No. _____

IN THE SUPREME COURT OF THE UNITED STATES

---

BILLY LEON KEARSE,

*Petitioner,*

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent.*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

CAPITAL CASE

---

PAUL KALIL
Fla. Bar No. 174114
Assistant CCRC–South
*kalilp@ccsr.state.fl.us*
**Counsel of Record*

RILEY HORAN
Florida Bar No. 1035446
Staff Attorney

Capital Collateral Regional Counsel – South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

February 23, 2023

**CAPITAL CASE**

## QUESTIONS PRESENTED

In *Strickland v. Washington,* 466 U.S. 668 (1984), this Court announced the now-familiar two-prong test for establishing ineffective assistance of counsel requiring that the defendant show deficient performance and prejudice. *Strickland* makes clear that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland* at 690. While "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Id.*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, at 691.

The two-prong test from *Strickland* is well-known, courts' interpretations of what constitutes "a reasonable strategic decision" has been onerous and inconsistent. While a court "must indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance," too frequently, this presumption is given blindly without any degree of scrutiny into the underlying decision and the record on which it is based.

Here, the Eleventh Circuit Court of Appeals relied on trial counsel's postconviction testimony that the decision to forego any discovery regarding the state's mental health expert and failure to prepare his own expert to rebut the State's expert, was a "strategy," without any analysis of whether trial counsel's purported strategy was reasonable.

The question presented in this case is:

> Whether the Eleventh Circuit's analysis of ineffective assistance of counsel claims fails to protect the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment right to due process announced in *Strickland v. Washington*, when it denies relief based on assertions of "strategy" without considering whether that purported strategy was reasonable?

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner Billy Leon Kearse, a death–sentenced Florida prisoner, was the Defendant/Petitioner/Appellant in state court proceedings and the Petitioner/Appellant in federal court proceedings.

Respondent, the Secretary of the Florida Department of Corrections, was the Respondent/Appellee in federal proceedings. The State of Florida was the Petitioner/Appellant in state court proceedings.

## STATEMENT OF RELATED CASES

Per Supreme Court Rule 14.1 (b) (iii), the following cases relate to this petition:

### Underlying Trial Proceedings

Initial Trial Proceedings:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991-CF000136A
Judgement Entered: May 29, 1998

Direct Appeal I:
Florida Supreme Court, Case No. SC79-037
*Kearse v. State*, 662 So.2d 677 (1995)
Remanded for new penalty phase: June 22, 1995

Penalty Phase after Remand on Direct Appeal:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: March 24, 1997

Direct Appeal II:
Florida Supreme Court, Case No. SC09-310
*Kearse v. State*, 770 So.2d 1119 (2000)
Sentence Affirmed: June 29, 2000

Petition for Writ of Certiorari on Direct Appeal:
United States Supreme Court
*Kearse v. Florida*, 532 U.S. 945 (2001)
Certiorari Denied: March 26, 2001

### State Collateral Proceedings

Initial Postconviction Proceeding:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: August 30, 2005 (denying postconviction relief)

Initial Postconviction Appeal:
Florida Supreme Court, Case No. SC05-1816
*Kearse v. State*, 969 So. 2d 976 (2007)
Affirmed: August 30, 2007

State Petition for Writ of Habeas Corpus:
Florida Supreme Court, Case No. SC06-942
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, 969 So.2d 976 (2007)
Denied: August 30, 2007

Successive Postconviction Proceeding I:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: September 17, 2008 (denying postconviction relief)

Successive Postconviction Appeal I:
Florida Supreme Court, Case No. SC08-1986
*Kearse v. State*, 11 So. 3d 355, 2009 WL 1464452, at *1 (Fla. 2009)
Affirmed: May 22, 2009

Successive Postconviction Proceeding II:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: January 6, 2011 (denying postconviction relief)

Successive Postconviction Appeal II:
Florida Supreme Court, Case No. SC11-244
*Kearse v. State*, 75 So. 3d 1244 (Fla. 2011)
Affirmed: October 21, 2011

Successive Petition for Writ of Habeas Corpus:
Florida Supreme Court, Case No. SC12-1349
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, 100 So. 3d 1148 (Fla. 2012)
Judgment Entered: August 30, 2012

Successive Postconviction Proceeding III:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: July 16, 2016 (denying postconviction relief)

Successive Postconviction Appeal III:
Florida Supreme Court, Case No. SC17-0346
Dismissed: May 9, 2017

Successive Postconviction Proceeding IV:
Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida
*State of Florida v. Billy Leon Kearse*, Case No. 561991 CF000136A
Judgement Entered: February 6, 2018 (denying postconviction relief)

Successive Postconviction Appeal IV:
Florida Supreme Court, Case No. SC18-458
*Kearse v. State*, 252 So.3d 693 (Fla. 2018)
Affirmed: August 30, 2018

**Federal Habeas Corpus Proceedings**

Federal Petition for Writ of Habeas Corpus Proceeding:
United States District Court, Southern District of Florida
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, Case No. 09-14240-CIV
Petition Dismissed: November 22, 2010

Federal Habeas Corpus Appeal I:
Eleventh Circuit Court of Appeals, Case. No. 11-12267
*Kearse v. Sec'y, Fla. Dep't of Corr.*, 669 F.3d 1197 (11th Cir. 2011)
Vacated and Remanded: November 3, 2011

