IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-942

BILLY LEON KEARSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This first petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Kearse was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as follows:

"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;

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of

Florida guarantees "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const. The petition presents issues that directly concern the constitutionality of Mr. Kearse's convictions and sentences of death.

Jurisdiction in this action lies in the Court, see, e.g. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Kearse's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Kearse requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, entered the judgments of convictions and sentences under consideration.

Mr. Kearse was indicted on February 5, 1991 for one count of first-degree murder and one count of possession of a firearm by a convicted felon (R1. 2428-

2430). On May 8, 1991, an Amended Indictment was filed with the additional charge of armed robbery (R1. 2431-2433).

Mr. Kearse pleaded not guilty and was tried by jury in October, 1991. He was found guilty on the counts of first-degree murder and robbery (R1. 1864-1865). The jury voted eleven to one for death on the first-degree murder conviction (R1. 2361, 2367). Judge Marc A. Cianca imposed the death sentence[1] for first-degree murder, and life imprisonment for armed robbery (R1. 2395, 2671).

On direct appeal, this Court affirmed the judgments of conviction, but vacated the death sentence and remanded for a new penalty phase because of errors

[1] At the sentencing in November, 1991, the judge 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. § 921.141(5)(d), (e), (g), (h), (j), Fla. Stat. (1991). 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. § 921.141(6)(b), (f), Fla. Stat. (1991). 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."

relating to the penalty phase instructions and the improper doubling of aggravating circumstances. Kearse v. State, 662 So. 2d 677 (Fla. 1995). [2]

The second penalty phase was conducted on December 9 through 19, 1996. The jury voted for death on the first-degree murder count by a vote of twelve to zero (R2-T. 2695-2797). Judge C. Pfeiffer Trowbridge sentenced Mr. Kearse to

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[2] On direct appeal, counsel for Mr. Kearse raised the following issues: 1) the denial of the requested limiting instruction on the consideration of duplicate aggravating circumstances; 2) the aggravating circumstances of murder of a law enforcement officer and avoiding arrest or hindering the enforcement of laws constituted improper doubling; 3) the court's failure to find Kearse's age to be a mitigating factor; 4) the consideration of the aggravating circumstance of committed while engaged in the commission of a robbery; 5) finding that the murder was HAC; 6) the denial of the requested instruction on the cold, calculated, and premeditated (CCP) aggravating circumstance; 7) the prosecutor engaged in misconduct during the penalty phase; 8) the aggravating circumstance of committed while engaged in the commission of a robbery was based on the same aspect of the offense as the other aggravating circumstances; 9) the death penalty is not proportional; 10) the admission of evidence regarding Kearse's emotional state during the penalty phase; 11) the giving of the State's special requested instruction on premeditated murder over defense objection; 12) instructing the jury on escape as the underlying felony of felony murder; 13) the denial of defense challenges for cause of prospective jurors; 14) the admission of testimony regarding the purpose of a two-handed grip on a gun; 15) the denial of defense motions to suppress evidence on the basis that Kearse's warrantless arrest was not based on probable cause; 16) the instruction on reasonable doubt denied Kearse due process and a fair trial; 17) the admission of hearsay evidence during the guilt phase; 18) the introduction of evidence in the penalty phase that Kearse had been previously convicted of robbery; 19) the admission of Kearse's alleged disciplinary record during the penalty phase; 20) the constitutionality of the felony murder aggravating circumstance; 21) the denial of the requested instruction regarding the weight to be afforded the jury's recommended sentence; 22) the denial of the requested instruction regarding mitigating circumstances; 23) the denial of the requested instruction regarding the burden of proof in the penalty phase; 24) the constitutionality of Florida's death penalty statute; and 25) the constitutionality of the aggravating circumstances found in this case.

death, 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) (R2. 706-709). On direct appeal, this Court upheld the sentence. Kearse v. State, 770 So. 2d 1119.[3] Mr. Kearse petitioned the United States Supreme Court for certiorari, which was denied. Kearse v. Florida, 532 U.S. 945 (2001).

[3] Appellate counsel raised the following issues on direct appeal of Mr. Kearse's resentencing: (1) denial of Mr. Kearse's request to have the new penalty phase tried in the county where the offense occurred; (2) overruling of Mr. Kearse's objection to a motion to comply with mental health examination which failed to comply with Rule 3.202 Fla. R. Crim. P.; (3) denial of Mr. Kearse's motion for continuance; (4) proportionality of the death sentence in this case; (5) the trial court's failure to expressly evaluate mitigation in its sentencing order; (6) the trial court's failure to evaluate the non-statutory mitigating circumstance of emotional or mental disturbance; (7) denial of Mr. Kearse's motion to disqualify the prosecutor; (8) denial of mistrial after prosecutor made improper and inflammatory remarks in the penalty phase; (9) repeatedly informing the jury that Mr. Kearse's conviction had been upheld by the appellate court but had been sent back for recommendation of a death sentence; (10) denial of Mr. Kearse's motion for leave to interview jurors; (11) trial court conducting pre-trial conferences in Mr. Kearse's absence; (12) denial of Mr. Kearse's objection to the State's cause challenges; (13) denial of Mr. Kearse's cause challenges; (14) the compelled mental health evaluation constitutes a one-sided rule of discovery and, (15) violated the ex post facto clauses of the Florida and United States Constitutions; (16) the compelled mental health evaluation violates the United States Constitution; (17) the trial court's jury instruction regarding; victim impact evidence; (18) failure to consider age as a mitigating circumstance; (19) consideration of robbery as an aggravating circumstance where the robbery was the same aspect of the offense; (20) consideration of the aggravating circumstance of robbery; (21) overruling of Mr. Kearse's objection to irrelevant and prejudicial evidence; and (22) electrocution is cruel and unusual.

In September 2001, Mr. Kearse filed a "shell" Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, pursuant to Fla. R. Crim. Pro. 3.850 (PCR. 14-68).[4] On March 1, 2004, Mr. Kearse filed his Amended Motion To Vacate Judgments of Conviction and Sentence. (PCR. 1458-1572). The circuit court conducted a Case Management Conference/Huff Hearing[5] 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).

