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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY

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

The State asserts that the lower court properly determined counsel rendered effective assistance during Mr. Kearse's guilt and penalty phase trials. (Answer Brief, p. 7). At the outset, Mr. Kearse stresses that several of the State's factual assertions in support of this position are inaccurate. For example, the State claims that trial counsel "sought co-counsel for original trial, but, that request was denied." (Answer Brief, p. 12). In fact, the record reflects that the trial court offered to appoint Attorney Fran Ross as co-counsel when Mr. Udell was first appointed to represent Mr. Kearse. The State objected to the appointment of co-counsel and, subsequently, Mr. Udell refused co-counsel. (R1. 15). Prior to the second penalty phase, Mr. Udell failed to request co-counsel. Then, weeks before penalty phase was to begin, Mr. Udell complained that he did not have enough time to present an effective mitigation case because of his other cases and clients:

> MR. UDELL: Judge, I physically don't have enough time between now and December 9th to

> present an affective [sic] case for mitigation on December 9. In a perfect world if I had no other clients, no other cases I could probably get it done between now and December 9, but that's just not the way it is.

(R2. 134).

Nevertheless, the State points to several duties which Mr. Udell did perform, including challenging several potential aggravating factors. (Answer Brief, p. 13). The State fails to mention that two of those aggravators had been struck on Mr. Kearse's first direct appeal and were therefore inapplicable to his case.

The State also claims that Mr. Kearse has not shown what Mr. Udell could have done that he did not do in defending against conviction or sentence. (Answer Brief, p. 20). To the contrary, as detailed below and in Mr. Kearse's Initial Brief, Mr. Udell's shortcomings included, but were not limited to, failing to depose or obtain a report from the State's mental health expert, failing to call available witnesses, failing to obtain public records to support Mr. Kearse's defense, failing to explore additional areas of mental health mitigation including Post-Traumatic Stress Disorder, failing to provide "vital" materials to his experts, and failing to adequately prepare his experts and lay witnesses to testify.

The State also points out that Mr. Udell objected to the

compelled mental health evaluation and the use of information gathered during it. (Answer Brief, p. 13). Once again, the State ignores the relevant facts of this claim. It is clear from the record that Mr. Udell was caught off guard when the State notified him that their experts would be evaluating Mr. Kearse. Mr. Udell did object to the examination, however, he had the opportunity to be present at the examination and chose not to, and did absolutely nothing to determine what information was gathered by the State's expert or what the expert would testify to.

The State also stresses that, for the second penalty phase, Mr. Udell was able to locate Rhonda Pendleton, the State's key witness at trial, even though the State was unable to do so. (Answer Brief, p. 15). In fact, as demonstrated at the evidentiary hearing, the State knew that Rhonda Pendleton was in Hopkinsville, Kentucky, and that she had recently been arrested for writing bad checks, information withheld from Mr. Kearse.

A. PREPARATION OF AND FOR MENTAL HEALTH EXPERTS

Addressing the merits of Mr. Kearse's claims, the State argues that Mr. Udell's negative comments about his case and client to the media, the court, and the jury, did not amount to ineffective assistance. As the State rightly points out, the question is not what Udell's attitude was at the time, rather it

is whether Udell's representation met the constitutional standard under Strickland. (Answer Brief, p. 20). Perhaps the comments, in and of themselves, do not constitute ineffective assistance, however, Mr. Udell's conduct clearly demonstrated the defeatist attitude that contributed to his numerous failings which did constitute ineffective assistance.

The State argues that Mr. Udell's concession to the jury that he had "no idea what the mental health experts are talking about" was a reasonable strategy, and that Mr. Udell assured the court he knew "the jargon" and had two experts teaching him. (Answer Brief, p. 22). A complete reading of Mr. Udell's evidentiary hearing testimony demonstrates that, despite his assurances, he really did not have the knowledge required to effectively defend a death penalty case. At the time of Mr. Kearse's penalty phase, and at the time of the evidentiary hearing, Mr. Udell did not know the difference between two of the most common psychological tests employed by mental health professionals in capital cases: the MMPI, a personality test, and the WAIS, an intelligence test. (PCR-T. 543). Mr. Udell did not, and does not, know the difference between a psychiatrist and a psychologist. (PRC-T. 539). Mr. Udell's understanding of Fetal Alcohol Effect, a recognized disorder and the crux of his penalty phase defense, is that he or his expert came up with that term. (PCR-T. 541-542).

