No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILLY LEON KEARSE,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

VOLUME I of I

CAPITAL CASE

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APPENDIX A

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United States Court of
Appeals, Eleventh Circuit.

Billy Leon KEARSE, Petitioner-Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Attorney General, State of Florida, Respondents-Appellees.

No. 15-15228
|
Filed: 08/25/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 2:09-cv-14240-WJZ

Attorneys and Law Firms

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Leslie Teresa Campbell, Lisa-Marie Lerner, Attorney General's Office, West Palm Beach, FL, for Respondents-Appellees.

Before Wilson, Luck, and Ed Carnes, Circuit Judges.

Opinion

Luck, Circuit Judge:

***1** Billy Kearse was convicted and sentenced to death for the 1991 murder of police officer Danny Parrish. Thirty years later, Kearse appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. section 2254. He contends that the Florida Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in denying claims that his trial counsel was ineffective because he failed to investigate and prepare for the testimony of the state's mental health expert and he failed to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public. Kearse also contends that the Florida Supreme Court unreasonably applied *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) in concluding that his death sentence was not cruel and unusual even though he had low-level intellectual functioning, mental and emotional impairments, and was eighteen years and eighty-four days old at the time of the murder. After careful review of the briefs and the record, and with the benefit of oral argument, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Murder

On the night of January 18, 1991, Kearse and his friend, Rhonda Pendleton, decided to pick up some pizza. On their way back to Pendleton's home in Fort Pierce, Florida, Kearse drove the wrong way down a one-way street. Officer Parrish saw Kearse driving the wrong way and pulled him over for a traffic stop. Kearse couldn't give Officer Parrish a valid driver's license because he didn't have one and he lied about his name and date of birth. Officer Parrish told Kearse that he would write

Kearse three tickets and let him go if Kearse would tell him his real name.

Kearse kept lying about his name, so Officer Parrish told Kearse to get out of the car and put his hands on top of it. When Officer Parrish went to handcuff Kearse, Kearse told Officer Parrish not to touch him and called Officer Parrish a "lying ass pig" and said "I'm not going no mother fuckin' where with you." At some point, Officer Parrish accidentally hit Kearse below the eye with his handcuffs while trying to control Kearse. A physical struggle followed during which Kearse snatched Officer Parrish's service pistol.

Kearse shot Officer Parrish, causing Officer Parrish to fall back. Kearse briefly paused while Officer Parrish pleaded for his life—"Come on, man, don't do it, don't do it"—before firing off another round of bullets. He fired again and again and again and again and again and again and again and again and again and again and again and again—a total of thirteen bullets into Officer Parrish, killing him.

Kearse kept Officer Parrish's pistol, drove Pendleton home, and flattened his car's tire "[t]o keep the police off [him]." He told Pendleton that he killed Officer Parrish because he was on probation, he wasn't sure if there was a warrant out for his arrest, and he didn't want to go back to prison so soon after his release the month before. Kearse was arrested later that night and confessed that he shot Officer Parrish.

The Trial

***2** The State of Florida charged Kearse with first-degree murder and robbery with a firearm. Robert Udell, a defense attorney experienced with capital cases, was appointed to defend Kearse.

After a week-long trial in October 1991, the jury convicted Kearse on both counts. As required by Florida's capital-sentencing statute, the state trial court then held a separate sentencing hearing in front of the jury. The jury recommended that Kearse be sentenced to death, and the state trial court sentenced Kearse to death consistent with the jury's recommendation. The Florida Supreme Court affirmed Kearse's convictions but remanded for resentencing because of "errors relate[d] to the penalty phase instructions and the improper doubling of aggravating circumstances." *Kearse v. State*, 662 So. 2d 677, 685, 686 (Fla. 1995).

Resentencing

Resentencing was set for Monday, December 9, 1996. Thirteen days before the resentencing hearing, the state moved to have its mental health expert, Dr. Daniel Martell, examine Kearse. In response, Mr. Udell moved to continue the resentencing or to strike Dr. Martell as a witness. Mr. Udell argued that he only heard about the state's intent to use Dr. Martell as an expert witness after the state responded to a discovery demand on November 30. And he said he could not attend Dr. Martell's examination on the state's proposed dates because of scheduling conflicts. Mr. Udell also moved to: (1) limit the use of any information gathered from

the examination; (2) declare unconstitutional Florida Rule of Criminal Procedure 3.202—the newly established rule that permitted the state to examine Kearse;[1] (3) prohibit application of rule 3.202; and (4) limit the scope of the examination.

On December 3, 1996, the state trial court held a hearing on Mr. Udell's motions. The state trial court granted the state's motion to examine Kearse and set the examination for December 5, the Thursday before the December 9 resentencing. The state trial court denied Mr. Udell's motion to continue resentencing or to strike Dr. Martell as a witness, and deferred ruling on his other motions.

At the start of resentencing on December 9, Mr. Udell renewed his motion to continue or to strike Dr. Martell as a witness. Mr. Udell explained that three days earlier the state gave him "a copy of the raw data that Dr. Martell generated as a result of his mental health evaluation of [Kearse]" and that the data was "on its way to [Kearse's] experts for their review." But Mr. Udell wanted more time so he could research Dr. Martell's prior publications and expert opinions. The state trial court denied the motion, concluding there were no grounds for a continuance and explaining that Mr. Udell could depose Dr. Martell in the evening or over a weekend.

***3** Under Florida's capital-sentencing statute, the jury was required to consider whether at least one "aggravating circumstance" existed and, if so, whether there were sufficient "mitigating circumstances" to outweigh the aggravating circumstances the jury found. *See* Fla. Stat. § 921.141(2) (1996). Mr. Udell sought to prove three statutory mitigating circumstances at resentencing: (1) the murder was committed while Kearse was under the influence of extreme mental or emotional disturbance; (2) Kearse's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and (3) Kearse's age at the time of the murder. *See id.* § 921.141(6)(b), (f), (g). Mr. Udell also sought to prove forty non-statutory mitigating circumstances, including twenty-one related to Kearse's mental health.[2]

Mr. Udell called three mental health experts to prove the statutory and non-statutory mitigating factors related to Kearse's mental health.

Kearse's mental health experts' testimony

1. Pamela Baker

Pamela Baker, a licensed mental health counselor, first met Kearse in 1981. Mrs. Baker worked with children who had been referred to the state as abused, neglected, or ungovernable. Kearse was referred to Mrs. Baker as an ungovernable child because he left home without telling anyone and was having problems with his behavior and attendance at school. Kearse was only eight years old at the time, which was unusual because most children referred to the state were much older. Mrs. Baker explained that Kearse was committed to a county program for a few months and then returned to his mother's care.

Mrs. Baker's review of Kearse's records revealed that the state was concerned about whether he was suffering abuse at home. It seemed that Kearse's mother had given up on him and had little interaction with him. Kearse would often hoard food at school events because he was neglected at home, and he didn't want to leave the county program because he was eating better than he ate at home. When Kearse was placed into the county program, he explained that he ran away from home because he got scared when his mother drank alcohol and fought with her boyfriend. Kearse's mother agreed to participate in a state parenting program, but her participation was only superficial.

Mrs. Baker noted that Kearse was a juvenile delinquent by age eight. He committed several offenses over the years, primarily burglaries and petty thefts, but his delinquency records didn't reflect a lot of aggressive behavior; Kearse would typically fight with someone only if they were first aggressive to him.

Mrs. Baker testified that her husband had taught Kearse and that he had no doubt that Kearse was severely emotionally handicapped and "operating at a retarded level." By the time Kearse was thirteen and in the seventh grade, he could spell only two words: "cat" and "run." Mrs. Baker taught Kearse for two years and also had no doubt that he was severely emotionally handicapped. Mrs. Baker never thought Kearse would kill someone, although she did think that about other children she had encountered. She described Kearse as being very hyperactive but not violent.

Mrs. Baker visited Kearse in 1991 after he was jailed for murdering Officer Parrish. During the visit, Kearse discussed his upbringing. He told Mrs. Baker that he was once punished by having to walk around the block naked in front of his neighbors, that he had been tied to a bed and beaten, and that his mother would beat him with extension cords and coat hangers fashioned into clubs. Kearse also told Mrs. Baker that he started drinking alcohol when he was four or five years old, started smoking marijuana at the age of twelve or thirteen, and started smoking cigarettes at the age of fourteen. Kearse reported that he had been sexually molested when he was twelve years old and had lost his virginity to a thirty-one-year-old when he was less than sixteen years old.

***4** Mrs. Baker diagnosed Kearse with "panic disorder." Mrs. Baker also thought that Kearse met the criteria for "conduct disorder." Mrs. Baker reviewed Kearse's medical records and noted that he had been diagnosed with "brain damage" and possibly suffered from fetal alcohol syndrome.

