IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-942

BILLY LEON KEARSE,

Petitioner,

VS.

STATE OF FLORIDA,

Respondent.

# RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## PRELIMINARY STATEMENT

Petitioner, Billy Leon Kearse, was the defendant at trial and will be referred to as the "Defendant" or "Kearse". Respondent, the State of Florida, the prosecution below will be referred to as the "State". References to records and briefs will be as follows:

1. Record on Direct Appeal - "1ROA" for the appellate records for case number SC60-79037;

2. Record from the re-sentencing - "2ROA" for the re-sentencing appellate records for case number SC60-90310;

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

4. Petition for Writ of Habeas Corpus - "HC"

Supplemental records will be designated by the symbol "S" preceding the record type.

## STATEMENT OF THE CASE AND FACTS

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

He was sentenced to death following the jury's recommendation. Kearse I, 622 so.2d at 680.

On direct appeal, Kearse raised 25 issues, however, only the guilt phase issues, as phrased by this Court, are outlined below given that a new penalty phase was granted:

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

Kearse I, 622 So.2d at 681.

The Florida Supreme Court found the following facts:

> After [Fort Pierce police officer Danny] Parrish observed Kearse driving in the wrong direction on a one-way street, he called in the vehicle license number and stopped the vehicle. Kearse was unable to produce a driver's license, and instead gave Parrish several alias names that did not match any driver's license history. Parrish then ordered Kearse to exit the car and put his hands on top of the car. While Parrish was attempting to handcuff Kearse, a scuffle ensued, Kearse grabbed Parrish's weapon and fired fourteen shots. Thirteen of the shots struck Parrish, nine in his body and four in his bullet-proof vest. A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female

> drive away from the scene, and called for assistance on the police officer's radio. Emergency personnel transported Parrish to the hospital where he died from the gunshot injuries.
>
> The police issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo. By checking the license plate that Officer Parrish had called in, the police determined that the car was registered to an address in Fort Pierce. Kearse was arrested at that address. After being informed of his rights and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop.

Kearse I, 622 So.2d at 680. Although affirming the convictions, the sentence was vacated. Kearse I, 622 So.2d at 685-86. Rehearing was denied, but a revised opinion issued.

The second penalty phase resulted in a unanimous death recommendation Kearse v. State, 770 So. 2d 1119, 1123 (Fla. 2000) ("Kearse II").

> The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the

> mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse II, 770 So.2d at 1123. Kearse appealed raising 22 issues as outlined by this Court:

> (1) the trial court's refusal to return venue to the county where the offense occurred; (2) the denial of Kearse's objection to a motion to comply with a mental health examination; (3) the denial of Kearse's motion for a continuance; (4) the proportionality of the death penalty; (5) the trial court's evaluation of the mitigating circumstances in the sentencing order; (6) the trial court's failure to evaluate the nonstatutory mitigating circumstance of emotional or mental disturbance; (7) the denial of Kearse's motion to disqualify the prosecutor; (8) the denial of Kearse's motion for a mistrial based on the prosecutor's comments during argument; (9) the trial court informed the jury that Kearse had been found guilty in a previous proceeding, but that the appellate court had remanded the case for resentencing; (10) the denial of Kearse's motion to interview jurors in order to determine juror misconduct; (11) pretrial conferences were conducted during Kearse's involuntary absence; (12) the granting of the State's cause challenge to Juror Jeremy over Kearse's objection; (13) the denial of Kearse's cause challenges to Jurors Barker and Foxwell; (14) Kearse's compelled mental health examination constituted an unconstitutional one-sided rule of discovery; (15) the compelled mental health examination violated the ex post facto clauses of the United States and Florida Constitutions; (16) the compelled mental health examination violated Kearse's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (17) the victim impact jury

> instruction was vague and gave undue importance to victim impact evidence; (18) the trial court gave little weight to Kearse's age as a mitigating circumstance; (19) the trial court should have merged the "committed during a robbery" aggravating circumstance with the other aggravators; (20) the trial court should not have considered the "committed during a robbery" aggravating circumstance; (21) the admission of photographs of the victim; and (22) electrocution is cruel and unusual punishment.

Kearse II, 770 So.2d at 1123. On June 29, 2000 the sentence was affirmed and August 24, 2000, Kearse's rehearing was denied. Kearse II, 770 So.2d at 1119.

Later, Kearse petitioned the United States Supreme Court for certiorari review raising three issues.[1] Such was denied March 26, 2001. Kearse v. Florida, 121 S.Ct. 1411 (2000). (PCR.6 833).

On October 3, 2001, Kearse filed a "shell"[2] Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. Kearse's final motion was submitted on March 1,

[1] I - Florida's compelled mental health examination violates the right not to be compelled to be a witness against oneself; II - Florida's compelled mental health examination does not require reciprocal discovery in violation of the due process requirements of Wardius v. Oregon, 412 U.S. 470 (1973) in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United State's Constitution; III - Use of Florida's compelled mental health examination violates the ex post facto rule of the United States Constitution. (PCR.6 727-94)

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

2004, and an evidentiary hearing was held. (PCR.10 1458-1572)[3] Upon the court's review, relief was denied and Kearse appealed. (PCR.37 5704-40). The postconviction appellate brief in case number SC05-1876, was filed on the same day as the instant petition for writ of habeas corpus. The State's ordered response to Kearse's petition for writ of habeas corpus follows.