Hon. Marc A. Cianca conducted the evidentiary hearing on April 18 - 21, 2005, and May 25, 2005. On August 20, 2005 the circuit court entered its order denying relief on all claims. (PCR. R. 5703).

Mr. Kearse appealed the denial of his motion for postconviction relief, and his Initial Brief is being filed simultaneously with this Court.

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[4] On November 26, 2001, Judge Robert R. Makemson summarily dismissed Mr. Kearse's Rule 3.850 Motion without prejudice to refile. (PCR. 834-836). In March, 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).

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

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE NUMEROUS MERITORIOUS ISSUES ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(A) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

A. INTRODUCTION

Mr. Kearse had the constitutional right to the effective assistance of appellate counsel for his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). There is a violation of the Sixth Amendment right to counsel when appellate counsel's performance is constitutionally ineffective under the standards set in Strickland. Therefore, the Strickland test applies equally to allegations of ineffective assistance of trial and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Kearse's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Kearse's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th

Cir. 1987). The lack of appellate advocacy on Mr. Kearse's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Kearse involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

In Wilson, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165.

The failure of Mr. Kearse's appellate counsel to act as a "zealous advocate" deprived him of his right to the effective assistance of counsel.

As this Court stated in Wilson, Supra:

> The criteria for proving ineffective assistance of appellate counsel parallels the Strickland standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines). Guideline 11.9.2 of the 1989 ABA Guidelines is clear that "Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules." ABA Guideline 11.9.2 Duties of Appellate Counsel (1989). The 2003 Guidelines further state, "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise **every potential ground of error that might result in a reversal** of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003).[6] (Emphasis added). Appellate counsel failed to raise a number of such grounds.

[6] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable

In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different. Confidence in the result of Mr. Kearse's direct appeal has been undermined. A new direct appeal should be ordered.

B. THE LOWER COURT ERRED BY DENYING MR. KEARSE'S CHALLENGE TO A BIASED JUROR FOR CAUSE.

Mr. Kearse was denied due process and a fair trial before an impartial jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments at his second penalty phase when the trial court denied Mr. Kearse's for-cause challenge to a Juror Matthews who was biased (R2. 1097).

Juror Matthews was born and raised in Indian River County (R2-T. 503; 860). At the time of Mr. Kearse's second penalty phase trial, Juror Matthews held an insurance license and sold all lines of insurance through a local State Farm Insurance agency (R2-T. 504; 861). Among her clients were prosecutor David Morgan and his family (R2-T. 508; 860).

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professional norms that counsel should have utilized in Mr. Kearse's case. Although Mr. Kearse's case was tried in 1991 with a new penalty phase in 1996, the 2003 Guidelines still apply to his case. In Rompilla v. Beard, 1125 S. Ct. 2456 (2005) the trial took place in 1989, prior to the promulgation of either the 1989 or the 2003 Guidelines. However, the U.S. Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.
Furthermore, as the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel".

During voir dire by the State, Juror Matthews was asked if there was anything that wasn't asked of her that she thought would have a bearing on her willingness or ability to serve (R2-T. 507). Juror Matthews explained that she knew Mr. Morgan on a professional level (R2-T. 508). She did agree with prosecutor Bruce Colton that it would not cause her "any concern[s] or problem[s] in sitting as a juror in this case" (Id.). However, during voir dire by defence counsel, Juror Matthews explained that she personally handled insurance matters for prosecutor Morgan and his family, with contacts both over the phone and in person (R2-T. 860). Defense counsel then inquired about whether there was anything about her knowledge of Mr. Morgan or her relationship with him that would "tip the scale into their side" to which Juror Matthews answered no (R2-T. 861).

However, the fact that Juror Matthews' occupation is dependent on keeping and expanding her insurance clients is not something that can be ignored or pushed aside for the sake of fairness in a trial proceeding. Unlike an expressed belief (e.g. for or against the death penalty), where a person may be able to overcome their thoughts for the sake of due process, Juror Matthews' employment is a fact cannot change to provide fairness to Mr. Kearse. In addition, Juror Matthews admitted to

having a familial relationship[7] with the lead crime scene detective who would soon be sharing Christmas dinner in her home with her family.

Juror Matthews admitted that she had learned something about the case from the media, and when she was being asked about that issue, she volunteered other information about her relationship with Sgt. Raulerson:

> MS. MATTHEWS: Yes. If it's the case I recall, I vaguely remember hearing something. I feel like there might be something else I should add to that, I don't know if this is the time or place to say it.
>
> MR. UDELL (Defense Counsel): About what you learned?
>
> MS. MATTHEWS: No, sir, just something else that occurred recently last night.
>
> MR. UDELL: Okay. Is it something you learned about this case?
>
> MS. MATTHEWS: No, sir.
>
> MR. UDELL: Go on and tell us.
>
> MS. MATTHEWS: Yes, it is, but I just – in conversations with a family member last night, learned of another family member who was coming into town for the holidays only because he had to testify in a trial where a cop was killed and I have a feeling, and I'm assuming that it's probably this trial, because I'm sure there aren't many trials going on. I don't know, I feel I need to tell you this.
>
> MR. UDELL: Who's that person?
>
> MS. MATTHEWS: Should I give his name?

[7] Detective Raulerson is the uncle of juror Matthews' husband (R2-T. 868-869).

MR. UDELL: Please.

MS. MATTHEWS: . . . His first name is Leo and last name Raulerson. Leo may be a nickname…

(R2-T. 865-867).

MR. UDELL: Well clearly if he testifies and you're a juror, I think we'd all agree that if we later find out you and he sat down and had coffee, there would be some argument about whether that was fair or appeared to be improper. Is that going to create a problem for you?

MS. MATTHEWS: I'll be honest with you. I think the only day I will see this man is Christmas Day.

MR. UDELL: Not before then?

MS. MATTHEWS: I don't want to mess up this trial in any way, it's important to everybody involved.

MR. UDELL: You promise us that you won't see him before this trial is over?

MS. MATTHEWS: I can make a point.

MR. UDELL: You can make a point?

MS. MATTHEWS: My husband will make excuses if he goes up there before Christmas.

