> (1) The first is the claim that I told Ms. Martinez that Mr. Spivey placed restrictions on the examination I conducted. As I swore above, it was Mr. Kennedy, and not Mr. Spivey, who informed me of the restrictions. I relayed Mr. Kennedy's statements to Ms. Martinez. . .
>
> 10. I swear that I have not disclosed any of the statements made by Mr. Spivey, or test results obtained during my examination of Mr. Spivey on March 28th to Ms. Martinez or any other Government representative. My communications with Ms. Martinez and the other members of the Government's prosecution team have been limited to asking them to provide me with information I require to conduct my examination and prepare my report and evaluation of Mr. Spivey. . .

(Affidavit of Billy R. Blackburn, PCR. 2575-2576). On May 28, 1997 the court denied the defendant's request for a Kastigar hearing, based on Martell's sworn affidavit.

Four days later, on May 2, 1997, United States Attorney John Kelly informed Mr. Spivey's counsel that Dr. Martell's affidavit was less than accurate. Agents had discovered a videotape of D. Martell's March 28, 1997, evaluation wherein Mr. Spivey, not Mr. Kennedy, informed Dr. Martell that he would not answer certain questions about the crime. (Affidavit of Billy R. Blackburn, PCR. 2576-7).

> Furthermore, and most importantly, Mr. Kelly informed [counsel] that after his evaluation of Mr. Spivey. . .Dr. Martell attended a party at lead prosecutor Elizabeth Martinez's house and that during the course of this party, Dr. Martell had discussed certain portions of his examination of Mr. Spivey with one of the case agents. This particular statement was obviously in direct

> contradiction to the numerous self-serving statements that Dr. Martell made in his April 8, 1997 Affidavit.

(Affidavit of Billy R. Blackburn, PCR. 2577).

As a result, the government indicated they wanted to commence plea negotiations, ultimately resulting in a plea agreement, despite six weeks of jury selection. Dr. Martell brought such embarrassment on the U.S. Attorney's Office that the U.S. Attorney himself went to the jail to offer a plea to Spivey. "There was absolutely no question during the course of this discussion that [U.S. Attorney Kelly] believed Dr. Martell had discussed portions of his evaluation as it relates to Mr. Spivey and that Dr. Martell's statement that he did not disclose any of the statements made by Mr. Spivey to any Government representative was absolutely not true." (PCR. 2578). The U.S. Attorney informed Judge LeRoy Hansen that the case was being resolved due to his concerns about "Dr. Martell's lack of honesty as it relates to his Affidavit." (Affidavit of Billy R. Blackburn, PCR. 2579). The government later informed Mr. Spivey's attorneys that Dr. Martell would not be evaluating three other defendants in death penalty cases for which he had been retained. (Affidavit of Billy R. Blackburn, PCR. 2579).

Martell's conduct in the Spivey case was simply perjurious. Martell knew that his affidavit was false, that it would be submitted to the court, and that the allegations in his affidavit were material to the issues raised by the defense. Martell willfully violated the court's order by revealing information to the government which could, and would have, been used against the defendant. Martell also revealed information which he conceded should arguably be shared only among mental health professionals.

Martell's conduct clearly exhibited his bias in favor of the prosecution which was so pervasive that it overrode his duty to obey the orders of a Federal Court, his obligations to the laws of the United States, his obligations of candor to the tribunal, the integrity of his own oath, and his ethical obligation of maintaining the confidentiality of patient/psychotherapist communications.

The actions of the government in response to Dr. Martell's conduct demonstrates that his reputation for truth and veracity were so tarnished that the U.S. Attorney was forced to negotiate a plea agreement in a federal death penalty case despite six weeks of jury selection. This evidence, if offered only for impeachment, would demonstrates that Dr. Martell is philosophically and financially beholden to prosecutors and that his credibility is sufficiently lacking to negate his testimony rebutting Mr. Kearse's mitigation claims. Given the prejudicial nature of Dr. Martell's testimony, which went unrebutted due to counsel's failings, and the mitigation presented at trial and the evidentiary hearing, this evidence would probably produce a different sentence.

ARGUMENT III

MR. KEARSE WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE CERTAIN FILES AND RECORDS PERTAINING TO MR. KEARSE'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES AND FLA. R. CRIM. P. 3.852.