[3] A more detailed history of the postconviction litigation can be found in the State's answer brief in case number SC05-1876.

## ARGUMENT

### CLAIM I

**APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL EITHER DURING KEARSE'S DIRECT APPEAL OF HIS CONVICTION OR DURING THE APPEAL FOLLOWING RE-SENTENCING (restated)**

Kearse challenges the representation he received from appellate counsel during his direct appeal in case number SC60-79037 following his initial conviction and sentence as well as challenging appellate counsel's representation following re-sentencing in case number SC60-90310. His first sub-claim is addressed to counsel's failure to raise the issue of the trial court's denial of a challenge for cause leveled against Juror Matthews who sat on Kearse's re-sentencing jury. In the second sub-claim, Kearse complains that counsel failed to challenge on the first direct appeal the denial of a second-chair attorney for Kearse's initial trial. While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995), this Court will find that both issues are procedurally barred and without merit as Kearse has failed to prove that appellate counsel's actions were both deficient and prejudicial. Relief must be denied.

"The standard of review applicable to claims of ineffective

assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington . . . standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). Given that the Strickland standard applies, this Court stated recently:

> Thus, the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. *See, e.g., Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). See Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted) See Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 862 So.2d at 718. See Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." Holland v. State, 916 So.2d 750, 760 (Fla. 2005). With these principles in mind, it is clear that Kearse has not met his burden and all relief must be denied.

**Juror Claire Matthews ("Matthews")** - It is Kearse's claim that appellate counsel was ineffective in not raising on appeal the denial of the "for cause" challenge to Matthews as she was

not qualified to sit because she wrote the prosecutors insurance policies and was related, by marriage, to one of the police officer witnesses, Detective Raulerson; he was her father-in-law's half brother. (HC 10-17; 2ROA 868-69).

With respect to both challenges to Matthews, her professional relationship with the prosecutor and her familial relationship, through marriage, with Detective Raulerson ("Raulerson"), the matter is procedurally barred. On direct appeal, appellate counsel challenged the denial of "for cause challenges" during the seating of his re-sentencing jury, although counsel directed this Court's attention to three jurors other than Matthews. See Kearse, 770 So.2d at 1128-29 (rejecting claims of trial error for granting the state requested cause challenges and denying defense initiated cause challenges). Having raised the issue on direct appeal, Kearse may not raise the same issue, but on different grounds. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) (confirming that "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.") Cf. Pope v. State, 702 So.2d 221, 223 (Fla. 1997) (stating defendant

may not raise claims of ineffective assistance on a piecemeal basis by filing successive motions); Jones v. State, 591 So.2d 911, 913 (Fla. 1991) (same).

Furthermore, trial counsel's objection to Matthews was limited to her relationship with witness Raulerson. (2ROA 1097). Trial counsel objected to Mathews stating: "At this time the Defendant would challenge Juror No. 29 for cause based on her relationship with Detective Raulerson, based on her knowledge of the facts of the case and other statements which would indicate that she could not be fair and impartial." Clearly, the trial court was not put on notice; its attention was not drawn to Matthews' professional relationship with the prosecutor through her insurance business. The matter was not preserved for appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(opining "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Because the matter, as it relates to Matthews knowing the prosecutor through her insurance agency, was not preserved for appeal, appellate counsel may not be deemed ineffective for not having presented this issue on direct appeal. Rodriguez, 919 So.2d at 1282 (opining "[a]ppellate counsel is not ineffective for failing to raise issues not preserved for appeal. However, an exception is made where appellate counsel fails to raise a

claim which, although not preserved at trial, represents fundamental error."); Hendrix v. State, 908 So.2d 412 (Fla. 2005). A fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So.2d 481 (Fla.1960)). Kearse has not shown that fundamental error occurred here.

Matthews disclosed her relationship with the prosecutor when she informed the parties that it was professional only and that she had sold insurance policies to the prosecutor and his family. (2ROA 508, 860-61). According to Matthews, her relationship with the prosecutor would not cause her any concern or problem sitting on the jury (2ROA 508); she did not "feel that it would tip the scales or sway [her] opinion at all." (2ROA 861). Based upon the mere fact that Matthews sold insurance to the prosecutor does not disqualify her from sitting on the jury. Such is not one of the enumerated grounds for a challenge to individual jurors for cause as outlined in section 913.03, Florida Statutes (1993). Given the fact that Matthews expressed her belief that it would not impact her ability to be fair - it would not sway or tip the scales in the State's favor, the cause challenge was denied properly and appellate counsel had no basis for raising it on appeal. As such, he was not

ineffective for failing to raise a non-meritorious issue. Valle, 837 So.2d at 907-08.