MR. UDELL: Apparently he was with the very agency that Danny served with the Fort Pierce P.D., I was hoping it was the sheriff's office, at least we'd have some separation there and you know he's going to testify, who obviously he knows something about this case. I mean, I assume that he and Officer Parrish knew each other since they served with the same agency, I don't know how long. I understand that you promise you'll make a point of not seeing him before.

What I'm concerned about is come Christmas Day and the trial's over, that you got to face this man and you

> recommended life when one of his buddies who was out there in the streets day after day fighting crime was killed. Is that going to be a problem?
>
> MS. MATTHEWS: No I would stand strong by my conviction, whatever it was.
>
> MR. UDELL: Can you do that?
>
> MS. MATTHEWS: Yes, I can.

(R2-T. 870-872)

Detective Raulerson was a Sergeant and crime scene investigator in the detective bureau at the time of the homicide (R2-T. 1287). He was characterized as being lead detective at the crime scene (R2-T. 1307), whose responsibility was to control the crime scene (R2-T. 1221). He was also characterized as being the chief crime scene officer (R2-T. 1252), who was "running the show about documenting the crime scene" (R2-T. 1284). This included collecting evidence at the crime scene (shell casings, clothing, shoes, etc) (R2-T. 1287-1288). He was present at the autopsy (R2-T. 1296) and also collected evidence and took some of the photographs during the autopsy (R2-T. 1302-1304). Therefore, Detective Raulerson had a significant role in the investigation of the crime. He had testified at length during the guilt phase in 1991 (R1. 1178-1206), and he also had a significant role in the second penalty phase proceeding (R2-T. 1286-1312).

Juror Matthews also had knowledge of the case through pre-trial publicity and remembered very specific and harmful facts:

> I just remember it was a cop in Fort Pierce and what I remember was that he was shot about 14 times, and that one thing -- and one other kind of sticks out in my mind and, again, I feel kind of stupid because I don't know if it's the same incident that he had – tried to crawl away after he was shot a couple times. There was like a trail where he tried to get away. Again, I don't know if this is the same incident or not. Those two things do stick out in my mind about the media.

(R2-T. 1008).

Juror Matthews went on to say that she believed what she heard about the case as being true (R2-T. 1012), but denied having any preconceived notions about the case (R2-T. 1013-1016).

The record reflects that there were many ethical and practical hurdles for Ms. Matthews to overcome in order to push aside all influences that were at play. She had to overcome the fact that her livelihood of selling insurance could possibly be affected by her decision in the case; she knew that immediately after the verdict she had to face her husband's relative who had an integral part in the investigation and testimony during the proceedings and who worked with and knew the victim, and finally she had to overcome her specific knowledge of the crime she had gathered through the media. Although in each instance Juror Matthews said she would not allow herself to be influenced, these factors combined created a reasonable doubt as to whether she possessed an impartial state of mind.

Defense Counsel Robert Udell requested a challenge of Juror Matthews for cause, "based upon her relationship with detective Raulerson, based upon her knowledge of the facts of the case and other statements which would indicate that she could not be fair and impartial" (R2-T. 1097). Udell challenged Juror Matthews for cause, had expended his peremptory challenges, and asked for additional challenges (R2-T. 1105-1108), which were denied (R2-T. 1098). He then identified jurors he would strike if additional peremptory challenges were granted (R2-T. 1105-1111). He also reserved his objections when the jury panel was selected (R2-T. 1111). This resulted in juror Matthews taking part in recommending death for Mr. Kearse. According to Trotter v. State, 576 So. 2d 691 (Fla. 1990), defense counsel did all that he could to seat an impartial jury, and in doing so, preserved this issue for appeal. Appellate counsel's failure to appeal the impartial jury was ineffective assistance.

It is well settled law that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury – and any claim that a jury was not impartial must focus on the jurors who ultimately sat. Ross v. Oklahoma, 487 U.S. 81 (1988). This court has aptly stated:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in a particular case. A juror is not

> impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill v. State, 477 So. 2d 553 (Fla. 1985).

> Although it is true that this Court gives deference to a trial court's determination of a prospective juror's qualifications, and will not overturn that determination absent manifest error, [Conde v. State, 860 So. 2d 930 (Fla. 2003)], this Court also requires that a juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind.

Overton v. State, 801 So. 2d 877 (Fla. 2001).

Appellate counsel's failure to appeal this issue deprived Mr. Kearse of the effective assistance of counsel required by the Constitution, which resulted in a recommendation for death being imposed by a biased jury. Therefore, Mr. Kearse should be afforded another penalty phase with an impartial jury.

C. THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S MOTION FOR CO-COUNSEL AT MR. KEARSE'S TRIAL.

The Court erred in denying trial counsel's motion for co-counsel at the guilt phase of trial. The record indicates that at a hearing on January 23, 1991, Mr. Kearse was represented by the Public Defender. (R1. 2). Mr. Yaccuci, the Assistant Public Defender representing Mr. Kearse, had filed a motion in open court requesting to withdraw from the case due to his personal and professional relationship with the victim, and requested that outside counsel be appointed to

represent Mr. Kearse (R1. 2-3). Mr. Yaccuci was recommending that Mr. Udell, private counsel, be appointed, explaining that he would not be comfortable with another Assistant P.D. in his office representing Mr. Kearse stating:

> Therefore, I don't think ethically that I should handle the case and we're in a situation where I don't think anyone else in my office should handle the case either.
>
> The capital cases that we work up are done only among two or three attorneys including myself, **necessarily because of the nature of them we - - it's a combined effort** and I would not be comfortable allowing another attorney to proceed and rendering any kind of assistance at all.

(R1. 3) (Emphasis added).

Therefore, even before Mr. Udell was appointed to represent Mr. Kearse, the Court was made aware of the practice of the Public Defender to have a team approach in a capital case, and knew that, but for the bias of Mr. Yaccuci, Mr. Kearse would remain with the Public Defender and have the benefit of more than one counsel. Mr. Yaccuci even explained the importance of and usual duties of a second chair attorney:

> But if I understand the case law correctly the – there's not an absolute right to a second chair, but it is the appropriate manner and the approved way to handle it. The reason for it and the necessity for it generally comes at the trial itself so that there can be one counsel that can concentrate on the guilt and innocence phase and the other counsel, if there is a first degree and there is a second penalty phase, that the other counsel can take care of that.