The record reflects that Mr. Udell's comments to the jury were not the result of a reasoned strategy decision. The evidentiary hearing testimony demonstrated that Mr. Udell's lack of knowledge of mental health issues rendered him incapable of making such a strategy decision.

Nevertheless, the State argues that Mr. Udell adequately prepared, and prepared for, mental health experts' testimony. (Answer Brief, p. 23). The State quotes thirteen pages of portions of the lower court's order, most lifted entirely from the State's post-hearing memorandum. (Answer Brief, p. 23-36). The lower court concluded that "it is apparent from the record that Udell knew or anticipated the substance of Dr. Martell's testimony despite not having deposed Dr. Martel." (Answer Brief, p. 33, Order). This finding is not supported by the record. In fact, the record reflects that when Mr. Kearse's second penalty phase began, nine days after Mr. Udell received notice that the State intended to call Dr. Martell, Mr. Udell had "no idea what Dr. Martell is going to say." (R2-T. 175)(emphasis added). Mr. Udell did not even know what type of expert Dr. Martell was, believing him to be a psychiatrist. (R2-T. 172). The State and the lower court rely upon Mr. Udell's evidentiary hearing testimony that he "knew what the man was going to say, generally speaking" because "I could have asked him." There is no indication in the record that Mr. Udell

did, in fact, ask what the State's expert knew or would testify to. Alternatively, Mr. Udell claims that he could have had "informal conversations with the State Attorney":

> I mean, we often in preparing for trial will say to each other what is your witness going to say? And that's not unusual. You know, which -- which aggravating factors is Dr. Martell going to opine exist, which ones is he going to say didn't? . . . Sometimes you speak to opposing counsel and you ask them big picture, you know, which mitigating or aggravating factors is the doctor going to say existed, and rely upon those representations."

(PCR-T. 561). Despite his representations, Mr. Udell has no recollection of any such conversation taking place prior to Dr. Martell's penalty phase testimony. [1]

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[1] The State's conduct in preparation for, and during, the evidentiary hearing clearly demonstrates that a casual and informal conversation with the State Attorney to determine what their expert will testify to is not a reliable means of conducting discovery. As the Assistant State Attorney explained:

> I had a conversation with Mr. Kalil [Collateral Counsel] over the phone. I may have misinterpreted the facts that -- that Dr. Martell sent to me. He was -- it turns out he was in possession of the same material I was. So if that makes sense to you, what I've just said, is that what you're thinking?
>
> MR. KALIL: Well, that's one of the items that I wanted to address. The version of his story that you gave me is --
>
> MR. MIRMAN: Is different from what his testimony is, and it's consistent with what

The lower court found that Mr. Udell "most likely acquired details of Dr. Martell's report through discussions with the prosecutors and through Udell's familiarity with the work of Dr. Martell's partner, Dr. Dietz." (Answer Brief, p. 33). Neither Mr. Udell, the lower court, nor the State are able to explain how Mr. Udell's claimed "familiarity" with the State's expert's partner's work in another case would adequately provide him with the "details" of his opinion in every other case. To accept the lower court's finding of no deficient performance one must accept that Dr. Martell is so biased, and his expert opinion in every case is so predictable, that Mr. Udell needed not conduct any discovery. At the same time, the court finds Dr. Martell's testimony credible, and ignores the evidence to the contrary and its own circular reasoning. In any event, even had Mr. Udell "casually" spoken with the State Attorney or obtained Dr. Martell's "details" from past experience with another expert, this could not possibly substitute for obtaining a report or deposition detailing Dr. Martell's findings or potential

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> his letter is. He didn't tell me anything different than what is in his letter. I have the same letter that he sent to the Feds that you have. That's what I was reading when I spoke to you on the phone. I got it wrong, but it's not -- he didn't perjure himself, he didn't testify inconsistently with anything he told me.

(PCR-T. 1319-1321).

testimony to satisfy the “objective standard of reasonableness" envisioned by Strickland and its progeny.