Turning to Matthews' knowledge of the case and witness Raulerson, there is no basis for granting a challenge for cause, thus, it was neither deficient performance nor prejudicial representation under Strickland not to raise the claim on direct appeal. Matthews, during voir dire, explained that she had heard about the case from the media and then heard that Raulerson was coming to her family's holiday dinner. Raulerson was unknown to Matthews, she knew him only as her "father-in-law's half brother" and knew he was retired from the Fort Pierce Police Department (2ROA 866-68). Matthews **assumed** Raulerson, who was coming to town to testify in a police officer murder case, was going to be testifying here as there could not be that many cases. Matthews also promised to make it a point not to talk to Raulerson when he did come to town. (2ROA 869). From this exchange, it is obvious Matthews and Raulerson never spoke, and in fact, had not met.

This is supported by subsequent questioning where Matthews made it explicitly clear that the information she had about the case came from a newspaper or television news item years previously; she had not heard anything about the case recently. She recognized neither the name Kearse or Officer Parrish (2ROA 1007-09). It was merely as voir dire continued that she started

to wonder if this was the case she had heard about years before; she heard nothing recently, nor anything about the procedural history of the case (2ROA 1009-13). Matthews averred that she could set aside any preconceived notions about the case, and decide the matter based upon the facts heard in court and the law given by the judge. She could be fair and decide whether the aggravating circumstances existed to justify a death sentence and consider whether mitigation existed to outweigh aggravation (2ROA 1013-16).

Although trial counsel raised a challenge for cause against Matthews, noted he would have stricken her when he asked for additional peremptory challenges, and re-raised his prior objections to the jury before the panel was sworn, Trotter v. State, 576 So.2d 691, 693 (Fla. 1990), the trial court did not abuse its discretion in denying the challenge against Matthews. A trial court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion. Kearse, 770 So.2d at 1122; Castro v. State, 644 So. 2d 987 (Fla. 1994) (excusing juror for cause is subject to abuse of discretion review as trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility). Matthews did not know Raulerson, and agreed she could set aside anything she had heard before and decide the case on the facts and law given by the court. (2ROA 1097-98). Given this, there was no basis for

the challenge for cause which was denied properly, and thus, no deficiency or prejudice in failing to raise the matter on appeal. Kearse has failed to prove that an objectionable juror sat on his jury, and as such, he has not carried his burden under Strickland. Relief must be denied. Holland, 916 So.2d 762.

**Denial of a second-chair attorney during the first trial** - Kearse complains that his appellate counsel should have raised on direct appeal from the first trial, the issue of the denial of defense counsel's request for a second-chair attorney. This claim is meritless. Counsel did not move for co-counsel on the grounds that the case was complex, the only viable basis for granting co-counsel at the time, and he received a new penalty phase, thus, neither deficiency nor prejudice can be shown.

As Kearse noted, when his originally appointed public defender moved to withdraw due to the fact he was a personal friend of the victim in this case, it was noted that the public defender always offered a capital defendant two counsel. It was determined that Robert Udell ("Udell") be specially appointed and it was suggested, before the County Attorney had notice, that co-counsel may be appointed merely because it was a capital case, however, Udell would have to file a motion.

In the defense motion for appointment of co-counsel, Udell offered only that Kearse should have co-counsel because: (1) he

would have had two attorneys had he been able to remain a client of the 19th Judicial Circuit Public Defender's Office; (2) every Florida Public Defender's Office appoints to counsel for capital defendants; (3) that the American Bar Association recommended the appointment of two attorneys for capital defendants, and (4) the State had listed many witnesses and had submitted a 1000 pages of discovery. (1ROA 2464-67). At no time did Udell aver to the court that he believed the case was complex.

During the hearing on the motion, Udell reiterated that he believed an equal protection violation would occur if co-counsel were not appointed because those defendants represented by state public defenders' offices and those tried in the federal system would get two attorneys to represent them. Again, at no time did Udell inform the court that Kearse's case was complex. The closest he came to that matter was when he noted that one basis for granting co-counsel in the federal system was due to the general complexity of capital cases. The trial judge denied the motion without prejudice finding that Kearse's case was not complex and there was no legal basis to appoint co-counsel (1ROA.v1 39).

More important though, when the request was revisited shortly before trial, Udell offered that co-counsel was needed for the penalty phase on credibility grounds; Udell believed the jury may not respond well if he had to change strategy in the

penalty phase after arguing in the guilt phase the Kearse was innocent or guilty of a lesser crime. (1ROA.v1 63-64). That was the sole basis for the renewed motion. If fact, Udell stated:

> **I'm not moving for the appointment of co-counsel based upon the complexity of the case**. **It's not a complex case**, guilt or innocence, or I would have set that forth in the motion. I am capable of handling the guilt or innocence phase as his attorney without the appointment of co-counsel. I'm seeking appointment of co-counsel simply for the reasons I set forth in the motion and as alleged in the affidavit and that is the only ground.

(1ROA.v1 65) (emphasis supplied). The State objected because the law did not provide for appointment of co-counsel on those grounds.