(R1. 5).

The court also expressed the importance of having co-counsel to represent a person facing a death sentence and had made it clear that there was such a need:

> …My concern is the capacity of one individual to represent in this day and age in Florida a capital case. I take that from just review of cases, listening to, you know, programs and seminars. And Mr. Udell if we appoint him my concern is who could be co-counsel. I think it's important to have co-counsel and have adequate - - and then I will feel that I have done the best I can to assure that Mr. Kearse – you know, that he will have effective and adequate counsel.

(Id).

The court then made assurances to Mr. Kearse, specifically telling him that two attorneys would be appointed to represent him (R1. 7). Once Mr. Udell appeared in the courtroom and stated his agreement to accept the case, he was temporarily appointed – yet the court was very specific about having another counsel when Mr. Kearse was again told, "…but I'm gonna also appoint another lawyer" (R1. 8).

The court wasn't prepared to appoint a second attorney at that time, Mr. Udell suggested that he'd see if he could get an agreement from the State and submit an order, or if not, that he would file a motion for co-counsel (R1. 9).

At the next proceeding on February 7, 1991, the trial judge noted that attorney Fran Ross had indicated that she would help Mr. Udell in representing Mr.

Kearse, and Mr. Udell said he'd have no problem with that (R1. 13). However, the prosecutor objected to the appointment of co-counsel without some showing that it was necessary. The prosecutor also indicated that before appointment of a second attorney that the county attorney should be present due to the costs involved (R1. 14). The Court deferred to Mr. Udell, who responded saying:

> Judge, our position is this. I agree with Mr. Morgan that there's no constitutional right to appointment of second counsel per se… My only concern is that the court has -- the court in its experience and based upon its knowledge of record activity in this case and the nonrecord activity in this case felt and announced on the record that you felt it was appropriate to appoint second counsel. I obviously welcome the help. But I agree with Mr. Morgan that before you appoint a second attorney the - - the county has to be a party to that because they're the one who's gonna foot the bill. So I guess the proper way to proceed is let me file my motion if I find it appropriate and set for a hearing and then you can rule based upon the facts.

(R1. 15).

Thereafter, Mr. Udell filed a motion for co-counsel in March, 1991 (R1. 2464-2467). At the hearing on April 9, 1991, Mr. Udell noted that the issue of co-counsel was first raised by the court (R1. 29). He also pointed out that if Mr. Kearse were still represented by the Public Defender, two attorneys would represent him. Mr. Udell also argued that in all other circuits in Florida, the Public Defenders have a policy to appoint two counsel when the State is seeking the death penalty, and therefore it is a denial of equal protection to deny Mr. Kearse the same

opportunity (R1. 30-31). Mr. Udell further argued that the ABA standards recommend that two attorneys be appointed on all death penalty cases (R1. 30) and pointed out that if this were a prosecution in federal court, Section 3005 of the U.S. Code requires that two attorneys be appointed in death cases (R1. 30-34).

Mr. Udell also delineated the preparation needed for trial as justification for appointment of co-counsel:

> Judge, as I said before when we got to the issue of a continuance, the State's original answer to the demand for discovery list 52 witnesses. The State has incorporated by reference into that witness list all persons that appear in any documents which they've supplied in answer to demand for discovery. That refers to another 30 persons. The discovery materials are over eight hundred pages long to date. The State's second answer to demand for discovery lists an additional 30 persons, five of whom are experts.

(R1. 34).

The State opposed the motion claiming no constitutional right, and no right under case law or state law, to two appointed attorneys; that the ABA standards are not law that should be followed; that the case is not complex; that the costs involved were prohibitive, and that appointment of a second counsel would not shorten the time period to get the case to trial (R1. 35-37). The County Attorney agreed with the State and opposed the motion saying, "…we agree with Mr. Levin and it's not that complex a case and Mr. Udell could handle it alone." (R1. 39).

The court then denied the motion saying, "We will look at this thing in June and see what progress you're making. In hopes of trying this case on a September date or late August, assuming all discovery is done and we can proceed from there" (R1. 40).

Although trial counsel asserted his need for co-counsel explaining that he didn't feel he could adequately represent Mr. Kearse alone, the State and County attorneys decided that Mr. Udell was wrong about his assessment. The court clearly had no understanding of the role of a second counsel in a death case considering that the suggestion was that they wait until late summer to see how things were going for the defense. At that time, in preparation for trial, if Mr. Udell was able to show a need for co-counsel, the court's plan was to consider appointing a second attorney within a month or two of trial – certainly not within sufficient time for another attorney to investigate mitigation and to fully prepare the penalty phase.

In fact, Mr. Kearse was indicted in February, 1991, for a crime that occurred in January, 1991. Mr. Udell was appointed to represent Mr. Kearse in February and requested the aid of a co-counsel in March, 1991. The trial commenced in October 1991. Immediately prior to trial, Mr. Udell again attempted to obtain co-counsel, and submitted an affidavit swearing under oath his need for co-counsel and stating his belief that Mr. Kearse would be found guilty of first degree murder

and that the case would go to the penalty phase (R1. 2586-2589). Again his motion for co-counsel was denied (R1. 63). As a result, trial counsel was inadequately prepared for trial and penalty phase in this capital case.

As alleged in this habeas petition, there were many areas where trial counsel provided ineffective assistance. The denial of co-counsel greatly contributed to trial counsel's inability to properly prepare for trial and defend against a sentence of death. Included in this deficient performance was trial counsel's failure to cross-examine and effectively impeach crucial State witnesses whose trial testimony was inconsistent with prior sworn statements and depositions. Rhonda Pendleton was one such witness (R1. 1451-1484). Trial counsel also failed to effectively cross-examine Derrick Dickerson at the Motion to Suppress hearing (R1. 158-163), and failed to challenge the veracity of State witness Bruce Heinnsen who had indicated in his deposition that he had prior felony convictions but claimed to have served on a jury (R1. 1215-1277).