2. Dr. Fred Petrilla

Dr. Fred Petrilla, a licensed clinical psychologist, testified that he examined Kearse at the time of Kearse's trial in 1991 and again in 1996 shortly before resentencing. In 1991, Dr. Petrilla spent twenty hours with Kearse and met with Kearse's mother. Dr. Petrilla gave several tests to Kearse, including an intelligence test. The results of the tests suggested brain dysfunction. Although Kearse's IQ was 79 —"within the borderline range of intelligence,

with mentally retarded being 60 and down"—he was not mentally retarded. At the time, Kearse scored at a third-grade level for reading and spelling and at a fourth-grade level for arithmetic. Dr. Petrilla explained that the tests he gave Kearse accounted for whether a patient was malingering and that he did not think that Kearse was malingering.

One of the tests Dr. Petrilla gave to Kearse was the Minnesota Multifacing Personality Inventory ("MMPI"). Dr. Petrilla gave the MMPI to Kearse in 1991 and again in 1996. The results showed that Kearse acted without thinking and was extremely sensitive. One of the factors in the test—the F Scale—considered whether a person was trying to fake their symptoms. Kearse's scores in 1991 weren't suggestive of malingering. However, Kearse's F Scale in 1996 was highly elevated. Although Dr. Petrilla conceded that he wasn't an expert in interpreting F Scale results, he believed that Kearse's elevated F Scale did not indicate malingering but was instead elevated for other reasons, including stress, brain damage, and emotional problems.

According to Dr. Petrilla, Kearse suffered from one of the broadest arrays of problems that he had seen in anyone he examined. Dr. Petrilla concluded that Kearse suffered from longstanding brain dysfunction and learning disabilities. Dr. Petrilla concluded that Kearse murdered Officer Parrish while Kearse "was under an extreme emotional disturbance" and that he was "still under an extreme emotional disturbance" at the time of resentencing. Dr. Petrilla also concluded that Kearse was substantially incapable of conforming his conduct to the requirements of the law at the time of the murder.

3. Dr. Jonathan Lipman

Dr. Jonathan Lipman, a neuropharmacologist, examined Kearse for drug-related conditions. Dr. Lipman spoke with Kearse's mother who confirmed that she abused alcohol while she was pregnant with Kearse. He concluded that Kearse suffered from "[f]etal [a]lcohol [e]ffect, a milder form of [f]etal [a]lcohol [s]yndrome." Dr. Lipman also had Kearse undergo several brain scans, the results of which suggested brain damage. He spoke with Kearse about his recollection of the night of the murder and determined that Kearse was "confabulat[ing]." Dr. Lipman explained that this meant Kearse was not lying but was instead filling the gaps in his memory with what he believed was reasonable. He concluded that Kearse had acted impulsively on the night of the murder.

Dr. Lipman testified that he often relied on the reports of other experts to reach a professional opinion in a case. And because Dr. Lipman was not a psychologist or neuropsychologist, he reached out to Dr. Lawrence Levine, a board-certified neuropsychologist, and Dr. Alan Friedman, a board-certified psychologist, to get their opinions on Dr. Martell's test results and Kearse's elevated F Scale. Dr. Lipman recounted to the jury what Dr. Levine and Dr. Friedman had reported to him.

***5** According to Dr. Lipman, Dr. Levine reviewed the results of Dr. Martell's examination of Kearse and explained that Kearse scored in the 50th percentile for a

nine-and-a-half-year-old child on one of Dr. Martell's tests and that Kearse's score on another of Dr. Martell's tests corroborated Dr. Petrilla's conclusion that Kearse suffered from a verbal memory disorder. Kearse's results from the verbal learning test also indicated, according to Dr. Levine, that he was not malingering. A third test that Dr. Levine reviewed showed low average performance and no malingering or exaggeration. Dr. Levine concluded that the test results showed brain dysfunction. Dr. Lipman discussed Dr. Levine's findings with Dr. Petrilla, who confirmed that they were consistent with his findings.

Dr. Lipman testified that Dr. Friedman was "the natural choice of a person" to interpret Kearse's elevated F Scale because Dr. Friedman was "recognized as the expert in [the MMPI]" and was "unique among[ ] psychological researchers in that he [wa]s the person that actually d[id] the raw studies of malingerers of disabled people, and he developed the norms." Dr. Lipman said that Dr. Friedman was the author of a "very famous paper" on the MMPI in which Dr. Friedman "provide[d] the tables of norms drawn from many people that he has evaluated by which to interpret F Scales." Dr. Lipman told the jury what Dr. Friedman had reported to him.

According to Dr. Lipman, Dr. Friedman reviewed Kearse's MMPI results and concluded that Kearse "understood the questions and answered honestly without any ... symptom magnification whatsoever and answered consistently thereby generating a valid profile." Dr. Friedman said that Kearse's "F Scale ... [was] in the valid range," thus "indicating a cooperative nondissimulating test taking attitude." Dr. Friedman concluded that "the elevation seen in all of ... Kearse's MMPI profiles reflect[ed] psychiatric disturbance" and that it was inappropriate to look only at the F Scale to assess whether Kearse was malingering. Dr. Friedman relied in part on the "F minus K index, which is a treatment that you give to the F Scale to interpret it." Dr. Friedman noted that Kearse's F minus K score was "significantly below" a benchmark for malingering.

The state's mental health expert's testimony

The state's only witness in rebuttal was Dr. Martell. Dr. Martell disagreed with Mrs. Baker's diagnosis of panic disorder. Dr. Martell also thought that fetal alcohol effect —Dr. Lipman's diagnosis—was "not a mental disorder." Dr. Martell explained that the features of fetal alcohol effect could occur naturally without alcohol and said that "in the literature, there's a call to get rid of this term [f]etal [a]lcohol [e]ffects." Dr. Martell concluded that, in any event, it was "highly questionable" that Kearse suffered from fetal alcohol effect.

Dr. Martell testified that Kearse "ha[d] some areas of weakness but that he d[id] not have brain damage." Dr. Martell disagreed with Dr. Petrilla's finding of brain damage because Dr. Petrilla relied on a set of norms that had been criticized for not accounting for the age, sex, and educational background of the subject. Dr. Martell determined that any impairment shown on Dr. Petrilla's tests resulted from Kearse's depression.

Dr. Martell concluded that Kearse suffered from a conduct disorder as a child and didn't perform well academically because he "made a choice not to apply himself in school." Dr. Martell also diagnosed Kearse with "antisocial personality disorder" and "psychopathy." Dr. Martell explained that neither diagnosis rose to the level of extreme emotional mental disturbance within the meaning of the statutory mitigating circumstance.

Dr. Martell also concluded that Kearse was "faking on [his] personality testing in an attempt to make himself look more impaired than he is." In Dr. Martell's opinion, Kearse's elevated F Scale in his MMPI results showed a "severe effort to fake the test." According to Dr. Martell, the MMPI results were "totally invalid," "uninterpretable," and "reflect[ed] an attempt on [Kearse's] part to fake crazy in order to avoid responsibility."

***6** Dr. Martell stated that he had reviewed the information that Dr. Friedman had relayed through Dr. Lipman. Dr. Martell said that, although Dr. Friedman had been "portrayed ... as the world's greatest expert on the MMPI," he wasn't. Dr. Martell explained that the F minus K index used by Dr. Friedman was "not consistently reliable as a method for determining whether a profile is invalid or not." Dr. Martell also faulted Dr. Friedman for not having personally examined Kearse. Dr. Martell concluded that Kearse was a pathological liar, and he rejected Dr. Lipman's determination that Kearse was confabulating.

In sum, Dr. Martell concluded that Kearse wasn't under the influence of an extreme mental or emotional disturbance when he murdered Officer Parrish. Dr. Martell also concluded that Kearse's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the murder wasn't substantially impaired. That conclusion was based on Dr. Martell's assessment of Kearse's behavior before, during, and after the murder. Dr. Martell explained that Kearse: (1) understood he had done something illegal by driving the wrong direction down a one-way street and that he was worried about violating his probation; (2) showed a capacity to conform his conduct to the requirements of the law because he decided to lie to Officer Parrish about his name and date of birth to avoid responsibility; (3) made a decision with "[e]ach squeeze of th[e] trigger" as he fired multiple series of rounds at Officer Parrish; and (4) made efforts to conceal his involvement by taking Officer Parrish's pistol with him, disabling the car when he got to Pendleton's home, and hiding the pistol.