Petition for Writ of Habeas Corpus on Remand I
United States District Court, Southern District of Florida
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, Case No. 09-14240-CIV
Petition Denied: August 30, 2012

Federal Habeas Appeal II:
Eleventh Circuit Court of Appeals, Case No. 12-16610
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, 736 F.3d 1359 (2013)
Vacated and Remanded: December 2, 2013

Petition for Writ of Habeas Corpus on Remand II
United States District Court, Southern District of Florida
*Kearse v. Sec'y, Fla. Dept. of Corrs.*, Case No. 09-14240-CIV
Petition Denied: September 1, 2015

Federal Habeas Appeal III:
Eleventh Circuit Court of Appeals, Case. No. 15-15228
*Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526 (11th Cir. 2022)
Affirmed: August 25, 2022

## TABLE OF CONTENTS

## APPENDICES

## TABLE OF AUTHORITIES

Cases

**Statutes**



**Cases**

**Statutes**



**Other Authorities**



**Constitutional Provisions**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Billy Leon Kearse prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

## CITATIONS TO OPINION BELOW

The Court of Appeals for the Eleventh Circuit's opinion that is the subject of this Petition is unreported but referenced as *Kearse v. Secretary, 2022 WL 3661526* (11th Cir. Aug. 25, 2022), and is found in the accompanying Appendix as "Appendix A." The Court of Appeals for the Eleventh Circuit's order denying Kearse's motion for rehearing is unreported and is found in the accompanying Appendix as "Appendix B." The United States District Court for the Southern District of Florida's order denying Kearse's petition for writ of habeas corpus is unreported and is found in the accompanying Appendix as "Appendix C." The Florida Supreme Court's opinion affirming the denial of postconviction relief, *Kearse v. State*, 969 So. 2d 976 (Fla. 2007), is found in the accompanying Appendix as "Appendix D." The Florida Supreme Court opinion affirming sentence of death, *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), is found in the accompanying Appendix as "Appendix E." The Florida Supreme Court opinion affirming convictions and vacating and remanding for a new penalty phase, *Kearse v. State*, 662 So. 2d 677 (Fla. 1995), is found in the accompanying Appendix as "Appendix F."

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the basis of 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on August 25, 2022, and denied Petitioner's timely Petition for Rehearing and/or Rehearing En Banc on October 26, 2022. Counsel sought an additional time for the filing of this Petition, which was granted up to and including February 23, 2023. This petition is timely filed.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

### I. Introduction

The Appellant, Billy Leon Kearse, was convicted and sentenced to death in St. Lucie County, Florida for the murder of Fort Pierce Police Officer Danny Parrish on January 18, 1991, when Kearse was eighteen years and eighty-four days old.

Earlier that evening, Kearse confronted his stepfather who had been verbally abusive to Kearse's mother, and they had a fight. (R. 1457, 2725). Upset at what happened, Kearse went to his friends Derrick Dickerson and Rhonda Pendleton's house. (R. 1457).

They decided to order a pizza for dinner. Kearse and Pendleton took her brother's car to go pick it up. (R. 1458-59). While on their way back to the house, the car started leaking oil and smoking. (R. 1461). To avoid traffic, Kearse turned and drove the wrong way down a one-way street.

Officer Danny Parrish witnessed this violation and conducted a traffic stop. (R. 1113). Kearse did not have a valid driver's license. Initially he gave Officer Parrish false names, which he knew was wrong. (SR. 10). The officer told him that if he provided his real name, he would write three tickets and let him go. (SR. 8). Kearse then gave Officer Parrish his real name, date of birth, and age. (SR 8-19). Officer Parrish then initiated an arrest.

Officer Parrish told Kearse to exit the car and put his hands on top of it. (SR. 5, 19). While maneuvering with the handcuffs, Parrish hit Kearse under his left eye with them. (SR. 5, 19). A scuffle ensued during which Kearse believed the officer was reaching for his gun. (SR. 5, 11, 19). Panicked, Kearse grabbed the officer's

weapon and fired several shots, killing him. (SR. 9). Kearse fled the scene and returned to Pendleton's home. (R. 1469-70).

## II. Trial and First Penalty Phase

Kearse was indicted for one count of first-degree murder and one count of possession of a firearm (Officer Parrish's weapon) by a convicted felon.[1] (R. 2428-2430). The State later filed an Amended Indictment adding the charge of robbery with a firearm (the taking of Officer Parrish's weapon during the struggle). (R. 2431-33).

After the public defender moved to withdraw due to conflict, the trial court appointed attorney Robert G. Udell to represent Kearse. (R. 2450). Kearse pleaded not guilty and was tried by a jury in October of 1991 in Indian River County, Florida. The jury rendered guilty verdicts on both the first-degree murder and robbery counts. (R. 1864-65). After the penalty phase, the jury recommended death by a vote of eleven-to-one. (R. 2361, 2367). On November 8, 1991, the trial court imposed a sentence of death for the murder and life imprisonment for the robbery conviction.[2] (R. 2395, 2403, 2423).

---

[1] Kearse's previous felony conviction was for burglary and "possession of burglary tools" after he and friends broke into a school two years prior.