The lower court also concluded that “Udell cannot be held responsible for the ruling just weeks before commencement of the second penalty phase compelling the State’s mental health examination of Mr. Kearse.” This conclusion is not supported by the record, the State’s position at the time of trial, or the law. Fla. R. Crim. P. 3.202, allowing the State to seek a compelled mental health examination of a capital defendant when mental health is at issue, went into effect on May 2, 1996, seven months before Mr. Kearse’s second penalty phase. Amendment to Fla. Rule of Crim. Pro. 3.220-Discovery, 674 So. 2d 83, 85 (Fla. 1995). Had he been current on the case law, Mr. Udell would have known that this Court had sought to “level the playing field” by approving a similar procedure years before. See Kearse v State, 770 So. 2d 1119, citing Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994). Clearly Mr. Udell had the professional obligation to anticipate the compelled mental health examination and to prepare for it. Instead, Mr. Udell chose to simply object to the evaluation, refuse to cooperate, and “let the chips fall where they may.” (PCR-T. 553).

The lower court finds that Mr. Udell’s failure to provide Rhonda Pendleton’s testimony to Dr. Lipman was not deficient performance (in fact, Mr. Kearse alleged that Mr. Udell was

ineffective for not producing Rhonda Pendleton's statement given to police the night that Officer Parrish was killed). The court and State reason that Dr. Lipman's opinion would not have changed had he been provided the "testimony" and, therefore, Mr. Kearse was not prejudiced by Mr. Udell's failure. This is clearly refuted by the record, as the State argued to the jury that Dr. Lipman was without the necessary information on which to base his opinions, as opposed to Dr. Martell, who had been provided everything:

> 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. 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. 2604).

The lower court also finds no fault with Mr. Udell offering expert psychological testimony through a neuropharmachologist, though, at trial, Dr. Lipman was threatened with criminal sanctions for doing so:

> THE COURT: 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. . .

(R2. 2286-7). The court concedes that Mr. Kearse has shown examples that Dr. Friedman, had he been called by Mr. Udell, could have been more authoritative in delivering his opinion first-hand rather than through Dr. Lipman. Still, the court blames Dr. Lipman for his performance on cross-examination rather than Mr. Udell, who put Dr. Lipman in this untenable position.

The State argues that Mr. Udell made a strategic decision to "allow [Dr. Lipman] to rely on testing by other experts." (Answer Brief, p. 37). Dr. Lipman's testimony refutes this contention, and the law refutes the court's finding. It was Dr. Lipman who, out of frustration, consulted with Drs. Friedman and Blumenkof to support his opinion. Mr. Udell played no part in that decision and Mr. Udell was not in a position to "allow" Dr. Lipman to discount the other doctors' opinions. Mr. Udell's decision was limited to how to present Dr. Friedman's valuable testimony to the jury and judge. Rather than considering and rejecting alternative courses of action to arrive at a reasonable strategic decision, Mr. Udell simply reasoned "if the

question is why didn't we call Friedman? The analysis was we'd get the same testimony, same information to the jury through Lipman." (PCR-T. 807). The result of this decision, as demonstrated in the record, was that Dr. Lipman's credibility was called into question and he was threatened with criminal sanctions. This cannot result from any reasoned strategy on Mr. Udell's part.

In denying Mr. Kearse's claim that Dr. Petrilla inappropriately used and relied on the MMPI, the lower court finds no prejudice because "Dr. Crown developed a personality profile of Kearse consistent with Dr. Petrilla's personality profile using a different test instrument." (Answer Brief, p. 36.) In fact, a careful reading of the evidentiary hearing testimony and Dr. Crown's report indicates that he did not do any personality testing and did not "develop a personality profile" of any type. Once again, the lower court's findings, and the State's argument, are not borne out by the record.

The State argues that Mr. Kearse has not shown that Udell's experts did not present available mental health mitigation. (Answer Brief, p. 40). The State, and the lower court, failed to recognize that Dr. Dudley testified that Mr. Kearse suffers from Post-Traumatic Stress Disorder (PCR-T. 1044), and Drs. Hyde and Dudley found Attention Deficit Hyperactivity Disorder. (PCR-T. 1044, 1452). Mr. Udell was, or should have been, aware

that Pamela Baker had found evidence of Post-Traumatic Stress Disorder at Mr. Kearse's penalty phase, but did not pursue this area of inquiry.

B. FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF OFFICER PARRISH'S PRIOR MISCONDUCT AND DIFFICULTIES DEALING WITH THE PUBLIC

At the evidentiary hearing, trial counsel agreed that "[a]n imperfect self-defense argument is clearly what we were intending to argue." (PCR-T. 777). Trial counsel knew it was crucial for him to argue that when Mr. Kearse took the gun from Officer Parrish and fired the fatal shots, Mr. Kearse didn't plan to or have the intent to kill Officer Parrish in order to avoid arrest. Yet, he did not present any evidence that would substantiate any other reason for the shooting. He did not fully investigate and present evidence of the victim's misconduct as a law enforcement officer and the victim's negative approach in dealing with the public, including threatening and erratic behavior. Furthermore, contrary to the State's assertions, trial counsel completely failed to investigate the background of Officer Parrish by failing to obtain Officer Parrish's personnel files from the Ft. Pierce Police Department.

In its answer brief, the State presents a substantial portion of the trial court's order denying post-conviction

relief concerning this issue. (Answer Brief, p. 44-47). The lower court noted that:

> However, Kearse does not allege any actual provocation by Parrish during the traffic stop. And at the evidentiary hearing, **Kearse presented no evidence of actual provocation** by Parrish during the traffic stop.

(PCR. 43)(emphasis added). This finding is not supported by the record. Evidence presented at trial, including Mr. Kearse's statement to police, showed that Officer Parrish struck Mr. Kearse with handcuffs, and that Mr. Kearse perceived that he was in danger of great harm by Officer Parrish. The State was able to rebut this evidence by arguing that:

> Danny Parrish was a true symbol of what a police officer should be. His actions the night he died are an example of what a police officer is and should be. 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.

(R. 2583-4).

The lower court found that it was a reasonable "strategy" for trial counsel to fail to present evidence of Officer Parrish's erratic and threatening behaviour with members of the public. The State argues that trial counsel's decision not to present such evidence was "pure strategy" which was developed

after an investigation, **although not an exhaustive one**." (Answer Brief, p. 47)(emphasis added).

There is no doubt that in a challenge based on ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland v. Washington, 466 U.S. 668, 689 (1984). But there is no magic in simply saying the word – there must be some basis to determine that a trial attorney used a careful plan or method, i.e., strategy. There is no such justification presented in this case when it comes to failing to present witnesses who could have circumstantially backed up Mr. Kearse's perception that Officer Parrish became threatening and aggressive and Mr. Kearse felt he had to defend himself.

The State argues that "Udell considered arguing an 'imperfect self-defense' but in analyzing all the evidence, and assuming it would all come into evidence, Udell reiterated that he did not think it would not reach the 'tipping point' where the information would be helpful in the guilt phase." (Answer Brief, p. 48). This argument is not supported by the record. Mr. Udell testified at the evidentiary hearing that "[a]n imperfect self-defense argument is clearly what we were intending to argue." (PCR-T. 777). That being the case, Mr. Udell had an obligation to present some evidence to support this

defense. His decision to not present this evidence, made after incomplete investigation, cannot be attributed to reasonable strategy.

Trial counsel could not remember personally investigating the complaints, though he was certain that either he and/or one of his investigators would have attempted to locate all of the complainants. (T. 47). This answer just does not suffice as a showing of a reasonable investigation. Criminal defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffective assistance of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland, at 691. Furthermore, when there is an incomplete investigation, the strategic choices that are made are considered "reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation". Id. at 690-691. The Eleventh Circuit Court of Appeals has set forth the proper analysis for investigation omission in death penalty cases:

> First it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong

> presumption of correctness and the enquiry is generally at an end. If however the failure to present the mitigating evidence was an oversight and not a tactical decision, then a harmlessness review must be made to determine if there is reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different.

Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988).

Here, there is evidence that the reasonable professional judgment of a highly experienced investigator who had spoken with complainants, saw the need for further investigation into Officer Parrish's entire personnel file and internal affairs reports – and saw the value of testimony of members of the community who could verify that Officer Parrish was erratic and acted in a threatening manner with them. This is not the "distorting effects of hindsight," Strickland, but rather was foresight by a well-trained defense investigator.