On cross-examination, Mr. Udell highlighted that Dr. Martell hadn't spoken with Kearse's mother or several of the defense witnesses. And Dr. Martell conceded that reasonable experts could form different opinions about the same set of facts. Dr. Martell also admitted that if he were to have a pregnant wife, he wouldn't want her to drink alcohol like Kearse's mother had because it could have significant detrimental effects on their child and lead to brain dysfunction. Dr. Martell confirmed that he hadn't studied the effects of alcohol on animals and that he didn't practice neuropharmacology.

Dr. Martell admitted that he relied on reports of Kearse's brain scans but hadn't reviewed the

scans. Dr. Martell also acknowledged that his opinion about Kearse's lack of effort at school conflicted with the defense witnesses who said otherwise. And he admitted that the psychiatric manual he relied on—the Diagnostic and Statistical Manual of Mental Disorders—previously considered homosexuality to be a mental disorder.

Mr. Udell challenged Dr. Martell's conclusion that Kearse was capable of conforming his conduct to the requirements of the law based on Kearse's actions at the time of the murder. Mr. Udell asked Dr. Martell to explain when he thought that Kearse formed the intent to kill Officer Parrish, and Dr. Martell conceded that he "hadn't thought about it." Mr. Udell also asked Dr. Martell why Kearse didn't have a gun with him if he was determined to avoid arrest. Dr. Martell responded that Kearse likely didn't want to add a felon-in-possession charge to his record. Mr. Udell then highlighted a conflict in Dr. Martell's testimony: "He was willing to kill in order not to go back to jail but he wasn't willing to possess a firearm charge, he wasn't concerned about that but he was so concerned about not going back to jail that he'd kill an officer?" Mr. Udell similarly contrasted Dr. Martell's conclusion that Kearse was trying to conceal his involvement in the murder with the fact that Kearse confessed to killing Officer Parrish as soon as he met with police.

Kearse's renewed death sentence

***7** The jury unanimously recommended the death penalty and the state trial court followed that recommendation, finding that the aggravating circumstances of Kearse's crime outweighed the mitigating ones. The state trial court found two statutory aggravating circumstances. First, the state trial court found that the murder was committed while Kearse was engaged in the commission of—or during flight after committing or attempting to commit—robbery. And second, the state trial court found three other statutory aggravating circumstances which it merged into one because they involved a single aspect of the offense: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (2) the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (3) the victim was a law enforcement officer engaged in the performance of his official duties.

The state trial court found only one statutory mitigating circumstance—Kearse's age at the time of the murder. The state trial court found three non-statutory mitigating circumstances: (1) Kearse cooperated with law enforcement; (2) his behavior at trial was acceptable; and (3) he had a difficult childhood that resulted in psychological and emotional problems. The state trial court found that the mitigating circumstances were "not individually or in toto substantial or sufficient to outweigh the aggravating circumstances."

Kearse again appealed his death sentence to the Florida Supreme Court, but this time the court affirmed. *Kearse v. State*, 770 So. 2d 1119, 1135 (Fla. 2000).

State Postconviction Relief

After the Florida Supreme Court affirmed Kearse's renewed death sentence on direct appeal, Kearse moved for postconviction relief in state court. Kearse claimed that he received ineffective assistance of counsel at resentencing because Mr. Udell failed to investigate and prepare for Dr. Martell's testimony. Kearse also claimed that he received ineffective assistance of counsel at resentencing because Mr. Udell failed to present evidence of "Officer Parrish's prior misconduct and difficulties in dealing with the public." Specifically, Kearse faulted Mr. Udell for calling none of the "several civilians" who had lodged complaints against Officer Parrish to testify at resentencing and for failing "to request Officer Parrish's complete personnel file from [the] Fort Pierce Police Department."

Evidence relating to Kearse's ineffective assistance of counsel claim based on Mr. Udell's failure to investigate and prepare for Dr. Martell's testimony

In April and May 2005, the state postconviction court held a five-day evidentiary hearing on both claims. As to his ineffective assistance of counsel claim based on Mr. Udell's failure to investigate and prepare for Dr. Martell's testimony, Kearse presented testimony from five mental health expert witnesses (Dr. Friedman, Dr. Lipman, Dr. Barry Crown, Dr. Richard Dudley, and Dr. Thomas Hyde), Mr. Udell, and Robert Norgard, an expert on the community standards for defense attorneys. The state called one witness, Dr. Martell.

1. Dr. Friedman

Dr. Friedman testified that he became involved in Kearse's case when he was contacted by Dr. Lipman in 1996. He testified that Dr. Lipman asked him to look at Kearse's MMPI data. He did so and determined that Kearse's MMPI results produced a "valid profile" because his F minus K index fell within a range that suggested "that the test [was] valid, that he wasn't faking, that it[was] open to interpretation." Dr. Friedman explained that Kearse's "F(P) score" also indicated that "he was not exaggerating." Although Kearse's F Scale was elevated, which could suggest that Kearse was faking, he testified that Kearse's F Scale may have been high because Kearse had "serious maladjustment or psychiatric problems." He disagreed with Dr. Martell's finding that Kearse's MMPI results were "[t]otally invalid."

***8** On cross-examination, Dr. Friedman admitted that the profile generated by Kearse's MMPI results was at least in part consistent with Dr. Martell's findings. He also conceded that Dr. Martell "had an advantage in being able to interview [Kearse]." And he agreed that whether an F Scale showed malingering was subject to interpretation. Dr. Friedman confirmed that Dr. Lipman's recitation of his opinion at resentencing was largely accurate.

Dr. Friedman would have testified at Kearse's resentencing if he had been asked to.

2. Dr. Lipman

Dr. Lipman testified that Mr. Udell hired him to testify at Kearse's resentencing. He was qualified to testify as an expert about MMPI results, although he "would normally request another consultation ... for [his] own edification." He consulted Dr. Petrilla about Kearse's MMPI results, and Dr. Petrilla told Dr. Lipman that he thought Kearse's MMPI results were invalid. Dr. Lipman knew from his own research that Dr. Petrilla "was probably not correct about [that]," so he sought an "outside opinion" from Dr. Friedman. Mr. Udell never had any interaction with Dr. Friedman, and Dr. Lipman paid for Dr. Friedman's services.

At the time of resentencing, Dr. Lipman had not been provided Dr. Martell's deposition, report, or videotaped examination of Kearse. He didn't agree with Dr. Martell's findings. It was clear to him that Kearse had a "developmental disorder" and suffered from fetal alcohol effect.

On cross-examination, Dr. Lipman agreed that he had "sufficient information" to support his opinion that Kearse suffered from fetal alcohol effect. He also agreed that Mr. Udell "overwhelmed [him] with paperwork" and materials to rely on. No new information had been given to Dr. Lipman since the resentencing that would've changed his opinion that Kearse suffered from fetal alcohol effect.

3. Dr. Crown

Dr. Crown, a licensed psychologist, testified that he examined Kearse on December 9, 2002, and gave him neuropsychological tests. One of the tests showed that Kearse "was putting forth good effort, good motivation, no indication of malingering or exaggerating or faking." Dr. Crown concluded that Kearse was "impaired" and had "neuropsychological deficits," and he confirmed that his findings were consistent with Dr. Petrilla's. Dr. Crown's findings were also consistent with reports of doctors who had examined Kearse after resentencing—specifically, Drs. Hyde and Dudley. The common finding among the doctors was that Kearse "ha[d] low levels of functioning" and was "brain damaged."

Dr. Crown understood that when Dr. Petrilla gave the MMPI to Kearse, the questions had to be read to him. Dr. Crown thought it was "highly unlikely" that an MMPI given to Kearse would yield a valid result because the MMPI requires an eighth-grade reading level and Kearse was approximately at a sixth-grade reading level.

Dr. Crown reviewed the videotape and transcript of Dr. Martell's examination of Kearse and didn't think it was a standard neuropsychological clinical interview. Dr. Crown conceded that Dr. Martell didn't "get in ... Kearse's face," probe[ ] him like he was a police interrogator," or give him a "hard sell." Instead, Dr. Crown found the examination "confrontational" because it involved "negative priming"—"the first thing [Dr. Martell] did was tell ... Kearse he wanted to discuss the crime, ... which tends to create a negative set." Dr. Crown disagreed with Dr. Martell's ultimate findings about Kearse.