At the time Kearse was prosecuting his first direct appeal,[4]

[4] Florida Rule of Criminal Procedure 3.112 did not go into effect until July 1, 2000, some five years after Kearse's conviction was affirmed in Kearse, 662 So.2d at 685. However, even in the Committee Note, the possibility to have co-counsel appointed was not given the status of a legal right.

> These standards are not intended to establish any independent legal rights. For example, the failure to appoint cocounsel, standing alone, has not been recognized as a ground for relief from a conviction or sentence. *See Ferrell v. State*, 653 So.2d 367 (Fla. 1995); *Lowe v. State*, 650 So.2d 969 (Fla. 1994); *Armstrong v. State*, 642 So.2d 730 (Fla. 1994). Rather, these cases stand for the proposition that a showing of inadequacy of representation in the particular case is required. *See Strickland v. Washington*, 466 U.S. 668[, 104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). These rulings

the law in place was that:

> Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge **and is based on a determination of the complexity of a given case and the attorney's effectiveness therein**. *Makemson v. Martin County*, 491 So.2d 1109 (Fla.1986), cert. denied,479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987).

Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994) (emphasis supplied). See Lowe v. State, 650 So.2d 969, 974-75 (Fla. 1994) (announcing "We find that, despite the practice of appointing dual attorneys, the decision of whether to appoint co-counsel is not a right but is a privilege that is subject to the trial court's discretion."); Cummings-El v. State, 863 So.2d 246, 250, n.6, 258 (Fla. 2003); Larkins v. State, 655 So.2d 95 (Fla. 1995).

Here, Udell announced that Kearse's case was not complex, and that he was not moving for co-counsel on those grounds. (1ROA.v1 65). Furthermore, the trial court considered the matter and determined that the case was not complex. (1ROA.v1 39) As such, appellate counsel would be raising a non-meritorious, if not frivolous, claim. Counsel is not

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> are not affected by the adoption of these standards. Any claims of ineffective assistance of counsel will be controlled by *Strickland*.

As such, appellate counsel cannot be deemed ineffective for not having raised issue on appeal.

ineffective for choosing not to raise such a claim. See Armstrong, 862 So.2d at 718 (noting "[i]f a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective"); Valle, 837 So.2d 907-08 (same).

Moreover, the main thrust of Udell's request for counsel was to have a different attorney argue the penalty phase on the possibility that guilt phase counsel would have lost credibility with the jurors should they have rejected the defense claims. Given the fact that the original death sentence was vacated and the case was remanded for a new penalty phase, Kearse can not show any prejudice from the denial of co-counsel. While Udell represented Kearse during the second penalty phase, it was before a new jury. In spite of this fact, the new jury unanimously recommended death for the shooting of Officer Parrish.

Kearse's complaints about Udell's performance during the first trial and re-sentencing (HC 23-24) have no place in this petition. State habeas actions address appellate counsel's effectiveness, while Florida Rule of Criminal Procedure 3.851 address trial counsel's representation. Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999) (holding claims of ineffective assistance of appellate counsel are not cognizable in a rule

3.850 motion for postconviction relief and are more appropriately raised in a petition for writ of habeas corpus); Gaskin v. State, 737 So.2d 509, 513 n.8 (Fla. 1999)(same). As such, Udell's actions in the trial court do not further the inquiry here and do not form a basis for claiming prejudice. The focus is on appellate counsel's decision not to challenge the denial of co-counsel and as explained above, ineffective assistance has not been proven as Kearse was not entitled to co-counsel under the case law and arguments raised at trial. Relief must be denied.

**CLAIM II**

**KEARSE'S CAPITAL SENTENCE IS NOT UNCONSTITUTIONAL UNDER ATKINS V. VIRGINIA OR ROPER V. SIMMONS (restated)**

Kearse asserts that his capital sentence violates the Eighth Amendment to the United States Constitution under Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 125 S.Ct. 1183 (2005), not because he falls under the strict holdings of either case, but because he was youthful, only **eighteen years, three months old** at the time of the murder, and because he has mental issues, i.e., that he has a "**low level of intellectual functioning and mental and emotional impairments**." Not only is this matter barred, but this Court has rejected such a claim in Hill v. State, 921 So.2d 579 (Fla. 2006) and Kearse has not

offered a valid basis for this Court to recede from Hill. Relief must be denied.

Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

The matter is procedurally barred because Kearse is not claiming that he falls under the strict holdings of Atkins and Roper which have retroactive application. Instead, he is claiming that his youth and alleged mental illness at the time of the crime render him ineligible for the death penalty. Such are arguments which could have been made at trial and on direct appeal. In fact, Kearse did challenge the weight assigned to the statutory age mitigator found by the court and could have challenged the mitigation found regarding his difficult childhood which resulted in psychological and emotional problems. Having made certain arguments on direct appeal and left others unchallenged, Kearse may not use his habeas corpus petition to relitigate or gain a second appeal. Blanco, 507 So. 2d at 1384 (confirming that "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial."). This claim is procedurally barred and should be denied.