Trial counsel testified at the evidentiary hearing that

> "We were going to attempt to get in evidence any way we could. In analyzing it we assumed everything would come in, and then what do we have? And we just didn't think we'd reach the tipping point where it would be helpful."

(PCR-T. 777)(emphasis added). Trial Counsel did not have a co-counsel working with him on Mr. Kearse's case and his second penalty phase team was limited to himself and his seasoned investigator, Anne Evans. However, the testimony of Ms. Evans,

a former Washington D.C. homicide detective, refuted that there was agreement to not investigate or present this valuable evidence. Ms. Evans testified that she informed trial counsel that it was very important to obtain Officer Parrish's complete personnel file to investigate claims of misconduct. (PCR-T. 1404)(emphasis added), and that she and Mr. Kearse told Mr. Udell that this evidence should be presented to the jury. (PCR-T. 1204) (Emphasis added). Neither the State nor Mr. Udell refuted this testimony.

Here, there is credible, unrefuted evidence that Mr. Kearse (and his experienced investigator) understood and approved of a full investigation of Officer Parrish's conduct as a law enforcement officer, and were requesting that evidence by complainants be presented to the jury in support of Mr. Kearse's perception that Officer Parrish was threatening him.[2] Yet, trial counsel attempted to justify his lack of investigation and presentation of this evidence by saying:

> "If - - if the question is why didn't we? In the end, nobody would come through. When push came to shove everybody backed off of what they said; well, Mr. Udell, it wasn't really as bad as we suggested. And the

[2] Recently, this Court has held that evidence that counsel's conduct was part of a deliberate, tactical strategy that the defendant understood and approved of almost always precludes the establishment of deficient performance by trial counsel. Henry v. State, SC04-153 (October 12, 2006)(rehearing pending), citing Downs v. State, 453 So. 2d 1102, 1108 (Fla. 1984). Surely the reverse must also be true.

> general analysis was it was not helpful, it would be more harmful than helpful".

(PCR-T. 525).

The lower court relied upon this testimony in its order denying Mr. Kearse relief, and the State relies upon it in its argument. The State also points to negative aspects of the complainants as a further basis for trial counsel's stated "strategy" to not call these witnesses. (Answer Brief, p. 51). The record does not support the State's argument or the findings of the court. One complainant, Ms. Davis, was a civilian at the time of her encounter with Officer Parrish but at the time of Mr. Kearse's second penalty phase trial was a Hillsborough County Sheriff's Department Deputy. Deputy Davis testified that she had written a complaint against Officer Parrish (which was obtained by trial counsel) but had **never been contacted or given a subpoena to testify** at either of Mr. Kearse's trials. (PCT-R. 848-872).

Eric Jones, a long-established and well-respected Fort Pierce businessman, had also filed complaints against Officer Parrish. He **had been subpoenaed** to testify in 1996, had appeared at the courthouse **but was never called to testify**. He was upset about how trial counsel handled him and wrote a letter to Mr. Udell to that effect.

A reasonable investigation of Officer Parrish's

difficulties in dealing with the public should have lead trial counsel to meeting with Reverend Newton, the minister at Parrish's church. Rev. Newton was too sickly to attend the evidentiary hearing so Mr. Kearse proffered his testimony through two CCRC investigators, Stacie Brown (PCT-R. 1167-1191) and Nicholas Atkinson (PCT-R. 1192-1211). This proffer was discussed in detail in Mr. Kearse's Initial Brief – and it is compelling evidence of Officer Parrish's racist attitudes and erratic behavior.[3]

In its answer, the State concedes that trial counsel's investigation into Officer Parrish's background was "not an exhaustive one." (Answer Brief, p. 47). When that occurs, the question becomes whether reasonable professional judgments support the limitations on investigation so that it would be reasonable to conduct a less than complete investigation. Strickland v. Washington, 466 U.S. at 691 (1984). Trial counsel admits that he was pursuing an "imperfect self-defense" and further admitted that the complaints showed that Officer Parrish had a "hair trigger temper" and that

> "They - - a general proposition that we got from these people which was reflected in their letters, and then *as reflected again in the things I didn't get,* which is Danny

[3] The lower court did not make any findings concerning the credibility of these witnesses. Therefore, none of the defense witnesses presented at the evidentiary hearing were found to not be credible.