4. Dr. Dudley

***9** Dr. Dudley, a physician with a specialty in psychiatry, testified that he performed a psychiatric evaluation of Kearse on February 10, 2003. Dr. Dudley reached four conclusions based on his evaluation: (1) Kearse had "long-standing cognitive difficulties" that "certainly impaired his decision making [and] the impulsivity of his acts"; (2) Kearse suffered from post-traumatic stress disorder; (3) Kearse "had learning difficulties at minimum, and possibly [attention deficit hyperactivity disorder]"; and (4) Kearse had a "substance abuse diagnosis." Dr. Dudley also testified that Kearse's cognitive functioning was below where it should be and that Kearse wasn't able to conform his conduct to the requirements of the law when he murdered Officer Parrish. Dr. Dudley explained that his findings were consistent with Dr. Petrilla's and Dr. Lipman's testimony at resentencing and with Dr. Crown's and Dr. Hyde's findings.

Dr. Dudley reviewed the videotape of Dr. Martell's examination of Kearse and concluded that Dr. Martell should've done more to follow up on some topics. Dr. Dudley disagreed with Dr. Martell's findings that Kearse chose not to perform at school and that there was no evidence that Kearse suffered from a major mental disorder.

Dr. Dudley would've been available to testify at Kearse's resentencing had he been asked to.

5. Dr. Hyde

Dr. Hyde, a board-certified neurologist, testified that he performed a clinical evaluation of Kearse a few months before the postconviction hearing. Dr. Hyde concluded that Kearse suffered from "attention deficit hyperactivity disorder in childhood with residual attention deficit symptoms into adulthood." Dr. Hyde also concluded that Kearse had "brain damage" and "abnormalities [that] would be compatible with developmental dysfunction of the central nervous system." Dr. Hyde's findings were consistent with Dr. Crown's, Dr. Dudley's, and Dr. Petrilla's. According to Dr. Hyde, Kearse didn't exhibit any signs of malingering during the evaluation.

Dr. Hyde disagreed with Dr. Martell's opinion that Kearse suffered from antisocial personality disorder. Dr. Hyde explained that the neuropsychologists he worked with in his clinical practice "usually conduct[ed] their examinations quite differently than Dr. Martell did" because "[t]hey rel[ied] much more heavily on testing batteries," "[t]hey usually follow[ed] a ... structured diagnostic interview when trying to reach psychiatric diagnoses," and "[t]hey seem[ed] to explore all aspects of possible psychiatric pathology in a greater and more organized fashion." Dr. Hyde thought that Dr. Martell's examination of Kearse "was heavily weighted towards personality disorders and antisocial personality disorder in general, and was not as broad based an interview and examination of [Kearse] for looking for all aspects of psychiatric diagnoses."

6. Mr. Udell

Mr. Udell testified that his strategy at Kearse's resentencing was to establish mitigating circumstances based on Kearse's impoverished

background, his age, and the fact that he suffered from fetal alcohol effect.

Mr. Udell didn't know when he first became aware that the state sought to have Dr. Martell examine Kearse. Mr. Udell said that Kearse's resentencing may have been the first time he had dealt with Dr. Martell. When asked whether he had made any attempt to investigate Dr. Martell's background, Mr. Udell said that he "would have asked the lawyers that [he] kn[e]w who had been doing this kind of work for many years" if they knew of Dr. Martell, "but that's as far as it would have gone."

Mr. Udell couldn't remember if he'd obtained Dr. Martell's resume. And he didn't think he'd ever deposed Dr. Martell. 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."

***10** Mr. Udell said 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." Mr. Udell explained that it was not unusual for defense counsel and the state attorney to ask each other what their witnesses were going to say. Mr. Udell had known the state attorneys in Kearse's case for many years, and they had a professional courtesy of sharing information with each other.

The transcript of Dr. Martell's examination of Kearse reflected that Mr. Udell was present at the beginning but left shortly after it started. Mr. Udell asked Dr. Martell whether he and the state attorney needed to be present, and Dr. Martell said that he preferred to do the examination alone with Kearse, so Mr. Udell and the state attorney left. Mr. Udell didn't know if he ever reviewed the videotape of the examination.

On cross-examination, Mr. Udell said he thought he "put on everything there was concerning [Kearse], his social history, mental health history, [and] organic brain problems." Mr. Udell "spoke to all the people in the juvenile system who knew [Kearse]." Generally speaking, jurors in Indian River County, where the trial was held, were "not big fans of mental health testimony," so Mr. Udell tried to play to their sensibilities. Mr. Udell thought that "bringing in all [of Kearse's former] teachers ... would send a message to the jury, forget the mental health experts, we're on your level, this is a good kid." Mr. Udell explained that he was familiar with the medical terminology; when he spoke casually at trial, it was a strategy not to appear smarter than the jury.

Mr. Udell explained that he had Dr. Lipman relay Dr. Friedman's opinion that Kearse's F Scale scores did not show that Kearse was malingering because he "knew what [Dr.] Martell was going to say" at resentencing. A letter that Mr. Udell had written to Dr. Lipman confirmed that Mr. Udell planned to use Dr. Lipman to anticipatorily rebut Dr. Martell's testimony. Mr. Udell agreed that he used Dr. Petrilla and Dr. Lipman to rebut Dr. Martell's opinions. Mr. Udell also confirmed that Dr. Lipman reviewed Dr. Martell's test data. Mr. Udell "knew going into trial exactly what Dr.

Martell was going to say as to which statutory aggravators and/or mitigators existed, and what his test results supposedly revealed, and where he disagreed with Dr. Petrilla." Mr. Udell didn't separately call Dr. Friedman to testify because he could get the "same information to the jury through [Dr.] Lipman."

7. Robert Norgard

Robert Norgard, a defense attorney experienced with capital cases, testified as an expert about the community standards for defense attorneys at the time of Kearse's resentencing.[3] Mr. Norgard said that it would be "extremely improper" to have experts relay testimony of other experts outside their own expertise because they would have "no basis or experience to defend the information they're providing" and would be "vulnerable to cross examination."

***11** Mr. Norgard explained that there were "a lot of different tactical and strategic ways to go about preparing to deal with" a state's mental health expert. If the defendant took part in a videotaped mental health evaluation, "you would certainly want to review and be familiar with the evaluation." However, whether to attend the evaluation "would be a tactical and strategic decision by the attorney." Mr. Norgard noted that "[i]n some instances the [s]tate may call upon a local expert, someone that [was] routinely used in your geographic area that you may already be familiar with." Whether to depose an expert would be "within the tactical and strategic province of the attorney" and "would vary from case to case."

Mr. Norgard "would never say that you always have to depose an expert." For example, an attorney could decide against deposing an expert because there may be things "you don't want the other side to know about." Mr. Norgard agreed that even the best criminal defense lawyers might have different approaches to defending a particular client.

8. Dr. Martell

The state called Dr. Martell. Dr. Martell testified that his opinion about Kearse remained the same despite hearing Dr. Friedman's testimony. Dr. Martell noted that "Dr. Friedman didn't have the advantage of looking at the 1991 MMPI profile," and Dr. Martell disagreed with Dr. Friedman's testimony about the F minus K index. Dr. Martell believed he was in a better position than Dr. Friedman to interpret Kearse's MMPI results and assess whether Kearse was malingering because he had the advantage of personally examining Kearse.

Dr. Martell remembered Mr. Udell coming to his examination of Kearse. Dr. Martell recalled that Mr. Udell asked him to begin the examination by asking about the facts of the crime so that he could object and make a record. Dr. Martell agreed to that request and began with the crime. Mr. Udell made his objection and then left.

Dr. Martell didn't think he'd ever been formally deposed in Kearse's case. He also couldn't remember if he gave any information about his examination of Kearse to Mr. Udell before resentencing. Dr. Martell thought that he and Mr. Udell might've had "an informal

conversation about the scope of [his] testimony before [he] took the stand."

Evidence relating to Kearse's ineffective assistance of counsel claim based on Mr. Udell's failure to present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public

As to his ineffective assistance of counsel claim based on Mr. Udell's failure to present evidence of "Officer Parrish's prior misconduct and difficulties in dealing with the public," Kearse presented testimony from his investigator at resentencing and four citizens who had negative encounters with Officer Parrish. Kearse also called Mr. Udell to testify about his failure to obtain Officer Parrish's personnel file and his decision not to call citizens to testify about their negative encounters with Officer Parrish. And Kearse presented testimony from Mr. Norgard about the community standards for defense attorneys dealing with cases involving the murder of a police officer.

1. Anne Evans

Anne Evans, Kearse's investigator at resentencing, testified that, when Mr. Udell hired her in 1996, she interviewed "some individuals who had come in contact with [Officer Parrish] while he was a police officer, and [asked about] the experiences they had." Investigator Evans explained that Mr. Udell "gave [her] a list of names who had allegedly made complaints against [Officer Parrish], and asked [her] if [she] would go out and interview them." Investigator Evans also interviewed Kearse's family members and "tr[ied] to develop new witnesses" through her investigation.