[2] The trial court 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).

On direct appeal, the Florida Supreme Court affirmed Kearse's convictions but held the heinous, atrocious, and cruel (HAC) aggravating factor was improperly found. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995). Kearse's death sentence was vacated and the case was remanded for a new penalty phase. *Id.*

### III. The Second Penalty Phase

On remand, Udell again represented Kearse. The State presented testimony to establish the aggravating factors that the murder was committed in the course of a robbery (the taking of Officer Parrish's gun during the scuffle), the murder was committed to avoid arrest and hinder enforcement of the laws, and the victim was a police officer.

Kearse presented several witnesses in mitigation. Psychologist Fred Petrilla spent more than twenty hours evaluating Kearse, performing a battery of neuropsychological and personality tests, and interviewed Kearse's mother, Bertha. (R2-T. 2146-47). Dr. Petrilla opined that the killing of Officer Parrish was committed while Kearse was under extreme emotional disturbance and that Kearse "[m]ost definitely" could not conform his conduct to the requirements of the law. (R2-T. 2203-04).

Neuropharmacologist Dr. Jonathan Lipman evaluated Kearse, interviewed his mother, reviewed records, and consulted with neuropsychologists. Dr. Lipman opined that Kearse has suffered from neurodevelopmental problems since before age twelve, and while Kearse does not meet the diagnostic criteria for Fetal Alcohol Syndrome ("FAS"), he does suffer from the related disorder, Fetal Alcohol Effect ("FAE"). (R2-T. 2249-51). Dr. Lipman opined that all of the records and tests

confirmed "pervasive developmental abnormality" with very early onset. (R2-T. 2260). He testified that FAE subjects are hypo-responsive to stress, and Kearse most likely misunderstood Officer Parrish's instructions when effectuating the arrest. (R2-T. 2263, 2269). Further, Dr. Lipman noted that while Kearse is not psychotic, he shows psychoticism under stress. (R2-T. 2300-03).

Kearse also presented Pamela Baker, a licensed mental health counselor who works with mentally handicapped individuals. Ms. Baker explained that Kearse was diagnosed as severely emotionally handicapped in 1981 and continued to function "at a retarded level." (R2-T. 2033). She also described Kearse's impoverished, abusive, and deprived background. (R2-T. 2052, 2060). Ms. Baker indicated that Kearse showed signed of Post-Traumatic Stress Disorder and that Kearse suffers from what is commonly termed "brain damage." (R2-T. 2019, 2209-11; R. 2123-25).[3]

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

[3] In addition to the expert mental health testimony, Kearse offered evidence to support non-statutory mitigation.

results indicated malingering. He testified that Kearse's MMPI F-Scale, an indicator of malingering, was "the highest he had ever seen" and reflected scores that were "totally invalid, uninterpretable, and reflect an attempt on his part to fake crazy in order to avoid responsibility." (R2-T. 2406).

Udell's only effort to refute Martell's testimony was to present psychological testimony through Dr. Lipman, *who is not a psychologist*. The State objected to Dr. Lipman's testimony, and argued that he was practicing psychology:

> PROSECUTOR: [W]e have a person who has been qualified as an expert in one field who is attempting to give expert opinion in a field in which he is not qualified and for which there was no attempt to qualify him in this court. What he's doing is practicing psychology under this Statute he's being paid for it, he's practicing psychology and it's actually a misdemeanor under the Statute to do what he did in this courtroom yesterday.

(R. 2285-86). The Court allowed Dr. Lipman to testify, but issued an ominous warning:

> THE COURT: I guess maybe this witness ought to be warned that the State Attorney may file criminal charges against him and maybe he ought to claim the 5th Amendment from here on out, I don't know if that's the import of telling him he's guilty of a misdemeanor. What he's doing of course only a jury can determine whether you really are guilty of such offense. I don't want to be a part of leading him into being charged with a crime. . .

(R2. 2286-7).

The jury again recommended death. (R2-T. 2695). The trial court found two aggravating factors: (1) the murder was committed in the course of a robbery, and (2) the murder was committed to avoid arrest, and the victim was a law enforcement officer (merged). (R2. 706-09). The court found Kearse's age to be a

statutory mitigating circumstance and gave it "some but not much weight." (R2. 708). The court also found as non-statutory mitigation that Kearse exhibited acceptable behavior at trial and that he had a difficult childhood that resulted in psychological and emotional problems. (R2. 709).

### IV. Second Direct Appeal (*Kearse II*)

On direct appeal after re-sentencing, the Florida Supreme Court affirmed the death sentence by the narrowest of margins: four-to-three. *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000). The three dissenting justices expressed "several concerns with the majority's treatment of the issues, and especially with the conclusion that this is one of the most aggravated and least mitigated murders requiring that the eighteen-year-old defendant be executed." *Id.* at 1135 (Anstead, J., dissenting). They also pointed out that "there is no evidence that Kearse set out that night intending to commit any crime, let alone murder." *Id.* at 1136.

Kearse petitioned this Court for a writ of certiorari, which was denied. *Kearse v. Florida*, 532 U.S. 945 (2001).