Also, to the extent Kearse is attempting to prove mental retardation and to challenge his sentence based upon his age at the time of the homicide, the matter is barred. He never availed himself of the provisions of Fla. R. Crim. P. 3.203(d)(4)(C) which would have allowed him to raise a mental retardation issue in his then pending postconviction motion. Under this rule, Kearse had 60 days to amend, and having failed to do so, cannot make a claim of retardation at this time. Moreover, given the trial and evidentiary hearing testimony, the potential claim of mental retardation has been refuted by defense experts.[5]

Turning to the merits, in Roper, the United States Supreme Court determined that it was a violation of the Eighth Amendment to execute a defendant who had committed first-degree murder **before he turned eighteen years old**. Roper, 125 S.Ct. 1183, 1200 (determining "[t]he Eighth and Fourteenth Amendments forbid

[5] Dr. Petrilla, a psychologist, reviewed Kearse's prior psychological and school records in addition to conducting a new battery of neuropsychological testing and evaluating in 1991 and 1996. It was from those records Dr. Petrilla drew his conclusion that Kearse had emotional problems, neuropsychological or brain dysfunction, **but was not mentally retarded**. (2ROA 2138, 2144, 2146-47, 2153-59, 2170-2203). Dr. Kushner 1981 Weschler testing when Kearse was eight years old gave an **IQ score of 78**. (2ROA 2121-24, 2134). In order to prove mental retardation, the defendant's IQ must be below 70 before the age of 18 and there must be low adaptive functioning. See §916.106(12) and 921.137, Fla. Stat. Kearse has not met any of the criteria.

imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed") (emphasis supplied). Kearse has not offered any precedent or rationale for expanding Roper altering the bright-line rule it put in place. As noted above, Hill, 921 So.2d at 584 is on point. In Hill, this Court opined:

> Hill's third claim is that his mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). This claim is without merit.
>
> *Roper* does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. *Roper* only prohibits the execution of those defendants whose chronological age is below eighteen. *See* 125 S.Ct. at 1197-98 (recognizing that the rule prohibiting the death penalty for juveniles was necessary even though the mental and emotional differences separating juveniles from adults may "not disappear when an individual turns 18"), *see also Rodriguez v. State*, 919 So.2d 1252, 1265-67 (Fla. 2005) (affirming the trial court's denial of a motion for postconviction relief even though a mental health expert testified that the defendant's mental age was seven years).

Hill, 921 So.2d at 584.

Further support for rejecting Kearse's claim comes from Moreno v. Dretke, 2005 U.S. Dist. Lexis 5165 (W.D. Tex., March 17, 2005). There, the defendant tried to expand Roper by claiming he formed the intent to murder before he was eighteen,

but did not execute the murder until he had reached the age a majority. The Texas Federal District Court refused to extend Roper's holding noting that the United States Supreme Court had drawn a bright line in ruling that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed." Roper, 125 S.Ct. 1183, 1200. The Court further ruled that "[d]espite the fact that Petitioner may have engaged in certain preparatory acts while he was seventeen years of age, the undisputed fact remains that he committed the murder when he was eighteen years of age...and would eviscerate the bright line drawn by the Supreme Court." Moreno, 2005 U.S. Dist. LEXIS 5165. Likewise, Kearse is not entitled to relief.

In addition to relying upon Roper, Kearse attempts to gain solace from Atkins. However, Atkins bars the execution of the mentally retarded, not those that have low intellectual functioning or have mental and/or emotional impairments. Under sections 916.106(12) and 921.137(1), Florida Statutes define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." "Significantly subaverage general intellectual functioning" is defined as "performance which is two or more standard deviations from the mean score on a

standardized intelligence test specified in the rule of the department." Adaptive behavior is defined as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." See sections 916.106 (12) and 921.137(1), Florida Statutes. As reaffirmed in Rodriguez v. State, 919 So.2d 1252, 1266, n.8 (Fla. 2005): "Even where an individual's IQ is lower than 70, mental retardation would not be diagnosed if there are no significant deficits or impairments in adaptive functioning. Adaptive functioning refers to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting."

In order for mental retardation to be diagnosed, there must be significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure." (citations omitted). Such definitions comply with those suggested in Atkins v. Virginia, 536 U.S. 304 (2002) and set forth in the newly promulgated Rule 3.203. Having failed to avail himself of rule 3.202 and having failed to show he meets the criteria for mental retardation, Kearse cannot rely upon

Atkins as a bar to his capital sentence. Neither individually, nor together, do Atkins and Roper bar the imposition of Kearse's death sentence.[6] Relief must be denied.

[6] Moreover, in light of the trial and evidentiary hearing testimony produced during the postconviction litigation, Kearse's claim of brain damage is tenuous at best. Defense trial expert, Dr. Lipman concluded that Kearse's MRI and other brain scans were merely "suggestive" of brain damage, but there was nothing conclusive. In fact, Dr. Lipman agreed the MRI was "normal" (2ROA 2254-57). Kearse's evidentiary hearing expert, Dr. Dudley, confirmed the MRI, SPEC and PET scan's were normal. (PCR 1047-50). In the evidentiary hearing, Dr. Dudley, an expert in psychiatry, was asked to discuss Kearse's MRI and other scans in conjunction with the finding Kearse was brain damaged. Dr. Dudley confirmed that he had seen the reports prepared from the MRI, PET and SPECT scans; he stated "That's right, I remember that the tests that were done registered normal." (PCR 1048). He then noted that even though brain scans may be normal, such did not indicate that the patient did not have psychiatric problems. (PCR 1049-50).