***12** Investigator Evans didn't have access to any of Officer Parrish's employment records despite "specifically" asking Mr. Udell to request them and telling Mr. Udell that she "thought it was very important" to get Officer Parrish's personnel file. Both Investigator Evans and Kearse thought that the citizen complaints should've been presented at resentencing, but Mr. Udell said he wasn't going to present any of them.

2. Tracey Davis

Tracey Davis testified about her negative encounter with Officer Parrish. She testified that Officer Parrish pulled her over and wouldn't tell her what she had done wrong. They argued for about thirty to forty-five minutes before Officer Parrish told Ms. Davis what she was being charged with. Ms. Davis's mother eventually arrived, and Officer Parrish "very rudely told her" that he didn't have to explain anything to her.

Ms. Davis felt like Officer Parrish was "racially motivated to stop [her]." Ms. Davis thought that Officer Parrish targeted her because she lived in an "old black neighborhood" that was "crime ridden." She explained that "it was dark" out and that Officer Parrish "couldn't tell who was driving [her] vehicle at first." Ms. Davis thought that Officer Parrish followed her "figuring [she] was going into a drug area."

Ms. Davis immediately filed a complaint with the police department because Officer Parrish "was very unprofessional," harassed her, and belittled her. Ms. Davis wasn't surprised to learn that Officer Parrish had gotten "into a scuffle with a civilian" and died.

On cross-examination, Ms. Davis admitted that she had a "bad attitude" and cursed at Officer Parrish when he pulled her over. When questioned about Officer Parrish's report that Ms. Davis asked him, "[W]hat are you f***ing white cops doing up here anyway, why aren't you down f***ing with your own kind?", Ms. Davis testified that she was "pretty sure [she] didn't say that." Ms. Davis conceded that, although she had used the "N word" in her letter to the police department about her encounter with Officer Parrish, Officer Parrish "never used any racial terms" during the encounter. She also conceded that Officer Parrish never "physically intimidated" her—she just "didn't like [his] attitude."

Ms. Davis was never contacted by Mr. Udell to testify at Kearse's trial or at his resentencing, but she would have been willing and available to testify.

3. Fabian Butler

Fabian Butler, Kearse's maternal cousin, also had a negative encounter with Officer Parrish. On his way home one night, Mr. Butler stopped to talk to some friends at a street corner. Mr. Butler didn't want to be "affiliated with what [they were] doing," so he kept walking home. By the time he had gotten about ten to fifteen steps away from the corner, a police car pulled up, and the officer—who Mr. Butler later learned was Officer Parrish—said to stop. Mr. Butler kept walking and assumed that Officer Parrish was talking to the people on the corner. Mr. Butler stopped when he heard a pistol cocking.

Officer Parrish pointed his pistol at Mr. Butler and told him to "shut up" after Mr. Butler asked what he had done wrong. Officer Parrish "made open threats" and said, "I'm the type of officer I'm gonna do bodily harm to you and put you in jail and put you in a holding cell and don't let nobody see you."

Mr. Butler did not make a complaint against Officer Parrish after the incident because he did not know he could file complaints against police officers. Mr. Butler was not asked to testify at either Kearse's trial or resentencing but would have been willing to testify at both had he been asked to do so.

4. Charles Pullen

***13** Charles Pullen testified about an encounter with Officer Parrish that occurred while he was walking home one day. Officer Parrish mistook Mr. Pullen for his brother and handcuffed Mr. Pullen to a tree, where red ants started biting him. Mr. Pullen told Officer Parrish ants were biting him, but Officer Parrish said that he didn't "give a damn." Mr. Pullen was handcuffed to the tree for about five to ten minutes. The ant bites on Mr. Pullen's leg got infected, and he had to take medications.

On cross-examination, Mr. Pullen confirmed that he had been "arrested twenty times" before 1991 and had been in and out of jail. Mr. Pullen conceded that he never filed a complaint against Officer Parrish after the incident.

Mr. Udell contacted Mr. Pullen before Kearse's trial but did not ask him to testify. Mr. Pullen would've been willing to testify at Kearse's trial and resentencing had he been asked to do so.

5. Eric Jones

Eric Jones testified that he had multiple negative encounters with Officer Parrish. One time, Mr. Jones was pulled over by a female officer who told him to stay in his car while she waited for another officer to arrive. When Officer Parrish arrived, Mr. Jones got out of his car. Officer Parrish immediately "became extremely authoritative" and demanded that Mr. Jones get in his car.

Officer Parrish and the female officer asked him to sign a ticket that they had written. Mr. Jones said that he couldn't read the ticket because it was dark and he asked to read it in the light. Officer Parrish told Mr. Jones that he didn't need to know what the ticket said and that he didn't have the right to read it. As Mr. Jones opened his door to get in the light and read the ticket, Officer Parrish got directly in Mr. Jones's face, and Mr. Jones could "feel that [Officer Parrish] wanted [Mr. Jones] to just do something to provoke him." Mr. Jones felt threatened and got back in his car. Mr. Jones drove away but, "within minutes" of leaving, Officer Parrish pulled him over. Mr. Jones rolled his car window down four inches and didn't say anything because he felt that he was in danger. Officer Parrish told Mr. Jones he was "tailgating" and wrote him a ticket.

Three weeks later, Officer Parrish drove alongside Mr. Jones and yelled out the window for him to pull over. Officer Parrish wrote Mr. Jones another ticket. After this encounter, Mr. Jones filed a complaint with the Fort Pierce Police Department. Mr. Jones "wasn't surprised a bit" when he found out that Officer Parrish had been killed.

On cross-examination, Mr. Jones admitted that he'd had problems with the Fort Pierce Police Department before his encounter with Officer Parrish, but "really d[idn't] recall" whether he had reported that he "believe[d] [he was] being picked on by the Fort Pierce Police Department." Mr. Jones testified that he "d[idn't] recall" whether he'd been speeding when the female officer pulled him over but admitted that he'd been tailgating when Officer Parrish pulled him over the first time. Mr. Jones also testified that he challenged the ticket that Officer Parrish issued him for tailgating but that he was "found guilty" because "you always lose in traffic court with a patrol officer." And Mr. Jones testified that Officer Parrish "didn't make any threats against [him]."

Mr. Jones met with Mr. Udell before Kearse's trial but he didn't want to testify. Mr. Jones was subpoenaed to appear at Kearse's resentencing but said that his testimony "wouldn't [have] happened" and, in any event, he wasn't asked to testify. [4]

6. Mr. Udell

***14** Mr. Udell testified that he filed a formal demand for discovery with the Fort Pierce Police Department before Kearse's resentencing. He "specifically only asked for complaints against [Officer] Parrish," and the police department gave him six citizen complaints in response. Mr. Udell asked his investigators to follow up on the complaints, and he and his investigators located and visited a couple of the complainants.

The complaints generally suggested that Officer Parrish "was pretty aggressive in his handling of the citizens in the community" and that "he was a racist." Mr. Udell considered having some complainants testify at trial, but he decided against it because what they were willing to testify to wasn't sufficiently helpful. Mr. Udell thought that "if you're going to slam a victim, you'd better be able to pull it off," so he made an "educated strategy decision" not to have the complainants testify because "it would[']ve] be[en] more harmful than helpful."

Mr. Udell recognized that if he introduced any of the complaints against Officer Parrish, then the state could introduce evidence that the police department found the complaints not credible. Mr. Udell was also concerned that the state could undermine the complaints against Officer Parrish by faulting the complainants' actions. One complainant, for example, told Officer Parrish that he was arrested for murder and had "shot a cop but ... missed." Another complainant had "called [Officer Parrish] a pinhead and used the F word," and the complainant's wife later described his conduct as being more offensive than Officer Parrish's.

Mr. Udell thought that painting the victim as an aggressor could "backfire" against Kearse, particularly in a capital case. Mr. Udell understood that the jury wouldn't place great emphasis on the citizen complaints against Officer Parrish because police officers were often subject to complaints. And Mr. Udell knew from experience that blaming a law enforcement officer for his own murder would be a poor strategy in Indian River County:

> [T]he analysis may have been different if we were in New York, Philly, Boston, even West Palm Beach. I've tried cases in Indian River County. They're good Americans, they're solid Americans, they believe in the integrity of law enforcement, and we didn't believe we reached the tipping point where we could convince them that they should think otherwise in this case.

Although Mr. Udell recognized that a victim-blaming strategy might work in some cases, he didn't think he had an evidentiary basis to do so in Kearse's case. Mr. Udell decided not to go with a vilification strategy because Pendleton, Kearse's passenger on the night of the murder, described Officer Parrish as being polite, professional, and friendly. Pendleton

had also testified that Kearse told her Officer Parrish was polite. Moreover, the citations found in Officer Parrish's car after the murder suggested that he was going to let Kearse go.