Furthermore, at trial and in the second penalty phase, the State presented expert testimony regarding crime scene investigation, ballistics, firearms, and medical examination. Trial counsel did not call a single expert to testify on Mr. Kearse's behalf. Mr. Udell never consulted with a firearms expert. At trial and resentencing, Mr. Udell failed to challenge the expertise of Reed Knight, who the State offered as an expert in "firearms technology" (R1. 1488; R1. 1499). By his

own admission, trial counsel did not know much about guns (R1. 1504). Rather than investigate and educate himself prior to trial, and effectively challenge Reed Knight's testimony, Mr. Udell chose to ask uninformed questions which only bolstered Knight's credibility and reasserted his opinions repeatedly to the jury.

Clearly, Mr. Udell understood the gravity of the charges, the finality of the possible penalty and the degree of preparation needed for Mr. Kearse's defense when he requested co-counsel. The denial of the trial court to grant help to the lead attorney greatly contributed to Mr. Udell's deficient performance. Appellate Counsel's failure to raise this Court on direct appeal is deficient performance.

CLAIM II

MR. KEARSE'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. Kearse's low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense (eighteen and three months), render him "categorically less culpable than the average criminal." Atkins v. Virginia, 536 U. S. 304, 316 (2002). Because of his impairments and youth, Mr. Kearse is developmentally similar to a juvenile rather than to an adult. His "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Roper v. Simmons, 125 S. Ct. 1183 (2005).

Mr. Kearse's age, mental and emotional impairments, and cognitive deficits left him with "diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." Atkins v. Virginia, 536 U.S. 304, 318 (2002).

At the time of Mr. Kearse's capital offense he was 18 years and 84 days old. Mr. Kearse suffers from life-long cognitive deficits and mental and emotional impairments. As a child, Mr. Kearse functioned well below his grade level academically, and displayed poor motor skills. (R2.1 2122). When in fourth grade, Mr. Kearse was reading at the first grade level. (R2. 2031). At age thirteen, Mr. Kearse could only read at the first grade level and his overall functioning was that of a second-grader (R2. 2031). Mr. Kearse was classified as severely emotionally handicapped, with an I.Q. of 69 (R2. 2033-4). There was "no doubt" that Mr. Kearse was functioning at a retarded level (R2. 2033). At age 18, Mr. Kearse's ability to read and spell were consistent with those of a third grader. (R2. 2174). When tested in 1991, Mr. Kearse's verbal I.Q. was 75, and he had difficulty receiving, integrating, and sequencing information (R2. 2155). Later testing confirmed that Mr. Kearse suffered from emotional problems, neuropsychological and brain dysfunctions (R2. 2156) and the inability to concentrate (R2. 2158, 2164). Mr. Kearse has very poor memory and verbal skills, poor attention and

concentration (R2. 2170). Mr. Kearse was tested again in 1996, after five years of confinement, and showed some improvement, however the results of three different tests conducted since Mr. Kearse was eight were essencially the same (R2. 2188).

Mr. Kearse has suffered from pervasive neurodevelopmental problems from a very early age (R2. 2247). Mr. Kearse's impairments are consistent with brain damage (R2. 2121, 2125). He is impulsive and does not have the ability to reason clearly or consider options (R2. 2125). While he does not meet the criteria for Fetal Alcohol Syndrome, Mr. Kearse's impairments, low average intelligence, learning disabilities, and history of prenatal alcohol insult are consistent with Fetal Alcohol Effect (R2. 2123, 2250, 2259).

In Atkins the United States Supreme Court recognized that a fundamental "'precept of justice'" is that "'punishment for crime should be graduated and proportioned to the offense'." Atkins, 536 U.S. at 311 (quoting Weems v. United States, 217 U.S. 349 (1910)). The Court reiterated that determining whether a punishment is constitutionally excessive or cruel and unusual is judged by current standards, not by those that existed at the time the Eighth Amendment was ratified. The core Eighth Amendment concept is the "'dignity of man,'" and thus its constitutional content must be informed by "'the evolving standards of decency that mark the progress of a maturing society'." Atkins, 536 U.S. at 311 (quoting

Trop v. Dulles (1958) 356 U.S. 86, 100-01). The Court concluded that "our society views mentally retarded offenders as categorically less culpable than the average criminal." Atkins, 536 U.S. at 314-315.

In finding a national consensus opposing death for mentally retarded offenders, the Court relied primarily upon the fact that the state legislatures are overwhelmingly in favor of the prohibition. The Court, however, also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, Atkins, 536 U.S. at 316, n. 21, the opposition to the practice by "widely diverse religious" organizations, international practice and polling data. Although "by no means dispositive," these factors gave further support to the Court's opinion that there was a consensus opposing the practice "among those who have addressed the issue." Id. Finally, the Court also noted that even in those states that retained the death penalty for the retarded, only five had actually carried out the execution of a mentally retarded individual since Penry. Atkins, 536 U.S. at 316. Since the practice had become "truly unusual," it was "fair to say," according to the Court, that "a national consensus has developed against it." Id.

The Court then examined the underlying merits of the consensus, beginning with the observation that it reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and

the penological purposes served by the death penalty." Atkins, 536 U.S. at 317. The Court noted that due to their impairments those with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand the reactions of others." Id. These deficiencies, while not justifying a complete exemption from criminal liability, do diminish personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting their execution. Id. at 317-18.

Retribution in the capital context has been constitutionally limited, and requires that "only the most deserving of execution are put to death." Atkins, 536 U.S. at 318. Since "just desserts" necessarily depends on the culpability of the offender, the most extreme punishment was excessive due to the "lesser culpability of the mentally retarded offender." Id. The Court also concluded that no legitimate deterrence interests are served by the execution of the mentally retarded. According to the Court, capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will "inhibit criminal actors from carrying out murderous conduct," but this type of calculus is at the "opposite end of the spectrum" from the behavior of the mentally retarded due to their cognitive and behavioral impairments. Id. In addition to

concluding that retaining the death penalty for the mentally retarded would not further any interest in retribution or deterrence, the Court also held that the reduced capacity of mentally retarded offenders provided a "second justification for a categorical rule making such offenders ineligible for the death penalty." Ibid. Due to their impairments, there were a host of reasons, including the increased risk of false confessions, difficulties in communicating with counsel, lesser ability due to limited communication skill to effectively testify on their own behalf or express remorse that, "in the aggregate," carried an unacceptable "risk of wrongful execution." Id. at 319. The Court also noted the particular danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse from their crimes" which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. Id. at 319.

The Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgement of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and therefore the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, supra, 536 U.S. at 321 [quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)].

In considering claims that particular categories of convicted murderers are not constitutionally punishable by death, the Supreme Court has always focused on

the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense. Atkins, supra [death penalty unconstitutional for mentally retarded offenders]; Enmund v. Florida, 458 U.S. 782 (1982) [death penalty unconstitutional for minor participant who did not intend to kill]; Tison v. Arizona, 481 U.S. 137 (1987) [death penalty not unconstitutional for nontriggerman who was major participant in dangerous felony and acted with reckless indifference to human life]; Thompson v. Oklahoma, 487 U.S. 815 (1988) [death penalty unconstitutional for offenders under sixteen]; Roper v. Simmons, 125 S. Ct. 1183 (2005) [execution of individuals under 18 at the time of their crime unconstitutional].

The Supreme Court accepted the contention that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty. Its rationale for doing so compels the conclusion that the volitionally incapacitated are likewise ineligible. The Court noted the obvious cognitive limitations of the retarded, but also stressed their "diminished capacit[y]...to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," characterizations that have even greater applicability to those who because of mental illness are completely unable to conform their conduct to the requirements of the law. Atkins, supra, 536 U.S. at 317. Moreover, this inference as to the moral centrality of volitional

control is corroborated by the Court's reasoning in the recent decision in Roper v. Simmons, supra, 125 S. Ct. 1183, in which it held the execution of individuals under 18 at the time of their crime is unconstitutional, because the death penalty is a disproportionate punishment for juveniles. Id. at 1192-98.

The Court in Roper found three general differences between juveniles under the age of 18 and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Thompson, supra, 487 U.S. at 835. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See Stanford v. Kentucky, 492 U.S. 361 at 395 (1989). The reality that juveniles still struggle to define their identity means that even a heinous crime committed by a juvenile is not necessarily evidence of irretrievably depraved character. Simmons, supra, 125 S. Ct. at 1198-1200.

The Thompson plurality recognized the import of these characteristics with respect to juveniles under 16. Thompson, supra, 487 U.S. at 833-38. The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological

justifications for the death penalty – retribution and deterrence of capital crimes by prospective offenders, e.g., Atkins, 536 U.S. at 319, – provides adequate justification for imposing that penalty on juveniles. Simmons, supra, 125 S. Ct. at 1200.

Adolescents are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Thompson, supra, 487 U.S. at 834.

If crimes committed by the retarded and by young adolescents deserve less punishment due to those groups' lesser capacity to control their own conduct, the crimes of person who, by reason of youth and mental illness, lack sufficient capacity to control their conduct are also deserving of less than the most severe punishment.

Neither retribution nor deterrence is served by Mr. Kearse's death sentence. A capital sentence violates the Eighth Amendment when it is "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153 at 183 (1976) [joint opinion on Steward, Powell, and Stevens, JJ.]. Unless the death penalty "measurably contributes" to either the goal of deterrence or the goal of retribution, it is "nothing more than the

purposeless and needless imposition of pain and suffering." and therefore an unconstitutional punishment. Enmund, supra, 458 U.S. at 798 [quoting Coker v. Georgia, 433 U.S. 584 at 592 (1977)]. Neither retribution nor deterrence is served by the execution of defendants whose mental illness impaired their ability to make reasoned judgments.

Whether a defendant possesses that "degree of culpability associated with the death penalty," Penry, supra, 492 U.S. at 338, cannot be resolved by reliance on state law definitions of crimes and defenses. Although states "have authority to make aiders and abettors equally responsible . . . with principals, or to enact felony murder statutes," Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion), minor participation in a felony that results in an unanticipated death does not evidence sufficient "moral culpability" to justify the imposition of a death sentence on retributive grounds. Enmund, supra, 458 U.S. at 798-801; see also Atkins, supra, 536 U.S. at 316-17 ["[The] deficiencies [of mentally retarded offenders] do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."]

Similarly, the State may choose to make those whose youth, mental disturbance and intellectual impairments "equally responsible" as those who act with completely unimpaired capacity, but in order to justify a capital sentence for such offenders, it must explain how executing such offenders "measurably

contribute[s] to the retributive end of ensuring that the criminal gets his just desserts." Enmund, supra, 458 U.S. at 801. This the State has not done, and cannot do, because when a defendant's mental illness has severely impaired his volitional control there can be no measurable contribution to retribution, but only the "exacting of mindless vengeance" forbidden by the Eighth Amendment. See Ford v. Wainwright, 77 U.S. 399, 410 (1986) (execution of the insane amounts to the "exacting [of] mindless vengeance").

Capital prosecution of severely mentally disabled offenders carries heightened risks of unjustified executions. In Atkins, the Supreme Court cited the enhanced risk faced by retarded defendants "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Atkins, supra, 536 U.S. at 319 (quoting Lockett, supra, 438 U.S. at 605), as a second justification for the national consensus that they should be categorically excluded from eligibility for the death penalty. Defendants such as Mr. Kearse who suffer from mental and emotional impairments, in combination with their youth, face similar obstacles in "mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." Atkins, supra, 536 U.S. at 319.

In light of his severe mental impairments, Mr. Kearse's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, and must be vacated. The imposition of a judgment of conviction and sentence of

death under such circumstances violates fundamental notions of due process and human dignity, offends any acceptable standard of civilized behavior, including, but not limited to, those mandated by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and deprived Mr. Kearse of a reliable determination of guilt and penalty. Mr. Kearse's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment and must be vacated. Atkins, supra, 536 U.S. 304.

CLAIM III

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. KEARSE OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO NOTICE, A JURY TRIAL, AND HIS RIGHT TO DUE PROCESS

Florida's capital sentencing scheme is unconstitutional and deprived Mr. Kearse of his rights to notice, to a jury trial, and of his right to due process under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The role of the jury provided for in Florida's capital sentencing scheme, and in Mr. Kearse's capital trial, fails to provide the necessary Sixth Amendment protections as mandated by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). Ring extended the holding of Apprendi to capital sentencing schemes by overruling Walton v. Arizona, 497 U.S. 639 (1990). The Ring Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a

sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 497 U.S. at 2443.