### V. Postconviction Proceedings

Kearse timely filed his initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure 3.850/1 on September 29, 2001, which he subsequently amended. (PCR. 14-68, 1458-1572). After conducting a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (1993), the circuit granted an evidentiary hearing on several claims, including claims of ineffective assistance of counsel at the penalty phase. (PCR. 1458-1572, 1660-63).

At the evidentiary hearing, Kearse presented several expert and lay witnesses to support Kearse's claim that trial counsel was ineffective for failing to investigate and challenge the State's expert, Dr. Martell. Trial counsel Robert Udell testified to the limits of his preparation. When asked whether he attempted to investigate Dr. Martell's background, Udell admitted that he would have "call[ed] around to the lawyers in the community who do these kinds of cases . . . but that's as far as it would have gone." (PCR-T. 551). Udell could not recall whether he obtained Dr. Martell's curriculum vitae prior to his testimony, but it was not in his file provided to postconviction counsel. (PCR-T. 552). Even so, Udell testified that he would not have made any effort to verify its accuracy and "probably would have accepted [Martell's CV] as being true." (PCR-T. 553).

Udell also testified about the circumstances of Dr. Martell's compelled evaluation of Kearse. He admitted that he was not present for the evaluation itself—even though he billed 4.2 hours for it—because Dr. Martell said he "prefer[ed] to do it with [himself] and the Defendant." (PCR-T. 554, 559-60). The evaluation was videotaped, but Udell did not remember getting the videotape and surmised that he "could have relied upon, you know, the doctor's report." (PCR-T. 560). Udell could not recall whether he received a report, but "he knew what the man was going to say, generally speaking" from "[i]nformal conversations with the State Attorney." (PCR-T. 560-61). Udell further testified that he never actually deposed Dr. Martell, despite having billed 1.5 hours for doing so.[4] (PCR-T. 554-56).

[4] On October 29, 2009, Udell was disbarred pursuant to an order of the Florida Supreme Court after he was charged with, and admitted to, violating

Dr. Jonathan Lipman, the neuropharmacologist Udell hired for Kearse's second penalty phase, testified at the postconviction hearing to his frustrations in working with Udell. While preparing for Kearse's penalty phase, Dr. Lipman wrote a letter to Udell informing him that he needed to do additional work to rebut Dr. Martell's findings and he was running out of time in which to do it. (PCR. 5390). Dr. Lipman testified that he required the assistance of a neuropsychologist to put Dr. Martell's findings "in context." (PCR-T. 959). Dr. Lipman explained that a neuropharmacologist in these circumstances would be required to consult with a neuropsychologist according to the professional standards under which he practices. (PCR-T. 960). After receiving no response to his letter, out of "exasperation" and a "desire for thoroughness," Dr. Lipman contacted two neuropsychologists on his own. (PCR-T. 961). Dr. Lipman went so far as to pay one of the neuropsychologist's fees himself. (PCR-T. 951).

---

several of the Rules Regulating the Florida Bar. *See The Florida Bar v. Udell*, 22 So. 3d 60 (Fla. 2009). Udell admitted that between 2005 and 2008, he "submitted several fee affidavits to the Justice Administrative Commission which contained false information about the services he performed on behalf of at least two clients." (PCR3. 65) He also admitted that between 2005 and 2008, he "filed several motions for attorney's fees which contained false information about the services he performed on behalf of at least two clients." (PCR3. 65)

After Udell's disbarment, counsel filed a second successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 arguing that the circuit court improperly relied on Udell's testimony at the evidentiary hearing. (PCR3. 4-21). The circuit court summarily denied relief, and the Florida Supreme Court affirmed. (PCR3. 94-96); *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011) (unpublished table disposition)).

One of the neuropsychologists Dr. Lipman consulted with before testifying was Alan Friedman, Ph.D. (PCR-T. 950-51). At the postconviction evidentiary hearing, Dr. Friedman testified that he is a Fellow of the Society for Personality Assessment and has authored or co-authored several book chapters and research articles specific to MMPI interpretation. (PCR-T. 878, 882-84). He is also the senior author of three instructional textbooks on MMPI interpretation. (PCR-T. 409).

Dr. Friedman concluded that Kearse's high F-Scale scores were not as significant as his F-K Index, which indicates that Kearse, contrary to Dr. Martell's contention, was *not* malingering. The high F-Scale signifies that Kearse more likely suffers from emotional and psychiatric problems. (PCR-T. 889-907). Dr. Friedman also testified that he was available and willing to testify at Kearse's penalty phase, had Udell called him.

The circuit court denied postconviction relief as to all claims. (PCR. 5703). Kearse appealed the denial of his postconviction motion and simultaneously filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida. The circuit court's ruling was affirmed, and habeas relief was denied. *Kearse v. State*, 969 So. 2d 976 (Fla. 2007). The court determined that Kearse had not shown deficient performance or prejudice under *Strickland*. *Id.*

## VI. Federal Habeas Proceedings

After additional state court litigation, Kearse timely filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District

of Florida on July 17, 2009.[5] (DE 1). The district court issued its Order denying habeas corpus relief as to all of Kearse's claims on September 1, 2015 and denied his motion to alter and amend the court's judgment. (DE 53, 56, 60). The district court disagreed with the Florida Supreme Court on the deficient performance prong:

> Even construing reasonable professional assistance liberally, conducting no investigation of or preparation for the State's key rebuttal witness, when his client's best hope for a life sentence was the establishment of mental health mitigation appears to be below the standard.