Mr. Udell couldn't remember if he ever obtained Officer Parrish's personnel file. Kearse's postconviction counsel showed Mr. Udell the personnel file, which included performance evaluations that said that Officer Parrish "d[id] have a problem at times with the public on normal every day type problems," "ha[d] a tendency to get impatient in his dealings with the public," and tended to be "excited."

But the personnel file also contained positive material, including a "Memorandum of Commendation" which recognized Officer Parrish's heroism in "helping a juvenile that was threatening suicide and d[e]fus[ing] the situation," and performance evaluations that rated Officer Parrish's "meeting and dealing with the public" as "satisfactory," described Officer Parrish as "an asset to the police department" who was "always working a hundred percent on the streets," and noted that Officer Parrish "donat[ed] time to serve on the Honor Guard."

***15** After reviewing Officer Parrish's personnel file, Mr. Udell couldn't say whether he would have done anything differently if he had gotten it before resentencing. Mr. Udell conceded that the negative employee evaluations in the personnel file would've supported a blame-the-victim strategy at resentencing. But Mr. Udell also recognized that the state would've rebutted that strategy by highlighting the positive elements in Officer Parrish's personnel file.

7. Mr. Norgard

Mr. Norgard testified that he had experience dealing with cases involving the murder of a police officer and said that in some cases it would be important to look at the police officer's personnel file. Mr. Norgard explained that a police officer's personnel file's importance would depend on its relevancy to the case; in other words, it would depend on the circumstances of the killing and whether there was a dispute about the police officer being the aggressor.

The state postconviction court denied Kearse's motion for postconviction relief

After the evidentiary hearing, the state postconviction court denied Kearse's motion for postconviction relief. The state postconviction court denied Kearse's ineffective assistance of counsel claim that Mr. Udell failed to prepare for Dr. Martell's testimony because "it [was] apparent from the record that [Mr.] Udell knew or anticipated the substance of Dr. Martell's testimony despite not having deposed Dr. Martell," and reasoned that Mr. Udell couldn't "be held responsible for the ruling just weeks before commencement of the second penalty phase compelling the [s]tate's mental health examination of Kearse." The state postconviction court concluded that Mr. Udell's "strategy to proceed without deposing Dr. Martell [was] reasonable under the circumstances."

The state postconviction court also denied Kearse's ineffective assistance of counsel claim that Mr. Udell failed to present evidence of Officer Parrish's prior misconduct and difficulties in dealing with the public. The state postconviction court determined that Mr. Udell's "strategy not to pursue the victim vilification defense [was] reasonable" based on: (1) Mr. Udell's "consideration of alternatives"; (2) the absence of "stronger evidence of [Officer] Parrish's prior misconduct"; and (3) the absence of "evidence that [Officer] Parrish abused Kearse during the traffic stop." And the state postconviction court found "no prejudice" in Mr. Udell's failure "to obtain and consider [Officer Parrish's personnel file] prior to making a strategic decision not to pursue a strategy vilifying [Officer] Parrish" because "[a]n evaluation closer to the time of the traffic stop noted satisfactory job performance" and "the file contained other positive material concerning [Officer] Parrish's performance that the [s]tate could have used to rebut any claims of misconduct."

Kearse's appeal of the denial of his motion for postconviction relief to the Florida Supreme Court and his petition to the Florida Supreme Court for a writ of habeas corpus

Kearse appealed the denial of his motion for postconviction relief to the Florida Supreme Court. Kearse argued that Mr. Udell "rendered constitutionally ineffective assistance" during the resentencing because he "fail[ed] to investigate and prepare for testimony of the state's mental health expert." Kearse argued that Mr. Udell "made no effort to investigate" Dr. Martell and he "did not attempt to verify Dr. Martell's credentials or ascertain what testimony Dr. Martell was going to offer." Mr. Udell, Kearse contended, "had no idea what Dr. Martell was going to say" and left "Kearse's expert witnesses ... inadequately prepared to rebut Dr. Martell's opinions."

***16** Kearse also argued that Mr. Udell was ineffective "in two respects in failing to investigate and present evidence of Officer Parrish's prior misconduct as a law enforcement officer and Officer Parrish's difficulties in dealing with the public." First, Kearse argued that "Mr. Udell neglected to obtain Officer Parrish's complete personnel file from the Fort Pierce Police Department which indicated numerous deficiencies in Officer Parrish's job performance that were relevant to the issues presented in [Kearse's] case." And second, Kearse argued that Mr. Udell "failed to fully investigate the complaint reports and failed to call any of the complainants to testify."

Finally, Kearse petitioned the Florida Supreme Court for a writ of habeas corpus. Citing *Atkins* and *Roper*, Kearse argued that his "low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense (eighteen and three months)," rendered his death sentence unconstitutional.

The Florida Supreme Court's affirmance of the denial of Kearse's motion for postconviction relief and its denial of his petition for a writ of habeas corpus

The Florida Supreme Court affirmed the denial of Kearse's motion for postconviction relief. *See* Kearse v. State, 969 So. 2d 976 (Fla. 2007). The Florida Supreme Court concluded that Kearse's claim that Mr. Udell was ineffective for failing to investigate and prepare for Dr. Martell's testimony "fail[ed] to meet *Strickland*'s requirements":

> The record shows that Dr. Martell examined Kearse on the Thursday before the resentencing proceedings began the following Monday, and that [Mr. Udell's] motion for a continuance was denied. Upon receipt of Dr. Martell's raw data and report, [Mr. Udell] forwarded these to his experts and consulted with them about the information. He also consulted the state attorney regarding [Dr.] Martell's upcoming testimony. At the postconviction hearing, [Mr. Udell] testified that despite not having deposed [Dr.] Martell, he knew what Dr. Martell's testimony would be regarding statutory mitigators, what his test results supposedly revealed, and where [Dr.] Martell's testimony would differ from his own experts' testimony. As evidenced from the foregoing summary, the evidence shows that [Mr.] Udell correctly anticipated [Dr.] Martell's testimony. Kearse thus has not demonstrated anything material that [Mr. Udell] did not anticipate or could have done differently had he deposed Dr. Martell.

Id. at 985–86.

The Florida Supreme Court also affirmed the denial of Kearse's claim that Mr. Udell was ineffective for failing to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public. *See id.* at 986. The Florida Supreme Court found that Mr. Udell "considered this strategy [to vilify Officer Parrish] and investigated citizen complaints against Officer Parrish," but, "after considering several factors—including the refusal of some witnesses to testify, the lack of substance of some testimony, and determinations by the Fort Pierce police that formal complaints against [Officer Parrish] were unfounded—he ultimately decided not to use this strategy." *Id.* The Florida Supreme Court also found that Mr. Udell "considered the potential that the strategy would backfire, especially in light of the facts, such as Kearse's firing thirteen bullets into [Officer Parrish] as [Officer Parrish] pled for his life and [Pendleton's] testimony that at all times Officer Parrish was friendly and polite." *Id.* Based on these findings, the Florida Supreme Court concluded that Mr. Udell's "decision not to present this mitigation strategy was reasonable." *Id.*

***17** The Florida Supreme Court determined that Kearse was not prejudiced by Mr. Udell's failure to obtain Officer Parrish's personnel file because "the evidence at the postconviction hearing showed that any evidence in the file supporting the vilification mitigation could have been countered at trial by other evidence in it of Officer Parrish's good reports and commendations." *Id.*

Finally, the Florida Supreme Court denied Kearse's petition for a writ of habeas corpus because his death penalty didn't violate his Eighth Amendment rights under *Atkins* and *Roper*:

> [Kearse] argues that because of his age, low level of intellectual functioning, and mental and emotional impairments he cannot be executed under *Atkins* ..., which prohibited execution of people with mental retardation. However, Kearse's own expert at the resentencing testified that he was not mentally retarded, and he presented no evidence at his postconviction hearing that he was. Thus, his sentence is not unconstitutional under *Atkins*.
>
> Next, he argues that because he was only eighteen years and three months old at the time of the crime and had low level intellectual functioning and mental and emotional impairments, he cannot be executed under *Roper*.... *Roper* prohibited execution of any defendant who was under age eighteen at the time of the crime. Accordingly, Kearse does not qualify for exemption from execution under *Roper*.

Id. at 991–92 (citation omitted).