The second penalty phase record reveals that it was at Dr. Lipman's suggestion that additional testing be conducted on Kearse. (2ROA 2254). An MRI was done to look at the anatomical features of the brain, along with SPEC and PET scans (apparently in error the PET scan in noted in the record as PEC scan). Dr. Lipman consulted with Dr. Blumenkoff, a doctor at the Department of Neurological Surgery at Vanderbilt, for the MRI and PET scans. The SPEC scan was viewed by Dr. Lipman. The scans suggested damage to the left part of Kearse's brain, but they were not diagnostic; they did not mean anything clinically. The SPEC indicated low blood flow in the mid brain, but in light of the "normal MRI," that was no more suggestive than it was diagnostic. The PEC was relatively normal. According to Dr. Lipman, nothing definitive came from the scans. (2ROA 2245-57). Defense counsel elicited testimony from Dr. Lipman that Kearse's left ventricle of his brain was somewhat larger than the right. (PCR 754-552).

Dr. Petrilla, a defense psychologist, reviewed Kearse's prior psychological and school records in addition to conducting a new battery of neuropsychological testing. It was from those Dr. Petrilla drew his conclusion that Kearse had emotional problems, neuropsychological or brain dysfunction, but was not

## CLAIM III

**KEARSE'S CHALLENGE TO FLORIDA'S CAPITAL SENTENCING SCHEME BASED UPON RING V. ARIZONA IS PROCEDURALLY BARRED AND HAS BEEN REJECTED REPEATEDLY (restated).**

Here, Kearse points to Ring v. Arizona, 536 U.S. 584 (2002) and asserts that Florida's capital sentencing scheme is unconstitutional and deprived him of notice, a jury trial and due process under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[7] (HC 35-36). Not only is this claim procedurally barred because Ring is not retroactive, but this Court has rejected such challenges as raised by Kearse especially where the jury recommendation was unanimous.

It must be noted that Kearse's re-sentencing jury rendered a unanimous sentencing recommendation. Kearse II, 770 So.2d at 1123. This Court had denied challenges to the constitutionality of the capital sentence based upon Ring where the defendant had a unanimous jury recommendation for death. See claims in direct death appeals where the recommendations for the imposition of death were unanimous, as occurred in the instant case. See Taylor v. State, 2006 WL 1766774, *9 (Fla. June 29, 2006); Crain

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mentally retarded. (2ROA 2138, 2144, 2146, 2156, 2159, 2173-2203).

[7] Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

v. State, 894 So.2d 59, 78 (Fla. 2004), cert. denied, 126 S.Ct. 47 (2005).

Furthermore, on March 26, 2001, Kearse's certiorari petition was denied. Kearse v. Florida, 121 S.Ct. 1411 (2000). It was not until June 24, 2002, that the United States Supreme Court decided Ring. As such, Kearse's conviction and sentence became final before Ring was decided. Ring is not retroactive; Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that Ring is not retroactive to cases on collateral review), and this Court has denied habeas petitions on the ground that Ring is not retroactive. See Suggs v. State, 923 So.2d 419, 442 (Fla. 2005) (denying petition based on the fact that Ring is not retroactive and defendant's conviction and sentence became final before Ring was decided); Johnson v. State, 904 So.2d 400, 407 (Fla. 2005) (same).

Additionally, this matter is procedurally barred as Kearse could have raised the instant constitutional challenges at trial and during his appeal from the re-sentencing. See Kearse II, 770 So.2d at 1123. The claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Having failed to raise the matter on direct appeal renders the instant claim procedurally

barred as a state habeas petition may not be used to obtain a second appeal. Rutherford, 774 So. 2d at 643 (noting habeas petition may not be used to gain second appeal); White v. Dugger, 511 So. 2d 554 (Fla. 1987) (same); Blanco, 507 So. 2d at 1384 (same); Eutzy v. State, 458 So. 2d 755 (Fla. 1984) (same).

Moreover, this Court has rejected all of the claims raised by Kearse as violative of the constitution. In Parker v. State, 904 So.2d 370, 383 (Fla. 2005) this Court opined:

> Parker next challenges the constitutionality of his death sentence because the recommendation for death and the aggravating circumstances were not found by a unanimous jury. This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote. See *Whitfield v. State*, 706 So.2d 1 (Fla. 1997); *Thompson v. State*, 648 So.2d 692 (Fla. 1994); *Brown v. State*, 565 So.2d 304 (Fla. 1990); *Alvord v. State*, 322 So.2d 533 (Fla. 1975). Moreover, this Court has rejected claims that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), requires aggravating circumstances to be individually found by a unanimous jury verdict. *See Hodges v. State*, 885 So.2d 338, 359 n. 9 (Fla. 2004); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003). Moreover, one of the aggravating factors found to exist in this case is a prior violent felony, a factor that was determined by a unanimous jury and which satisfies the constitutional requirements of Ring. See *Doorbal v. State*, 837 So.2d 940, 963 (Fla.), *cert. denied*, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003) (noting that prior violent conviction aggravator was supported by contemporaneous felonies charged in the indictment and of which the jury found the defendant unanimously guilty).