(DE 53 p. 27). However, the district court found that Kearse was not entitled to habeas relief because he could not prove prejudice. (DE 53).

Kearse filed a timely Notice of Appeal. (DE 62). The district court granted a certificate of appealability as to one issue: "whether Petitioner's trial counsel rendered ineffective assistance due to his failure to investigate and prepare for testimony of the State's mental health expert." (DE 55).[6]

---

[5] The district court initially dismissed Kearse's petition as untimely. (DE. 14). On appeal, the Eleventh Circuit vacated the district court's order and remanded "for consideration of whether Kearse can present clear and convincing evidence to rebut the state court's factual finding that the verification page was not attached to Kearse's initial petition." *Kearse v. Sec'y, DOC*, 669 F.3d 1197, 1199 (11th Cir. 2011). The district court again dismissed the petition as untimely. On his second appeal, the Eleventh Circuit again reversed and remanded for adjudication of the merits of his petition. *Kearse v. Sec'y, DOC*, 736 F.3d 1359 (11th Cir. 2013).

[6] Kearse moved to expand the certificate of appealability. The Eleventh Circuit granted Kearse's motion as to two issues:

> [T]he proper resolution of Kearse's claims that his trial counsel unreasonably failed to investigate and present

## VII. Eleventh Circuit Court of Appeals

The Court of Appeals affirmed the denial of Kearse's petition for writ of habeas corpus on August 25, 2022. *See Kearse v. Secretary, 2022 WL 3661526* (11th Cir. Aug. 25, 2022). The Eleventh Circuit concluded that:

> [W]e can't say that the Florida Supreme Court's conclusion that Mr. Udell performed reasonably under the circumstances is beyond any possibility for fairminded disagreement.

*Id*. The court reasoned that Mr. Udell's "strategy" was to not depose expert witnesses because,

> Mr. Udell explained that he was a "firm believer of doing very little discovery on the record in the presence of the [s]tate [a]ttorney" because "[e]very time you take a deposition, they learn one thing about your case that but for your deposition they wouldn't have known." So, instead of deposing Dr. Martell, Mr. Udell learned what Dr. Martell was going to say by speaking informally with the state attorney or Dr. Martell, talking with lawyers in the community, and consulting his experts. And by not taking the deposition, he avoided divulging details about the defense.

*Id.*

Kearse's timely-filed Petition for Rehearing En Banc and/or Petition for Rehearing was denied on October 26, 2022. After receiving a 30-day extension on January 20, 2023, this petition for writ of certiorari timely follows.

---

> evidence of Officer Parrish's prior misconduct and difficulties in detailing with the public; and
>
> Whether Kearse's sentence of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

## REASONS FOR GRANTING THE WRIT

### THE ELEVENTH CIRCUIT'S TRUNCATED ANALYSIS OF "STRATEGIC DECISIONS" IN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IS IN CONFLICT WITH THIS COURT'S PRECEDENT.

It is axiomatic that, in order to establish that trial counsel was ineffective, a defendant must make a showing that counsel rendered deficient performance resulting in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. While wide deference is given to counsel's choices as to how to proceed in matters of strategy and preparation, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has to duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91.

Prejudice is shown, and relief is necessary, when the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 693.

The two-prong test from *Strickland* is well-known, but its interpretation across the circuits has been onerous and inconsistent.[7] As the Eleventh Circuit recognized, a court's analysis of trial counsel's performance is highly deferential to prevent succumbing to the "'all too tempting' impulse 'to conclude that a particular act or omission of counsel was unreasonable' after counsel's defense 'has proved unsuccessful.'" *Kearse v. Secretary, No. 15*-15228, 2022 WL 3661526 (11th Cir. Aug. 25, 2022) (quoting *Strickland*, 466 U.S. at 689). However, while a court "must indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance," too frequently, this presumption is given blindly without any degree of scrutiny into the underlying decision and the record on which it is based. *Id.* Such is what occurred here.

**Trial Counsel's "Mere Incantation of Strategy"**

In *Strickland*, this Court recognized that "merely invoking the word strategy to explain errors was insufficient since 'particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances' "[;] "so called

[7] *See generally* Gary Feldon & Tara Beech, *Unpacking the First Prong of the* Strickland *Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 Univ. of Fla. J. Law & Public Policy (2012); Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. Rich. L. Rev. 1459 (May 2009) (describing study of four circuits that demonstrated capital defendants did not achieve greater success at obtaining relief under *Strickland* even after *Wiggins v. Smith*); John H. Blume & Stacey D. Neumann, *"It's Like Deja vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 142 (2007) (noting "[a]lmost all representation was found to be within *Strickland*'s 'wide range of professionally competent assistance.'").