Federal Postconviction Relief

After the Florida Supreme Court affirmed the denial of his motion for postconviction relief and denied his petition for a writ of habeas corpus, Kearse filed a 28 U.S.C. section 2254 petition in the Southern District of Florida. Kearse argued that the Florida Supreme Court unreasonably applied *Strickland* in affirming the denial of his claims that Mr. Udell was ineffective at resentencing because Mr. Udell: (1) failed to "investigate and prepare" for Dr. Martell's testimony; and (2) failed to "investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public." Kearse also argued that the Florida Supreme Court unreasonably applied *Atkins* and *Roper* in determining that his death sentence was not cruel and unusual because his "low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense (eighteen and three months), render[ed] him categorically less culpable than the average criminal."

The district court denied Kearse's section 2254 petition. It reviewed de novo his claim that Mr. Udell was ineffective for failing to investigate and prepare for Dr. Martell's testimony. The district court reviewed this claim de novo, rather than under the Antiterrorism and Effective Death Penalty Act of 1996, because, it concluded, the claim failed even under the harder-to-meet de novo standard. Applying de novo review, the district court denied this claim because Mr. Udell's performance didn't prejudice Kearse. The district court reasoned that there was "little evidence" that

the "testimony from additional experts" at the postconviction hearing "would have added anything additional to the penalty phase to which Dr. Lipman or Dr. Petrilla did not already testify." Thus, the district court "f[ound] that there was not a reasonable probability of a different result" "[g]iven the strong aggravation evidence presented that was in comparison with the mitigation evidence that was presented and could have been presented had [Mr. Udell] not rendered a deficient performance."

***18** The district court also denied Kearse's claim that Mr. Udell was ineffective for failing to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public. The district court concluded that the Florida Supreme Court did not unreasonably apply *Strickland* in finding that Mr. Udell made a strategic decision not to vilify Officer Parrish because "[t]he record is clear that Mr. Udell viewed not calling the citizen complainant witnesses to the stand as a strategic one." And, the district court wrote, the Florida Supreme Court did not unreasonably apply *Strickland* in concluding that Mr. Udell's strategic decision was reasonable because Mr. Udell made the decision based on his and his investigators' interviews of the witnesses and his determination that their testimony "would['ve] be[en] more harmful than helpful." The district court also concluded that Kearse did not show that the Florida Supreme Court unreasonably applied *Strickland* by determining that Mr. Udell's failure to obtain Officer Parrish's personnel file didn't prejudice Kearse. That's because Kearse "offered no evidence of what or how law enforcement [officers] would have testified at trial had Mr. Udell subpoenaed Officer Parrish's personnel file."

Finally, the district court denied Kearse's claim that his death sentence was cruel and unusual because of his low level of intellectual functioning, his mental and emotional impairments, and his age at the time of the offense. The district court concluded that the Florida Supreme Court didn't unreasonably apply *Atkins* and *Roper* in rejecting Kearse's constitutional challenge to his death sentence because "there [was] no clearly established federal law which provide[d] that it would be cruel and unusual punishment for someone who is close in age to that of a juvenile and close in intelligence quotient to someone with mental retardation to be sentenced to death."

Kearse sought leave to appeal, and the district court granted a certificate of appealability on the issue of whether Mr. Udell was ineffective "due to his failure to investigate and prepare for testimony of the [s]tate's mental health expert." We later expanded the certificate to include whether Mr. Udell "unreasonably failed to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public" and whether Kearse's death sentence "constitutes cruel and unusual punishment in violation of the Eight and Fourteenth Amendments to the United States Constitution."

STANDARD OF REVIEW

We review a district court's denial of a section 2254 petition de novo. *Smith v. Comm'r, Ala. Dept' of Corr.*, 924 F.3d 1330, 1336 (11th Cir.

2019). Under the Antiterrorism and Effective Death Penalty Act, federal courts may not grant a section 2254 petition on any claim that was adjudicated on the merits in state court unless the state court's adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1)–(2). "[W]e must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1266 (11th Cir. 2014) (citing 28 U.S.C. § 2254(e)(1)); *see Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012) ("[O]ur review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review." (quotation omitted)).

Our focus under section 2254(d) is on the "last reasoned" state court decision. *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1261 n.12 (11th Cir. 2009). The question is not whether we believe that decision was "incorrect" but whether the decision "was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). A state court's decision is reasonable "so long as fairminded jurists could disagree on the correctness of the ... decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation omitted). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quotation omitted). To obtain relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

DISCUSSION

***19** Our review is limited to the three issues in Kearse's certificate of appealability. *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) ("[I]n an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the [certificate of appealability]."). First, we explain why the Florida Supreme Court did not unreasonably apply *Strickland* in affirming the denial of Kearse's claim that Mr. Udell was ineffective for failing to investigate and prepare for Dr. Martell's testimony. Second, we explain why the Florida Supreme Court did not unreasonably apply *Strickland* in affirming the denial of Kearse's claim that Mr. Udell was ineffective for failing to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public. And third, we explain why the Florida Supreme Court did not unreasonably apply *Atkins* and *Roper* in denying Kearse's Eighth Amendment claim that his death sentence was cruel and unusual because he had low-level intellectual functioning, mental and emotional

impairments, and was eighteen years old when he murdered Officer Parrish.

Kearse's Claim That Mr. Udell Was Ineffective in Investigating and Preparing for Dr. Martell's Testimony

As to Kearse's claim that Mr. Udell was ineffective for failing to investigate and prepare for Dr. Martell's testimony, the Florida Supreme Court concluded that Mr. Udell was not deficient because "the evidence show[ed] that [he] correctly anticipated [Dr.] Martell's testimony." *Kearse*, 969 So. 2d at 986. And the Florida Supreme Court concluded that there was no prejudice to Kearse because he had "not demonstrated anything material that [Mr. Udell] did not anticipate or could have done differently had he deposed Dr. Martell." *Id.* Kearse argues that the Florida Supreme Court unreasonably applied *Strickland*'s performance and prejudice prongs.

Strickland

Under *Strickland*, "[a] petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice—that counsel's performance 'fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 485 (11th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687–88). "[T]he failure to demonstrate either deficient performance or prejudice is dispositive of the claim against the petitioner," and "there is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one." *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1248 (11th Cir. 2009) (alteration adopted) (quoting *Strickland*, 466 U.S. at 697).

The performance inquiry is "highly deferential," and courts must not succumb 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." *Strickland*, 466 U.S. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "No absolute rules dictate what is reasonable performance for lawyers." *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) (citing *Strickland*, 466 U.S. at 688–89). Instead, "the performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*." *Strickland*, 466 U.S. at 688 (emphasis added). In other words, if a reasonably competent attorney in counsel's shoes could—but not necessarily would—have performed the same, then the representation was adequate. *See White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."); *see also Harrington*, 562 U.S. at 110 ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." (quotation omitted)); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (referring to

"[a] standard of reasonableness applied as if one stood in counsel's shoes").

***20** In reviewing a state court's determination that an attorney's performance was not unreasonable, we decide only whether the state court's conclusion about reasonableness was *itself* reasonable. *See* 28 U.S.C. § 2254(d)(1). We therefore give "both the state court and the defense attorney the benefit of the doubt." *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (quotation omitted). In other words, "because the standards created by *Strickland* and [section] 2254(d) are both highly deferential," our review is "doubly" deferential "when the two apply in tandem." *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1265 (11th Cir. 2020) (alteration adopted and quotation omitted).

The prejudice inquiry doesn't ask whether "the errors had some conceivable effect on the outcome of the proceeding." *See Strickland*, 466 U.S. at 693. Instead, "the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Hitchcock*, 745 F.3d at 485 (quoting *Strickland*, 466 U.S. at 695).

Deficiency

Kearse argues that the Florida Supreme Court unreasonably applied *Strickland*'s performance prong because Mr. Udell: (1) didn't depose Dr. Martell, didn't attend Dr. Martell's evaluation of Kearse, and thus "had no idea what Dr. Martell was going to say"; and (2) didn't adequately prepare Kearse's expert witnesses to rebut Dr. Martell's opinions. But we 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.

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. Mr. Udell testified that he knew what Dr. Martell was going to say either because he read Dr. Martell's report or because he had informal conversations with Dr. Martell or the state attorney before Kearse's resentencing. Dr. Martell also thought that he and Mr. Udell might've had "an informal conversation about the scope of [his] testimony before [he] took the stand." And Mr. Udell said that he would've investigated Dr. Martell's background by "ask[ing] the lawyers that [he] kn[e]w who had been doing this kind of work for many years" if they knew of Dr. Martell. Mr. Udell also attended Dr. Martell's examination of Kearse and only left after Dr. Martell said that he preferred to do the examination alone with Kearse. Mr. Udell sent the results of Dr. Martell's examination to Kearse's experts and Mr. Udell "knew going into trial exactly what Dr. Martell was going to say as to which statutory aggravators and/or mitigators existed, and what his test results supposedly revealed, and where he disagreed with Dr. Petrilla."