On December 13, 2003, Mr. Kearse filed several Demands for Additional Public Records pursuant to Fla. R. Crim. P. 3.852(g) from state agencies including the Fort Pierce Police Department and Office of the State Attorney, Nineteenth Judicial Circuit. Among the records requested were any and all photographs and video or sound recordings related to this case in the possession of the Fort Pierce Police Department, and personnel records of two employees of the State Attorney's Office. The lower court abused its discretion in denying Mr. Kearse access to these records to which Mr. Kearse is entitled.

A. Fort Pierce Police Department Records

Records previously received indicated that on September 5, 1991, FPPD detectives recorded 2 video tapes at the home of an eyewitness located at 601 Avenue B, Fort Pierce, which were placed in the FPPD evidence locker. Collateral counsel raised this issue on several occasions during the public records process, including two public records hearings and in its Notice of Outstanding Public Records. At a November 12, 2003 hearing, the circuit court heard argument from collateral counsel and the Fort Pierce Police Department regarding the missing videotape, and collateral counsel filed the police report indicating the tape was in the Fort Pierce Police evidence locker for safe keeping. (PCR. 1446).

Mr. Kearse raised this issue in his Motion for Postconviction Relief and requested an evidentiary hearing. (PCR. 1463, PCR-T. 411). The Circuit Court denied Mr. Kearse an evidentiary hearing on the issue. (PCR. 1662, PCR-T. 412). In its order denying Rule 3.850 relief, the circuit court accepted the Fort Pierce Police Department's representations 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." (PCR. 5708).

This finding is an abuse of discretion by the circuit court and is conclusively refuted by the report entered at the November, 2003 hearing. The report by Fort Pierce Police Officer Doug Heinmiller reads:

> ON 090591, THIS DET ALONG WITH DET TEDDER, JEFF CHANDLER, BOB UDELL AND RICH MCILWAIN. (S/A OFFICE) WENT TO 601 AVE "B" WHERE THIS DET DID TAKE COLOR PHOTOGRAPHS FROM ROOM #704 AND #612. ALL PARTY'S [SIC] LISTED WERE PRESENT WHEN THE PHOTOS WERE TAKEN BY THIS DET. AT A LATER TIME THIS DET DID MAKE THREE. (3) PHOTO LOGS WITH THE INFORMATION REF TO THE 35MM PHOTOS TAKEN AT 601 AVE "B" AS WELL AS TIMES THE PHOTOS WERE TAKEN AND THE LOCATION WHERE TAKEN. **ALSO WHILE IN THE ROOMS LISTED ABOVE THIS DET DID USE A V.C.R. CAMERA, THE VCR TAPE TO BE PLACED IN THE FPPD EVIDENCE LOCKER FOR SAFE KEEPING.**
>
> THE FIRST VIDEO CONDUCTED IN ROOM #704 AT 1940 HRS. THE SECOND VIDEO IN ROOM #612 AT 1955 HRS. THE THIRD VIDEO CONDUCTED AT ROOM #704 AT 2010 HRS.

(PCR. 1446)(Emphasis added).

B. Office of the State Attorney Records

1. Personnel Records

On December 13, 2001, Mr. Kearse made a demand, pursuant to Fla. R. Crim. P. 3.852, for the personnel files of Investigator Richard McIlwain, Attorney David Morgan and Attorney Sally Savage-Timmel. (PCR. 911, 913). On December 28, 2001, the Office of the State Attorney entered its response to the demand, raising several objections. (PCR. 922-931). The State did not claim any statutory exemption to the production of the personnel files.

The circuit court heard argument on the demand on January 30, 2002. (PCR-T. 55-57). On December 20, 2003, the court entered an order stating that an

in camera inspection of the personnel files would be necessary to determine if they are reasonably calculated to lead to discoverable evidence, and ordered that the State submit the records to the court within 45 days to determine if the records are subject to disclosure. (PCR. 1319). The court subsequently denied Mr. Kearse's demand. (PCR. 1343).