'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." *Porter v. United States*, 2012 WL 3024453 (M.D. Fla. July 24, 2012). Subsequent decisions reinforce that "the mere incantation of 'strategy' does not insulate attorney behavior from review." *Bullock v. Carver*, 297 F.3d 1036, 1048 (2002) (internal quotation marks and citation omitted) (citing *Fisher v. Gibson,* 282 F.3d 1283, 1296 (10th Cir. 2002)). Rather, "[c]ourts are required to consider whether that strategy was objectively reasonable." *Id.* at 1305; *Roe v. Flores-Ortega,* 528 U.S. 470, 481 (2000). "[T]he ultimate inquiry when deciding whether an attorney performed in a constitutionally deficient manner is not whether the counsel's actions can be considered strategic, but whether, under all the circumstances, counsel's actions may be considered objectively reasonable." *Bullock* at 1041.

The Eleventh Circuit's reliance on trial counsel's claim of "strategy" cannot obviate the need for review of whether the purported strategy is itself reasonable. Here, trial counsel made a "less than complete investigation" regarding the State's mental health expert and his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation.[8] As a result, counsel's performance was deficient with

[8] As the district court found, "conducting no investigation of or preparation for the State's key rebuttal witness, when his client's best hope for a life sentence was the establishment of mental health mitigation appears to be below the standard."

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

**Trial Counsel's Failure to Conduct Discovery**

In its efforts to attribute trial counsel's failings to a "strategy," the Eleventh Circuit avers that "the record shows that, with the limited time the state trial court gave him to prepare, Mr. Udell investigated Dr. Martell's testimony and knew what he was going to say at resentencing." " *Kearse*, 2022 WL 3661526, at *2. This is simply not true. The record reflects that Kearse's resentencing phase was to begin on December 9, 1996. On November 30, 1996, Kearse was notified by the State that Dr. Martell would be performing a compelled mental examination pursuant to Florida Rule of Criminal Procedure 3.202. (PCR. 475. 575, R2-T. 172). Dr. Martell was scheduled to examine Kearse on December 6, 1996. (R2. 538-9).

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

[9] Udell renewed the motion for continuance on at least two occasions during hearings on December 3 and 6, 1996.

Despite his arguments and the circuit courts admonition, Udell made no effort to investigate Dr. Martell, the State's sole mental health expert witness. Udell did not attempt to verify Dr. Martell's credentials or ascertain what testimony Dr. Martell was going to offer. He did not depose Dr. Martell. He made no effort to obtain a written report, and made no effort to obtain or review the video of Dr. Martell's evaluation of Kearse.

The Eleventh Circuit excuses counsel's failings because based on Udell's self-serving testimony that he "would have known what [Dr. Martell] was going to say" because he "would have either had a report or [he] would have asked the [s]tate [a]ttorney what [Dr. Martell was going to] say." *Id.* at *10. The Eleventh Circuit ignores the fact that Martell never provided a report and had no recollection of any discussions with Udell. Moreover, Udell had no specific recollection of any discussions with the prosecutor.

The Eleventh Circuit tries to attribute counsel's failings to a strategic decision because "Dr. Martell also thought that he and Mr. Udell might've had 'an informal conversation about the scope of is testimony before he took the stand'." *Id.* at *20. However, there is no indication, other than Dr. Martell's postconviction musings, that any such conversation actually took place. Even if Udell had casually spoken with the State Attorney about Dr. Martell's findings, this could not possibly substitute for obtaining a report or deposing the State's expert. One cannot cross-examine an expert based on what the State told him. One cannot adequately prepare his experts to rebut the opposition's experts based solely on what opposing

counsel tells him. One cannot effectively voir dire or challenge the opposition's expert's credentials based on what opposing counsel tells him.

Contrary to the Eleventh Circuit's belief, it is clear from the penalty phase transcript that Udell had no idea what Dr. Martell was going to say. As a result, Kearse's expert witnesses were inadequately prepared to rebut Dr. Martell's opinions and trial counsel was unaware of information that would have challenged Dr. Martell's credibility.

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

Udell did not attend Dr. Martell's evaluation of Kearse, despite having argued that it was necessary to do so, and despite billing 4.5 hours for it.[10] Udell was aware that Dr. Martell's examination was being videotaped, however he made no effort to obtain a copy of the videotape for his own information, or to provide to his experts to evaluate prior to their testimony. Udell testified that he "could have"

[10] On the videotape of Martell's evaluation, Udell appears briefly before asking Martell if there was any reason, from the State's expert's point of view, that he be present, and then leaving. (PCR-T. 559)

relied on the doctor's report.[11] (PCR-T. 560). However, Udell failed to obtain a written report from Dr. Martell.

Udell made no effort to depose Dr. Martell, despite having billed 1.5 hours for doing so and repeatedly requesting a continuance from the court specifically to do so. (PCR-T. 556). Instead, he simply asked the State Attorney or Dr. Martell (he couldn't remember) "what are you going to say, what's he going to say." (PCR-T. 810). Udell knew that he "wasn't going to get all fifteen chapters" but was content to get "the chapter headlines, which is, which aggravating factors existed and which mitigating factors didn't exist, or vice versa. . . It's not hard to figure out in many of these cases what an expert's going to say."[12] (PCR-T. 810).