> is pretty aggressive. He did apparently have a - - a hair trigger temper. But he would get a little aggressive quicker than one would hope. Everybody said that. And then there were the racial undertones from some of the minorities who filed these complaints."

(PCT-R. 525). His experienced investigator was frustrated in her efforts to get trial counsel to continue to pursue these witnesses, and when trial counsel did have a well-respected businessman willing to testify and waiting in the hallway of the courtroom, he failed to call him. Trial counsel's chosen alternative was to present **no evidence** to support his "imperfect self-defense." Rather, he simply made his argument to the jury in closing.

At the conclusion of the second penalty phase trial, the trial court made findings concerning the mitigating evidence presented. The dissenting opinion in Kearse v. State, 770 So.2d 1119 (Fla. 2000) pointed out that the factors relied upon by the trial court were not listed separately but rather were grouped together and treated categorically in the sentencing order. However, they were considered by the lower court, and partially include: low IQ, impulsiveness, and inability to reason abstractly; impulsiveness with memory problems and impaired social judgment; difficulty attending to and concentrating on visual and auditory stimuli; difficulty with perceptual organizational ability and poor verbal comprehension; impaired

problem-solving flexibility; deficits in visual and motor performance; lower verbal intelligence; poor auditory short-term memory; mild retardation and ability to function at a third grade level; developmental learning disability; slow learning and need for special assistance in school; severe emotional handicap; impaired memory; impoverished academic skills; mental, emotional and learning disabilities; delayed developmental milestones; and, severe emotional disturbance as a child. The jury heard this mitigating evidence, but did not have proof that there may be some credence in Mr. Kearse's perception that he was in danger of Officer Parrish. Without that evidence, the jury could only conclude that Mr. Kearse would wrestle a gun from a police officer and repeatedly shoot that officer to avoid being violated on his probation.

Officer Parrish was hired by the Ft. Pierce Police Department in mid-1987. (Defense Exhibit G). Therefore, he had only been an officer with that department for approximately 3½ years at the time of his death in January, 1991. During that short time, there were many complaints made against him, and there were problems noted in his personnel file. Under these circumstances, Mr. Kearse has shown that defense counsel's conduct renders the results of the proceeding unreliable. Gaskin v. State, 822 So. 2d 1243 (Fla. 2002) (quoting Strickland, 466 U.S. at 693).

The prejudice is demonstrated by the State's closing argument. Of course, it was the hand of the defense counsel that enabled the prosecutor to make that argument. For these reasons, Mr. Kearse is entitled to a new trial and/or another sentencing phase trial.

ARGUMENT II

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

The lower court found, and the State argues, that the evidence of Dr. Martell's conduct in U.S. v. Spivey did not exist at the time of Mr. Kearse's trial, and therefore does not meet the first prong of the Jones test for newly discovered evidence (Answer Brief, p. 64, citing Jones v. State, 709 So. 2d 512). The lower court's finding, and the State's argument, are at odds with the prevailing case law. The fact that the Spivey matter did not arise until three days after Mr. Kearse's sentence of death supports the conclusion that the evidence was not known to counsel at the time of trial and could not have been discovered through the exercise of due diligence. In any event, Dr. Martell's conduct in the Spivey matter is evidence of his bias and untrustworthiness which existed before and during Mr. Kearse's trial. See Mills v. State, 788 So. 2d 249 (finding evidence of a co-defendant's statement made after defendant's

trial was newly discovered under Jones).

The State also argues that the Spivey evidence would not be admissible to impeach Dr. Martell. The State's reliance on Fernandez v. State, 730 So. 2d 277, is misplaced. Unlike the allegation in Fernandez that a witness violated his clerical oath, the allegations that Dr. Martell committed perjury and lied to a federal court in Spivey directly impugn his veracity. The State further argues that Dr. Martell was truthful in his affidavit, and the allegations made against him do not call impartiality into question. The State fails to address the fact that Dr. Martell, who purports to be an objective scientist (PCR-T. 1283), admits that he socialized with prosecutors and relied on their legal advise to skirt around the orders of a federal court (PCR-T. 1292).

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

The State asserts that the trial court correctly resolved Mr. Kearse's public records requests and did not abuse its

discretion in denying access to public records from the Fort Pierce Police Department, Office of the State Attorney and/or trial counsel.