The circuit court's denial of access to the personnel files of the attorneys and investigators that prosecuted his case is an abuse of discretion. Rule 3.852(g) requires the circuit court, within 30 days after the filing of any objection, to hold a hearing and order production of the public records if the court determines that counsel has met the diligent search, specificity, and relevancy requirements of the rule. Rule 3.852 does not provide for an in camera inspection of the documents, one year after an objection, to determine whether the judge feels they are necessary or relevant to the defense. Collateral counsel and the State argued the relevancy of the records to Mr. Kearse's case and the State had the opportunity to respond at the January, 2002 hearing. The court ordered the in camera inspection more than one year later. The records were not provided to the Postconviction Records Repository, as is required under Rule 3.852, and are not currently in the possession of the Repository or the circuit court. (Affidavit of Kathy Moldonado, Supp. PCR. 58).

2. State Attorney Correspondence to Trial Attorney

At the evidentiary hearing Mr. Kearse called his trial attorney, Robert Udell, Esq. On direct examination Mr. Udell testified that his communications with the State Attorney prior to the evidentiary hearing were limited to "two or three conversations" with the Assistant State Attorney and that he was asked to "look at some materials to refresh [his] recollection." (PCR-T. 562). On cross-examination by Assistant State Attorney Lawrence Mirman, Mr. Udell admitted that he received a letter from the Assistant State Attorney.

MR. MIRMAN: You were asked a series of questions, I think they were addressed along the lines of did you communicate with the State Attorney, which I think you took to mean speaking on the phone. You mentioned speaking on the phone to me several times. Do you recall being asked that?

MR. UDELL: Yes, sir.

MR. MIRMAN: I just want to be clear for the record, I did send you a letter that was my work product in this case that was in anticipation of this hearing that outlined to you what the issues were, what my thoughts about the litigation were, classic work product type

letter; is that correct?
MR. UDELL: That's correct.

(PCR-T. 592-3).

On re-direct examination undersigned counsel requested to see the letter Mr. Udell received. The State objected claiming the letter was privileged work product. (PCR-T. 792-3). Mr. Udell initially indicated that he did not have a copy of the letter. However, after hearing argument on the State's objection, he produced the document, which he described as a twenty-four page letter. (PCR-T. 794). After sustaining the State's objection, at the request of Mr. Kearse, the Court entered the letter into the court record under seal. (PCR-T. 795, Supp. PCR. 27-52).

While the evidentiary hearing was on-going, Mr. Kearse moved for an in camera inspection of Mr. Mirman's letter. (PCR-T. 5502-11). After hearing argument on that motion, the Court indicated that it had already conducted an in camera inspection of the document and determined that the Assistant State Attorney's letter to Mr. Kearse's witness and trial attorney was properly withheld. (PCR-T. 1348).

Under Fla. Stat. Sec. 119.07(l)(1), a public record prepared by an agency attorney which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney, and which was prepared exclusively for litigation, is exempt from disclosure as attorney work product. The letter received by Mr. Udell is not privileged "work product." The letter was prepared by the State with the knowledge that Mr. Kearse would be calling Mr. Udell to testify at the evidentiary hearing, and to prepare Mr. Udell for his testimony. Mr. Udell is neither a public employee, officer of the State Attorney, nor an attorney "consulted" by an agency attorney. Nor is Mr. Udell a "party" to this litigation. He is one of many witnesses called to testify for the Defendant in a postconviction proceeding. Given the Circuit Court's ruling, the State would be free to write lengthy letters to every potential defense witness regarding their anticipated testimony, and the defense would not be entitled to know what the State had said in preparing the defense witnesses to testify.

Even assuming, arguendo, that letter were privileged, by disclosing the letter to Mr. Kearse's witness, who is not a party to this litigation, the State waived that privilege. If the public record is released to another public employee or officer of the same agency or any person consulted by the agency attorney, that exemption is not waived. Fla. Stat. Sec. 119.07(l)(2)(Emphasis added). However, disclosure to others who are not party to the litigation may waive the work product privilege.

Furthermore, some documents contained within an agency attorney's files

are non-exempt public records that are subject to public inspection.[17] While information regarding the opinion of an attorney may be exempt from disclosure as privileged work product, information regarding facts is not. In addition, where the material contains mixed fact and opinion work product, the "fact" work product. (i.e., factual information which pertains to the case and is prepared or gathered in connection therewith) is subject to disclosure. State v. Rabin, 495 So. 2d 257 (Fla. 3rd DCA 1986); Whealton v. Marshall, 631 So. 2d 323 (Fla. 4th DCA 1994).