The Eleventh Circuit relies on Udell's post-hoc assertion of "strategy" that "by not taking [Martell's] deposition, he avoided divulging details about the defense. *Kearse*, 2022 WL 3661526, at *22. However, "[a] decision not to investigate cannot be deemed reasonable if it is uninformed." *Fisher*, 282 F.3d at 1296 (citing *Strickland*, 466 U.S. at 691, 104); see also *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir.2001) (holding defense counsel's failure to investigate rendered any resulting strategy unreasonable). Nor can a trial strategy be deemed reasonable

[11] Udell testified that "the State's experts always do reports . . . I'd be hard pressed to believe that we got to trial and I didn't ask for it." (PCR-T. 553) The records reflects, however, that Martell did *not* produce a report and Udell never asked for it.

[12] Udell *repeatedly* asserts that he knew which *aggravating* factors Dr. Martell was going to testify to (PCR-T. 560-1, PCR-T. 757, PCR-T. 773-4, PCR-T. 810-11). Clearly, the State's expert was not in a position to testify to the existence of any aggravating factors.

based solely on what trial counsel think "might have" happened. See *Hooper v. Mullin*, 314 F.3d 1162, 1170–71 (10th Cir. 2002) ("Although defense counsel feared further investigation might prevent his arguing to the jury that Petitioner might have brain damage, Lee also admitted that he had no idea what additional testing might reveal.").

Moreover, the Eleventh Circuit's reliance on the mere incantation of the word "strategy" by a since-disbarred attorney ignores what *actually occurred* at trial. When arguing for a continuance on the day of trial, Udell was adamant that he "need[ed] to take the deposition of Dr. Martell and Dr. Mayberg before we pick the jury, before we do opening statement, and before I can do that I need to research their background, what they have published, what they have testified to before so I can ask them questions at deposition." (R.T. 204).

Trial counsel cannot fail to render effective assistance and then claim that it was his "strategy" to do so. The reviewing court must find that trial counsel's decision followed an informed and complete investigation. *Strickland,* 466 U.S. 668 (1984); *Harris v. Dugger*, 874 F. 2d 756, 763 (11th Cir. 1989) (Decisions limiting investigation "must flow from an informed judgment."); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) ("An attorney has a duty to conduct a reasonable investigation."); *See also*, *Wiggins v. Smith*, 539 U.S. 510 (2003). No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

The Eleventh Circuit excuses trial counsel's failure to depose the State's expert because "there is no categorical rule requiring defense attorneys to depose a witness in a criminal case." *Kearse*, 2022 WL 3661526, at *21.. The court reasons that "[n]either Alabama nor Georgia routinely permit depositions in criminal cases, and we don't understand Kearse to argue that every criminal defense attorney in those states provides ineffective assistance of counsel." *Id.* (footnotes omitted).

The court is correct that "[t]here is no constitutional right to discovery in a criminal case in Alabama." *Ex parte State*, 287 So. 3d 384, 394 n.5 (Ala. 2018) (quotation omitted).That being said, the court leaves out,

> "However, Rule 16, Ala. R. Crim. P., as adopted by the Alabama Supreme Court, specifically provides for discovery in criminal cases. Rule 16.5, Ala. R. Crim. P., addresses the sanctions that a court may impose for noncompliance with a discovery order."

*Id.* Moreover, the court ignores the fact that Alabama Rule 16.3(d) requires disclosure of expert reports upon request of the defendant.

Similarly, Georgia allows for depositions with leave of the court:

> "At any time after an accused has been charged with an offense against the laws of this state or an ordinance of any political subdivision or authority thereof, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of a prospective material witness of a party be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

Ga. Code Ann. § 24-13-130 (West).

More importantly, the court's reliance on Alabama and Georgia rules to excuse trial counsel's failings is misplaced where, as here, trial counsel argued vociferously for, and was granted, depositions, and simply failed to conduct them.

The Eleventh Circuit is correct that Kearse does not argue that every criminal defense attorney in those states provides ineffective assistance of counsel. However, in those states, as in Florida, any attorney who argues they are entitled to discovery, is granted discovery, and then fails to conduct any discovery, falls below the standard of effective assistance.

**Trial Counsel's Failure to Challenge the State's Expert**

In its insistence that Udell's failure to prepare was somehow a "strategy," the Eleventh Circuit never addresses Kearse's claims regarding Udell's reliance on Dr. Lipman, a neurologist, to refute Dr. Martell's psychological testimony. The court merely concludes that "as we've already explained, the record shows that Mr. Udell prepared Dr. Lipman and Dr. Petrilla to rebut Dr. Martell's opinion that Kearse was malingering." *Kearse*, 2022 WL 3661526, at *22.. However, the record reflects that Udell's attempt to use Dr. Lipman to rebut Martell's findings were disastrous for Kearse. Dr. Lipman is not a psychologist – he is a pharmacologist. Dr. Lipman testified in postconviction that he informed Udell that he needed to do additional work to rebut Dr. Martell's findings. (PCR. 5390). Dr. Lipman explained to Udell that, as a neuro*pharmacologist*, he was required to consult with a neuro*psychologist* to assist in these circumstances. (PCR-T. 960). Udell did not even respond to Lipman's concerns.

Dr. Lipman took it upon himself to contact two neuropsychologists, including Dr. Alan Friedman. (PCR-T. 950-51). Based on his expertise in the MMPI[13], Dr. Friedman concluded that, contrary to Dr. Martell's contention, Kearse was *not* malingering. Rather, Kearse's MMPI results more likely show that he suffers from emotional and psychiatric problems. (PCR-T. 889-907).