Parker, 904 So.2d at 383. See Suggs, 923 So.2d at 442 (rejecting claims capital sentencing unconstitutional under Ring); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Brown v. Moore, 800 So.2d 223, 224-25 (Fla. 2001) (rejecting constitutional challenge based on Ring where aggravators were not listed on indictment).

**CLAIM IV**

**THE CHALLENGES TO FLORIDA LETHAL INJECTION STATUTE AND PROCEDURE ARE PROCEDURALLY BARRED AND WITHOUT MERIT (restated).**

Kearse offers that Fla. Stat. §922.105 violates the separation of powers doctrine of the Florida Constitution and violates due process under the Fourteenth Amendment of the United States Constitution because the Department of Corrections was given discretion to develop the lethal injection protocols in violation of the Administrative Procedure Act. He also argues that lethal injection is cruel and unusual punishment given Florida's three drug cocktail may allow the capital defendant to feel the pain of his death, but be unable to

express this to authorities.[8] This last claim he bases primarily on an article written by Leonidas Koniaris and published in The Lancet. See Leonidas G. Koniaris et. al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 THE LANCET 1412 (2005). This matter is procedurally barred and has been rejected by this Court recently.

Kearse points to Hill v. Crosby, 126 S.Ct. 1189 (2006) and Rutherford v. Crosby, 126 S.Ct. 1191 (2006) and the stays that had been in place while the United States Supreme Court was deciding the matter as a reason why this Court should not review *The Lancet* article as support for revisiting and overturning Sims v. State, 754 So.2d 657 (Fla. 2000). These cases do not further Kearse's position either procedurally or on the law as they were addressed to the ability of a state capital defendant to bring a federal civil rights action under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. in spite of the fact that federal habeas corpus under chapter 28 U.S.C. § 2254 relief had been denied. See Hill v. McDonough, 126 S.Ct. 2096, *2103 (U.S. 2006) (determining capital defendant may be afforded review under both § 1983 and §2254, but noting strict pleading requirements for civil rights action);

[8] Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

Rutherford v. McDonough, 126 S.Ct. 2915 (2006) (same). In stead, Hill v. State, 921 So.2d 579 (Fla.), cert. denied, 126 S.Ct. 1441 (2006) and Rutherford v. State, 926 So.2d 1100 (Fla.), cert. denied, 126 S.Ct. 1191 (2006); govern. Both dictate that relief be denied.

As a preliminary matter, the claims are procedurally barred. To the extent he could have challenged the statute on direct appeal, he cannot raise the issue here. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992); Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983).

To the extent Kearse may argue that lethal injection and its protocols were not in place at the time of his re-sentencing and appeal therefrom, he is time barred from raising the matter at this juncture. It has been more than five years since the Legislature enacted the lethal injection statute and this Court reviewed such finding it constitutional in face of an Eighth Amendment Challenge as well as a separation of powers challenge. See Sims v. State, 754 So.2d 657, 666, n.18, 669-70, n.23 (Fla. 2000) (finding Florida's lethal injection statute to be constitutional). In fact, during much of this time, Kearse was

litigating his postconviction motion in the circuit court, but he failed to raise this challenge. As such, Kearse is time barred from raising that challenge now as there is no offer of a new constitutional provision held to be retroactive nor a claim of newly discovered evidence related to a separation of powers claim. Cf Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought within one year of date evidence was discovered or could have been discovered through due diligence).

With respect to the merits of the separation of powers challenge, Kearse fails. This claim was raised and rejected in Sims, where this Court opined:

> However, we do not find that the Legislature's failure to define the chemicals to be administered in the lethal injection necessarily renders the statute unconstitutional. First, the statute clearly defines the punishment to be imposed (i.e., death). Thus, the DOC is not given any discretion to define the elements of the crime or the penalty to be imposed. Second, the statute makes clear that the legislative purpose is to impose death. Secretary Moore testified that the purpose of the DOC's execution day procedures were to achieve the legislative purpose "with humane dignity." Third, determining the methodology and the chemicals to be used are matters best left to the Department of Corrections to determine because it has personnel better qualified to make such determinations. Finally, we note that the law in effect prior to the recent amendments stated simply that the death penalty shall be executed by electrocution without stating the precise

> means, manner or amount of voltage to be applied. Thus, we conclude that the lethal injection statute is not so indefinite as to constitute an improper delegation of legislative power, and the lack of specific details about the chemicals to be used does not violate the Eighth Amendment prohibition against cruel and unusual punishment.FN23
>
> _____
>
> FN23. Sims' remaining argument, that the DOC has unfettered discretion to determine whether the method of execution has been elected or defaulted, is without merit.