C. Conclusion

This Court should reverse the lower court's order denying Mr. Kearse access to public records to which he is entitled and remand the case to circuit court because all public records have not been properly disclosed. See Jennings v. State, 583 So. 2d 316 (Fla. 1991).

ARGUMENT IV

THE COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. KEARSE'S CLAIMS

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992).

The law strongly favors full evidentiary hearings in capital postconviction cases, especially where a claim is grounded in factual, as opposed to legal, matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Kearse] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).[18]

Some fact-based claims in postconviction litigation can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact

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[17] Specifically, the Florida Supreme Court has held that a public record, for purposes of Fla. Stat. Sec. 119.011(l), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. Pietri v. State, 885 So. 2d 245 (Fla. 2004); State v. Kokal, 562 So. 2d 324. (Fla. 1990); Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980).

[18] Furthermore, under the latest version of Fla. R. Crim. P. 3.850, evidentiary hearings are mandated for all factually based claims. While the new version of the rule is not strictly applicable to the instant cause, the intent behind the new rule is equally apposite to Mr. Kearse's case.

which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-3 (Fla. 1087). Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

1. Overwhelming Presence Of Uniformed Police In The Courtroom During The First Guilt Phase And Penalty Phase Trial

In his postconviction motion, Mr. Kearse requested an evidentiary hearing on the claim that he was denied a fair guilt phase trial because the atmosphere in and around the courtroom was so hostile as to interfere with the trial process due to the threat created by the presence of a multitude of uniformed law enforcement officers. Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). Mr. Kearse alleged, and the record reflects, that during his guilt phase and first penalty phase trials, the courtroom was "standing room only" with uniformed law enforcement officers. Mr. Kearse is entitled to an evidentiary hearing on this claim because the records and files fail to demonstrate that he is not entitled to relief. Further, where no evidentiary hearing was held by the lower court, the appellant's factual allegations must be accepted to the extent that they are not refuted by the record. Peede v. State, 748 So. 2d 243 (Fla. 1999).

In fact, the record of the second penalty phase reflects counsel's concerns that:

> the first time we tried this case five years ago, not in this courthouse because this courthouse is new, but Indian River County if you had come in here the seats were full. I mean, it was a packed courthouse with nothing but law enforcement officers. Green shirts, blue shirt, FHP, brown shirts.

(R2-T. 216) (emphasis added).

This statement was not refuted by the State at the time, and has not been refuted by the State at any other proceeding. The presence of a multitude of officers, in a case involving a police officer victim, creates an unacceptable risk of "impermissible factors coming into play." Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). At the minimum, Mr. Kearse should have been granted an evidentiary hearing on this claim.

2. Other claims

Mr. Kearse has plead substantial factual allegations 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 firearms experts; failure to prepare defense witnesses resulting in inadmissible testimony; 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.

Under Rule 3.850 and this Court's well settled precedent, a postconviction movant is entitled to an evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So. 2d 1250 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Kearse has alleged facts which, if proven, would entitle him to relief.

Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief. "A trial court may not summarily deny without attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief." Rodriguez v. State, 592 So. 2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So. 2d 1025, 1028 (Fla.1992). Neither the order on the Case Management Conference/"Huff" Hearing (PCR. 1660-1663) nor the order denying Rule 3.850 relief include such attachments.[19]

"Because we cannot say that the record conclusively shows [Mr. Kearse] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So. 2d 808 (Fla. 1982).

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Kearse respectfully urges this Court to reverse the lower court order, grant a new penalty phase and grant such other relief as the Court deems just and proper.

[19] It appears that the court was not even in possession of the complete record at the time he made the rulings that the record conclusively demonstrates that Mr. Kearse is not entitled to relief. (PCR-T. 470).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, toCopies furnished to Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this ____ day of May, 2006.

_____

PAUL KALIL
Florida Bar No. 0174114
Assistant CCRC-South
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

_____

PAUL KALIL
Florida Bar No. 0174114
Assistant CCRC-South
101 N.E.3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284
Attorney for Appellant