The jury in Mr. Kearse's case was clearly instructed that they were not the ultimate sentencer and their role was limited to issuing a recommendation and advisory opinion to the judge, who was solely responsible for sentencing Mr. Kearse (R2-T. 2553, 2629, 2684, 2689, 2691-2694). Mr. Kearse was not found guilty beyond a reasonable doubt by a unanimous jury on each element of capital murder; therefore, his death sentence should be vacated.

Mr. Kearse's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendment to the U.S. Constitution, and due process (R1. 2428-2430; 2431-2433).

In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), this Court revisited the holding in Mills v. Moore, 786 So. 2d 532 (2001) and addressed the concerns raised by Ring and its impact upon Florida's capital sentencing structure. The Bottoson and Moore decisions resulted in each Florida Supreme Court justice rendering a separate opinion. In both cases, a plurality per curiam opinion announced the result denying relief in those cases. In each of the cases, four separate justices wrote separate opinions specifically declining to join the per curiam opinion, but "concur[ring] in result only,"

Bottoson, 833 So.2d at 694-5; King, 831 So. 2d at 145, based upon key facts present in those cases. However, those key facts utilized by the Court to deny relief in Bottoson and King are not present in Mr. Kearse's case. A careful reading of those four separate opinions and the facts in Mr. Kearse's case reveal that he is entitled to relief.

The jury in Mr. Kearse's case was clearly instructed that they were not the ultimate sentencer and their role was limited to issuing a recommendation and advisory opinion to the judge, who was solely responsible for sentencing Mr. Kearse to death (R2-T. 2553, 2629, 2684, 2689, 2691-2694). During Mr. Kearse's trial, the jury heard repeatedly that their decision was "advisory," a "recommendation," and/or the trial judge was the "ultimate sentencer." Id. These repeated references made it clear to the jury they were not sentencing Mr. Kearse, but rather that the judge was sentencing him. Particularly important is that the jury was never told their advisory recommendation would be binding in any way. Id.

Mr. Kearse was not found guilty beyond a reasonable doubt by a unanimous jury on each element of capital murder. There is no way to know how the individual jurors voted or decided on each aggravator. The only information gleaned from the polling of the jury was that each juror agreed that a jury vote of twelve to zero recommended death for Mr. Kearse (R2-T. 2695-2698). Florida juries are not required to render a verdict on elements of capital murder. Even

though "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, Ring, at 2443 (quoting Apprendi, 530 U.S. at 494, n.19), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence can be imposed. § 921.141(2), Fla. Stat. (1999) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has made it clear that the jury's sentencing recommendation in a capital case is only advisory.

In addition, Mr. Kearse's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, the Florida Constitution, and due process. The indictment filed in Mr. Kearse's case failed to allege the necessary elements of capital murder. Jones v. United States, 526 U.S. 227, 243 n.6 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same

protections when they are prosecuted under State law.[8] Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, 122 S. Ct. at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19). The aggravators in Mr. Kearse's case were not alleged in the indictment.

Although Mr. Kearse recognizes that this Court has decided this issue, recently there have been indications that this is not a stagnant issue but rather an evolving one in a climate of potential change. One indication that this issue remains fluid is this Court's recent analyses in State v. Steele, 921 So. 2d 538 (Fla. 2005), where it was stated that since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. There, the court was asked to answer two questions relating to capital cases: 1) Does a trial court depart from the essential requirements of law by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors, and 2) Does a trial court depart from the essential requirements of law by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury? The Court answered "no" to the first and "yes" to the second question.

[8] The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

The Court reasoned that although there is no statute, rule of procedure, or decision of this Court or the United States Supreme Court which compels a trial court to require advance notice of aggravating factors, it is equally clear that none prohibits it, either. Moreover, the Court found that there is more justification for it now since the number of aggravators has increased more than 100%. Where previously there were 6 possible aggravating circumstances, now there are 14 possible aggravators.

However, this Court also decided that a requirement of a penalty phase special verdict form requiring the jurors to specify each aggravator found and the vote for that aggravator, is a departure from the essential requirements of the law. The Court's rationale was that this is an extra statutory requirement imposed on the capital sentencing process, stating:

> Unless and until a majority of this Court concludes that Ring applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute . . . the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

Even more telling is this Court's language encouraging legislative changes to Florida's capital sentencing statute when it said:

> Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should

> revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote.

Id.

In response, there is proposed legislation pending in the Florida legislature that would require an advisory sentence of death be made by a unanimous recommendation of the jury, yet allowing the trial court to depart from that recommendation under certain circumstances.[9] Although by its language this proposed legislation would not be retroactive, it is yet another indication that the issue is in flux.

Therefore, Mr. Kearse presents this claim to preserve challenges to his sentence, and submits that he is entitled to relief.

CLAIM IV

THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. § 922.105, AND THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATE ARTICLE II, SECTION 3 AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

A. INTRODUCTION

[9] HB 663; SB 1130 (2006)

Florida's lethal injection statute is an unconstitutional delegation of legislative authority under the separation of powers doctrine and violates the Fourteenth Amendment due process clause because the legislature gave the Department of Corrections no intelligible principle by which to create a rule of lethal injection protocol, and/or because its exemption of policies and procedures relating to the lethal injection method from the constraints and procedures of Florida's Administrative Procedure Act, without offering alternative procedures, gives the Department of Corrections unfettered discretion to create a lethal injection protocol. Fla. Stat. § 922.105 (2005). The checks and balances of the Administrative Procedure Act serve to ensure that agencies make rules in an informed, public manner. Section 922.105's delegation of legislative power to the Department of Corrections to fashion a lethal injection protocol behind closed doors and by any method of its choosing cannot pass constitutional muster. See Lewis v. Bank of Pasco County, 346 So. 2d 53, 55-56 (Fla. 1976) ("The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.")

Furthermore, execution by lethal injection imposes physical and psychological torture without commensurate justification, and therefore constitutes

cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and corresponding Article I, section 17 of the Florida Constitution.

B. THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

In light of new scientific evidence that was not previously available to the Florida Supreme Court in Sims v. State, 754 So. 2d 657 (Fla. 2000), it is now clear that the existing procedure for lethal injection that the State of Florida uses in executions violates the Eighth Amendment to the U.S. Constitution, as it will inflict upon Mr. Kearse cruel and unusual punishment.

Several recent developments since Mr. Kearse's last 3.850 motion compel this Court to address this claim: first, an April 16, 2005 article published in the medical journal THE LANCET["THE LANCET"]; second, the U.S. Supreme Court's January 2006 grant of stays of execution in two Florida capital cases, Hill v. Crosby, 126 S. Ct. 1189 (U.S. 2006); Rutherford v. Crosby, 126 S. Ct. 1191 (U.S. 2006), and grant of a writ of certiorari in Hill to decide whether a § 1983 claim is the proper format for challenging Florida's lethal injection procedure; and third, a U.S. District Court order directing the California Department of Corrections to modify its lethal injection procedure before proceeding with an execution. Morales v. Hickman, F. Supp. 2d. 2006 WL 335427, at 7 (N.D. Cal. Feb. 14, 2006).

In Sims v. State, 754 So.2d 657 (Fla. 2000), the Florida Supreme Court denied a lethal injection challenge, finding the possibility of mishaps during the lethal injection process insufficient to support a finding of cruel and unusual punishment. Subsequent to this opinion, new empirical evidence has established that the infliction of cruel and unusual punishment is no longer speculative.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarksy and three co-authors detailed the results of their research on the effects of chemicals in lethal injection. See THE LANCET. This study confirmed, through the analysis of empirical after-the-fact data, that the use of sodium thiopental, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium thiopental in their bloodstream to provide anesthesia. In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

The chemicals used in Florida executions are identical to that identified in the study:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666, fn. 17.

Sodium thiopental, also known as sodium pentothal, is an ultra-short acting barbituate that produces shallow anesthesia. Healthcare professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and then use different drugs to create a "surgical plane" of anesthesia to last through the operation and block the stimuli of surgery, which would otherwise cause pain. Sodium thiopental is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal that something is wrong.

The authors of the study note that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially considering that the prison personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people about to be executed are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious.

In a letter to THE LANCET dated September 24, 2005, Dr. Richard Weisman explained that the actions of sodium thiopental in a dying individual undergoing lethal injection are not comparable to its actions in a ventilated surgical patient. See Correspondence, Robyn S. Weisman et al., 366 THE LANCET 1074 (2005). According to Dr. Weisman, studies on living dogs showed that after a dog is injected with sodium thiopental, breathing slows and carbon dioxide builds up in the blood, leading to acidosis. Id. Acidosis causes the sodium thiopental to leave the blood and enter the fatty tissues. This suggests that the same dose of sodium thiopental will wear off more rapidly in an inmate undergoing lethal injection than in a surgical patient who is ventilated and not experiencing hypoxia and acidosis, risking that the inmate will be conscious and in pain from the effects of the pancuronium bromide and potassium chloride, but unable to communicate because he is paralyzed by the pancuronium (see discussion infra). This also indicates that the effects of doses used in clinical practice cannot be extrapolated to determine

their effects on inmates during execution. This evidence was not considered in the Hill opinion.

The second chemical used in lethal injection in Florida is pancuronium bromide, sometimes referred to simply as pancuronium, a paralytic agent which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, movement, or speech. Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection.

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart and causes massive muscle cramping before inducing cardiac arrest. When the potassium chloride reaches the heart, it causes a heart attack. With inadequate anesthesia, the condemned feels the pain of a heart attack, but is unable to communicate his pain because the pancuronium bromide has paralyzed his entire body so that he cannot express himself either verbally or otherwise.

The American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the combination of pentobarbital with a neuromuscular blocking agent to kill animals because of the risk of unrecognized consciousness. 2000 Report of the American Veterinary Medical Association

(AVMA) Panel on Euthanasia, 218 J. Am. Veterinary Med. Assn. 669, 680. (March 1, 2001). The use of sodium thiopental in combination with a neuromuscular blocking agent would certainly be even more unacceptable to the AVMA because of the increased risk (compared with pentobarbital) that an animal would regain consciousness after the ultra-short acting anesthetic wears off. Additionally, 19 states have expressly or implicitly prohibited the use of a neuromuscular blocking agent in animal euthanasia because of the risk that it would prevent veterinarians from detecting consciousness in animals. This evidence was not considered in the Hill opinion.

Because Florida's practices are substantially similar to those of the lethal injection jurisdictions that conducted autopsies and toxicology reports, kept records of them, and disclosed them to THE LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Kearse will not be anesthetized at the time of his death.

Florida's procedure is similar to procedures that two district courts have recently found to raise serious questions under the Eighth Amendment. See Morales v. Hickman, F. Supp. 2d , 2006 WL 335427, at 7 (N.D. Cal. Feb. 14, 2006) (finding that administration of same three-chemical sequence as used in Florida raises "substantial questions" that the condemned would be subjected to an "undue risk of extreme pain"), aff'd, F.3d , 2006 WL 391604 (9th Cir. Feb. 19,

2006), cert. denied, No. 05-9291, S. Ct. , 2006 WL 386765 (Feb. 20, 2006)[10]; Anderson v. Evans, No. Civ-05-0825-F, 2006 WL 83093, at 4 (W.D. Okla. Jan. 11, 2006) (accepting in its entirety a Magistrate Judge's report holding that death-sentenced inmates stated a valid claim that Oklahoma's administration of same three-chemical sequence for lethal injection "creates an excessive risk of substantial injury" and pain under the Eight Amendment).

Under the present circumstances, the State will violate Mr. Kearse's right to be free of cruel and unusual punishment secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium thiopental a/k/a pentothal, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of the unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Kearse respectfully urges this Court to grant habeas corpus relief.

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[10] It is noteworthy that Florida uses only two grams of sodium pentothal, less than half of the five grams used by California. See Morales v. Hickman at 1.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid to Leslie Campbell, Asst. Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on the _____day of May, 2006.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type.

_____
PAUL KALIL