Sims, 754 So.2d at 669-70. Similarly, in Bryan v. State, 753 So.2d 1244, 1254 (Fla. 2000), this Court stated:

> Bryan further argues the amendments to sections 922.10 and 922.105, Florida Statutes, which add lethal injection as a method of execution, also violate the separation of powers doctrine in that the legislature unlawfully delegated its authority to the DOC. However, in *Sims*, this Court disposed of the unlawful delegation of power argument as follows:
>
> > We likewise conclude that the new law does not improperly delegate legislative authority to an administrative agency. Generally, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. *See B.H. v. State*, 645 So.2d 987, 991-92 (Fla.1994); *Askew v. Cross Key Waterways*, 372 So.2d 913, 924 (Fla.1978); State v. *Atlantic Coast Line Railroad Co.*, 56 Fla. 617, 47 So. 969 (1908). However, the Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials

> within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Atlantic Coast Line Railroad Co.*, 56 Fla. at 636-37, 47 So. at 976.
>
> Other courts have considered the separation of powers argument and rejected the same. *See State v. Deputy*, 644 A.2d 411 (Del.Super.Ct.1994); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App.1978).
>
> 754 So.2d at 668 (footnote omitted). Accordingly, because this Court retains its power to interpret and apply the instant statutes and because we recently rejected the unlawful delegation of legislative power argument in *Sims*, we hold that Bryan's claims regarding the separation of powers doctrine are without merit.

These conclusions have been reaffirmed. See Thompson v. State, 796 So.2d 511, 515 (Fla. 2001) (affirming "statute authorizing death by lethal injection does not offend notions of separation of powers"); Francis v. State, 808 So.2d 110, 141 (Fla. 2001) (same). As such Kearse has not given this Court a basis for revisiting the determination that lethal injection is constitutional.

Likewise, his attempt to place before this Court, as newly discovered evidence, *The Lancet* article as an apparent basis for overcoming the bar to his Eighth Amendment challenge to lethal injection, is meritless under Hill, 921 So.2d at 582-83;

Rutherford, 926 So.2d at 1113-14. In fact, Kearse does not even address this Court's clear precedent against his position as set forth in Hill, 921 So.2d 582-83 and Rutherford, 926 So.2d at 1113-14. In Hill, 921 So.2d at 582-83, this Court found that an evidentiary hearing on *The Lancet* article was not justified under Fla. R. Crim. P. 3.851(f)(5)(A); 3.851(f)(5)(b) and 3.852(i). Specifically rejected was Hill's claim that the article in *The Lancet* "presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain." This was done even in light of the attachment of an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study.

Hill claimed that the information in the study published in *The Lancet* was new information, not previously available to this Court when it decided Sims. This Court disagreed, noting its holding in Sims, that "the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." Sims, 754 So. 2d at 668. Continuing, this Court noted that the 2005 study, did not sufficiently call into question the holding in Sims because the study applied toxicology data in autopsy reports obtained from Arizona, Georgia, North Carolina, and

South Carolina to the protocols used by Texas and Virginia, but no toxicology data from Florida was used, and there was no allegation that either the protocol or autopsy data from Florida were unavailable to the authors. "Indeed, **the study recognizes** that the ... sodium pentothal administered during lethal injection in Florida is 'a relatively large quantity [when] compared with the typical clinical induction dose of 3-5 mg/kg.'" Leonidas G. Koniaris et. al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 THE LANCET 1412 (2005) (emphaisis supplied). See Rutherford, 926 So.2d at 1113-14 (reaffirming rejection of *The Lancet* article).

Turning to the study's hypothesis that Florida's 3-5 mg/kg dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect, this Court agreed that the study is inconclusive, and therefore, did not warrant an evidentiary hearing. The study "does not assert that providing an inmate with "'**no less than two' grams**" of sodium pentothal, ... is not sufficient to render the inmate unconscious. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect." Hill, 921 So.2d at 583 (emphasis supplied). See Rutherford, 926 So.2d at 1113-14 (reaffirming rejection of *The Lancet* article); Sims,

754 So.2d at 665 n.17.

Also, this Court noted that courts across the nation have rejected claims that *The Lancet* article requires a new evaluation of the constitutionality of lethal injection. See Brown v. Crawford, 408 F.3d 1027 (8th Cir. 2005) (dismissing appellant's motion for stay of execution despite fact appellant based his claim under 42 U.S.C. § 1983 in part on *The Lancet* study at issue here); Bieghler v. State, No. 34500-0511-SD-679, 2005 WL 3549175 (Ind. Dec. 28, 2005) (finding *The Lancet* study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution"). See Hill, 921 So2d at 583, n.5. Kearse has offered nothing more that what has been rejected previously. Relief must be denied.

## CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Paul Kalil, Esq. Office of the Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on August 14, 2006.

## CERTIFICATE OF COMPLIANCE

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

LESLIE T. CAMPBELL