A. THE MISSING FORT PIERCE POLICE VIDEOTAPE

The lower court found that there was no videotape to produce. PCR. 5708. The court relied on the representations of counsel for Fort Pierce Police Department and faults collateral counsel for failing to inquire into, or object to, this "testimony." In fact, the record reveals that it was collateral counsel who initiated the inquiry as to the location of the videotape. Despite Fort Pierce Police Department's claim that the videotape may not even exist, the department's report indicating that the videotape was "placed in the FPPD evidence locker for safe keeping" (PCR. 1446) speaks for itself. The court's finding that the videotape does not exist is not borne out by the record.

B. PROSECUTOR'S LETTER TO TRIAL ATTORNEY

The State argues that the letter written by Assistant State Attorney Mirman to trial attorney Mr. Udell was privileged work product and that the court was correct in denying Mr. Kearse access to it. The State reasoned, in part, that Mr. Kearse had an "adversarial relationship" with Mr. Udell because he has raised an ineffective assistance claim. (Answer Brief, p. 72).

This reasoning is contrary to prevailing case law, and adopting such an "adversarial relationship" is contrary to prevailing professional norms.

The American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases, the standards to which the Supreme Court has long referred as guides to determining whether counsel's performance is reasonable, impose a continuing duty for trial counsel to act in the interests of the client, regardless of whether an ineffective assistance claim is raised in postconviction. The Guidelines read, in relevant part:

> Continuing duty to client.
>
> Guideline 10.13 The Duty to Facilitate the Work of Successor Counsel
>
> In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel.

ABA Guideline 10.13 (2003)(emphasis added).

As the Commentary to the Guideline explains,

> Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.

Commentary to ABA Guideline 10.13 (emphasis added).

Furthermore, the general rule is that "the attorney owes a duty of complete fidelity to the client and to the interests of the client." Id.

The State cites to case law holding that letters written by attorney's to their expert witnesses is privileged. The State infers that Mr. Udell's relationship to his client is the same as that of a State-retained expert to a criminal defendant, which is clearly not the case. The State cites no authority for the proposition that an attorney may claim privilege when writing to former counsel for a capital defendant. In any event, by disclosing thoughts and impressions regarding pending litigation to Mr. Kearse's attorney, the State has waived any privilege that might exist.

ARGUMENT IV

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

The State asserts that "the denial of each claim was well reasoned and supported by the record." (Answer Brief, p. 75). The State does not address the fact that the court was not even in possession of the complete record at the time he summarily denied several of Mr. Kearse's claims (PRC-T. 470). Judge Cianca, who did not preside over Mr. Kearse's resentencing, clearly did not have the complete record when he denied Mr. Kearse an evidentiary hearing on these claims. The court did

not state its rationale for denying a hearing at the time he ruled from the bench or in his written order issued after the Case Management Conference/Huff hearing.

With regard to Mr. Kearse's claim that he was denied a fair trial because of the presence of a multitude of uniformed law enforcement officers in the courtroom, the State argues, and the lower court found, that "Kearse alleges no facts to explain the unacceptable risk, the impermissible factors, the threat or the hostile courtroom created by there mere presence of the officers and Kearse does not otherwise demonstrate prejudice caused by the conduct of the officers." (PCR. 5737). This finding is contrary to prevailing case law. The eleventh circuit reiterated that the test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" Woods v. Dugger, 923 F.2d 1454; quoting Holbrook v. Flynn, 475 U.S. at 570, 106 S. Ct. at 1346; Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)).

As in Woods,

> The officers in [Mr. Kearse's] were there for one reason: they hoped to show solidarity with the killed [] officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The

> officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

Woods v. Dugger, 923 F.2d 1454.

At Mr. Kearse's Case Management/Huff hearing, Mr. Kearse offered witnesses who would testify to the atmosphere in the courtroom and in the community during trial and penalty phase (PCR-T. 457-459). Further, the claim is specifically framed as an ineffective assistance of counsel claim due to Mr. Udell's failure to memorialize or otherwise preserve the claim at the guilt phase. It was error to deny an evidentiary hearing this issue.

CONCLUSION 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this 18th day of October, 2006.

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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.

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