Despite the obvious importance of Dr. Friedman's opinion to support Kearse's case, Udell did not call Dr. Friedman to testify. Rather, Udell relied on Dr. Lipman to testify to Dr. Friedman's opinions which were outside Dr. Lipman's area of expertise. In postconviction, Udell's only explanation for failing to call Friedman was "we'd get the same testimony, same information to the jury through Lipman." (PCR-T. 917). The results were disastrous for Kearse. Dr. Lipman was not only effectively cross-examined, the State moved to exclude Dr. Lipman's testimony and the judge, speaking from the bench in open court, threatened him with criminal prosecution:

> THE COURT: [...]I guess maybe [Dr. Lipman] ought to be warned that the State Attorney may file criminal charges against him and maybe he ought to claim the 5th Amendment from here on out, I don't know if that's the import of telling him he's guilty of a misdemeanor. What he's doing of course only a jury can determine whether you really are guilty of such offense. I don't want to be a part of leading him into being charged with a crime, but

[13] Dr. Friedman testified in postconviction that he is a Fellow of the Society for Personality Assessment and has authored or co-authored several book chapters and research articles specific to MMPI interpretation (PCR-T. 878, 882-84) and is the senior author of three instructional textbooks on MMPI interpretation. (PCR-T. 409).

> anyway, my only point is, I'm going to overrule the State's objection and deny the motion.

(R2-T. 2287). It cannot be said that Udell's reliance on Dr. Lipman to rebut Martell did not prejudice Kearse.

Kearse submits that counsel's failings were not the result of any "strategy," and certainly not any reasonable one. *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (holding defense counsel's failure to investigate rendered any resulting strategy unreasonable). Failing to obtain a report, conduct a deposition, or even interview an opposing expert witness is not a strategy. Relying on opposing counsel to tell you what their expert will testify to is not a strategy. Assuming that what an opposing expert puts on paper is "probably true" (PCR-T. 553) is not a strategy. Assuming you can "figure out" what a State expert is going to say because all experts "tend to say the same things" (PCR-T. 810) is not a strategy. Refusing to attend the State expert's compelled mental examination of your client, "just saying you can't do that […] let the chips fall where they may" (PCR-T. 553), is not a strategy. Presenting psychological testimony through a pharmacologist, resulting in the judge threatening the pharmacologist with criminal sanctions, is not a strategy.

**The Prejudice Prong**

It cannot be said that trial counsel's failure to challenge the State's case did not prejudice Kearse. Trial counsel's failures to utilize his experts appropriately to rebut the State's expert resulted in Kearse being denied effective assistance. Trial counsel's failure to investigate and challenge Dr. Martell's testimony allowed the

State to decimate Kearse's mitigation claims. But for counsel's numerous failings, the result of Kearse's sentencing phase would have been different.

This is especially so given the circumstances of Kearse's case. The trial court found only two aggravators, one of which was only "technically" satisfied.[14] Kearse submits that this crime, while abhorrent and tragic, is not particularly aggravated. As Justice Anstead, joined by Justices Shaw and Pariente, stated in his dissent from the affirmance of the death sentence, "[W]e are considering a death sentence based upon only two aggravating factors, one of which the trial court itself gave diminished weight." *Kearse v. State*, 770 So. 2d 1119, 1136 (2000) (Anstead, J., dissenting). Moreover, there was substantial mental health mitigation:

> Based on the amount of mitigation presented by the defense and accepted by the trial court, and the presence of only one serious aggravator, this case is clearly not one of the most aggravated, least mitigated of first degree murders. Rather, the killing resulted from the impulsive act of an eighteen-year old who functions on a low average-borderline intelligence level and has a documented history of emotional problems.

*Kearse v. State*, 770 So. 2d 1119, 1136 (2000) (Anstead, J., dissenting).

As such, it cannot be said that trial counsel's failure to present to the jury a reasoned mitigation defense, and his failure to challenge the State's case, did not prejudice Kearse. Trial counsel's failures to utilize his experts appropriately to

---

[14] The sentencing court explained that the "in the course of a felony/robbery" aggravator was "diminished somewhat as stealing the officer's pistol was not a planned activity such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented." (R. 706)

rebut the State's expert resulted in Kearse being denied effective assistance. Trial counsel's failure to investigate and challenge Dr. Martell's testimony allowed the State to decimate Kearse's mitigation claims. But for counsel's numerous failings, the result of Kearse's sentencing phase would have been different.

As demonstrated herein, Kearse was prejudiced by Udell's numerous failings. But for counsel's failings, the compelling mitigation presented at the penalty phase "might well have influenced the jury's appraisal of [Kearse's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). The Eleventh Circuit's reliance on his incantation of strategy does not obviate the need for the court to determine whether that purported strategy was itself reasonable.

## CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

*/s/ Paul Kalil*

PAUL KALIL
Assistant CCRC–South
Florida Bar No. 174114
*kalilp@ccsr.state.fl.us*
**Counsel of Record*

RILEY HORAN
Florida Bar No. 1035446
Staff Attorney

Capital Collateral Regional Counsel – South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

February 23, 2023