In addition to Mr. Udell's testimony at the postconviction hearing, his cross-examination of Dr. Martell at resentencing showed that

Mr. Udell knew what Dr. Martell was going to say. For example, Mr. Udell was ready to challenge Dr. Martell's opinion that Kearse didn't have fetal alcohol effect by getting Dr. Martell to admit that a mother drinking alcohol while pregnant could cause significant detrimental effects on her child and lead to brain dysfunction. He drove that point home by having Dr. Martell admit that, if his wife were pregnant, he wouldn't want her to drink alcohol like Kearse's mother had. Mr. Udell also highlighted that Dr. Martell hadn't studied the effects of alcohol on animals or practiced neuropharmacology.

***21** Mr. Udell was also ready to challenge Dr. Martell's opinion that Kearse was capable of conforming his conduct to the requirements of the law by: (1) getting Dr. Martell to admit that he "hadn't thought about" when Kearse had formed the intent to kill Officer Parrish; and (2) highlighting facts that contradicted Dr. Martell's opinion that Kearse was determined to avoid arrest—including that Kearse was unarmed when Officer Parrish pulled him over and that Kearse confessed that he killed Officer Parrish as soon as he met with police.

And Mr. Udell prepared Kearse's expert witnesses to rebut Dr. Martell's opinions. Despite the state trial court's denials of his motions to continue resentencing and the fact that he only had the data from Dr. Martell's examination for three days before resentencing, Mr. Udell gave Dr. Martell's data to his experts who provided testimony that rebutted Dr. Martell's opinions. For example, Mr. Udell used Dr. Lipman to relay Dr. Levine's opinion that Dr. Martell's test results showed that Kearse's intellectual functioning was not where it should be. Mr. Udell also used Dr. Lipman to rebut Dr. Martell's opinion that Kearse was malingering by relaying Dr. Friedman's opinion that Kearse's F Scale results did not show that Kearse was malingering. And Mr. Udell similarly used Dr. Petrilla's opinion that Kearse's elevated F Scale did not indicate malingering to rebut Dr. Martell's opinion that Kearse was malingering. As the state postconviction court noted, it was "evident ... from Dr. Petrilla's and Dr. Lipman's testimony during [resentencing] that [Mr.] Udell anticipated that Kearse's personality profile would be at issue, particularly with respect to any indication of malingering."

Kearse contends that Mr. Udell's decision not to depose Dr. Martell and to instead rely on informal conversations with Dr. Martell or the state attorney "can hardly suffice for the purposes of defending a capital case" and "[was] not a strategy." But there is no categorical rule requiring defense attorneys to depose a witness in a criminal case. Neither Alabama[5] nor Georgia[6] 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. As Kearse's own expert testified, the decision to depose the state's expert would be "within the tactical and strategic province of the attorney" and "would vary from case to case." Kearse's expert also said that an attorney could decide against deposing an expert because there may be things "you don't want the other side to know about."

***22** That was Mr. Udell's strategy here. 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. We can't say that no fairminded jurist could conclude, as the Florida Supreme Court did, that Mr. Udell reasonably decided not to depose Dr. Martell. *See* *Messer v. Florida*, 834 F.2d 890, 896–97 (11th Cir. 1987) (concluding that defense counsel's decision not to depose the pathologist who performed an autopsy on the victim wasn't "outside the wide range of professionally competent assistance" where "[t]he defense counsel testified in state court that he had full access to the prosecutor's files, which presumably included the pathologist's report" (quotation omitted)); *Turner v. Williams*, 35 F.3d 872, 898 (4th Cir. 1994) (concluding that defense counsels' failure to depose the state's witnesses wasn't deficient where, "from their conversations with the prosecutor, [defense counsel] were aware of the substance of the witnesses' anticipated testimony"), *overruled on other grounds by* *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) ("A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel." (quoting *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc))).

Kearse also asserts that Mr. Udell "did not attend Dr. Martell's evaluation of Kearse, despite having argued [to the state trial court] that it was necessary to do so." But Kearse's expert testified that whether to attend the state's expert's evaluation "would be a tactical and strategic decision by the attorney." And Mr. Udell did attend Dr. Martell's examination of Kearse. Dr. Martell told Mr. Udell that he preferred to conduct the examination alone with Kearse. Mr. Udell honored that request, but only after he got Dr. Martell to question Kearse about the facts of the murder so that Mr. Udell could object on the record to that part of the examination.

Finally, Kearse argues that Mr. Udell failed to adequately prepare his expert witnesses to rebut Dr. Martell's opinions. But, 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.

Under our "doubly" deferential standard of review, we can't say that the Florida Supreme Court unreasonably concluded that Mr. Udell's performance was reasonable under the circumstances. *See* *Jenkins*, 963 F.3d at 1265. Because the Florida Supreme Court did not unreasonably apply *Strickland*'s performance prong, we don't need to address the prejudice prong because Kearse's failure to show deficient performance is "dispositive." *Windom*, 578 F.3d at 1248; *see* *Ledford v. Warden, Ga. Diagnostic Prison*, 975 F.3d 1145, 1160 (11th Cir. 2020) ("We cannot ... disturb the state habeas court's conclusion that trial counsel's performance was not deficient, and

we have no need to consider whether counsel's actions prejudiced [the petitioner's] defense.").

Kearse's Claim That Mr. Udell Was Ineffective in Failing to Investigate and Present Evidence of Officer Parrish's Prior Misconduct and Difficulties Dealing with the Public

As to Kearse's claim that Mr. Udell was ineffective for failing to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public, the Florida Supreme Court concluded that Mr. Udell's decision not to vilify Officer Parrish was a reasonable strategic choice and that Kearse had "not demonstrated prejudice from [Mr. Udell's] failure to obtain the personnel record." *Kearse*, 969 So. 2d at 986. Kearse argues that Mr. Udell was "deficient in two respects": (1) he failed to investigate all of the complaints against Officer Parrish and to call any witnesses who had filed complaints to testify about their negative experiences with Officer Parrish; and (2) he "neglected to obtain Officer Parrish's complete personnel file," which "indicated numerous deficiencies in Officer Parrish's job performance that were relevant to the issues presented in Kearse's case." The Florida Supreme Court decided the first part of this challenge on *Strickland*'s performance prong and the second part on the prejudice prong. *See id.* We conclude that the Florida Supreme Court didn't unreasonably determine that Mr. Udell made an informed strategic decision not to call citizen complainants to testify, and that Kearse wasn't prejudiced by Mr. Udell's failure to obtain Officer Parrish's personnel file.

Mr. Udell's failure to investigate and present evidence of citizen complaints against Officer Parrish

***23** Kearse argues that Mr. Udell "tried to pass his negligence [in not presenting evidence of citizen complaints against Officer Parrish] as a 'strategy decision.' " According to Kearse, Mr. Udell "did not have the information necessary to make a 'strategic decision' to abandon this defense" because he "fail[ed] to investigate and present evidence of several formal complaints against Officer Parrish, and others who [Officer Parrish] had threatened but did not make formal complaints." But it wasn't unreasonable for the Florida Supreme Court to find that Mr. Udell made an informed strategic decision. *See* *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."). That's exactly what Mr. Udell testified to: that he had made an "educated strategy decision." And Kearse has failed to prove—let alone by clear and convincing evidence—that the Florida Supreme Court's determination was unreasonable or incorrect. *See* 28 U.S.C. § 2254(d)(2), (e)(1); *Kimbrough v. Sec'y, DOC*, 565 F.3d 796, 804 (11th Cir. 2009) ("[A] state court's determination that a decision of counsel is 'tactical' is a question of fact that we review under a clear and convincing evidence standard.").

Mr. Udell investigated the citizen complaints and decided the evidence was unhelpful. Mr. Udell requested and received copies of citizen complaints that had been filed against

Officer Parrish and he and Investigator Evans interviewed some of the citizens who had negative encounters with Officer Parrish. For example, Mr. Pullen and Mr. Jones testified that they met with Mr. Udell before Kearse's trial. But Mr. Pullen had never filed a complaint against Officer Parrish, had been "arrested twenty times," and had been in and out of jail. And Mr. Jones said that he "would not have wanted" to testify in Kearse's trial. Another complainant had "called [Officer Parrish] a pinhead and used the F word" and his wife later described his conduct as being more offensive than Officer Parrish's. Mr. Udell recognized that if he introduced any of the complaints, the state would have undermined them by faulting the complainants' actions and introducing evidence that the police department found the complaints not credible.

Based on his review of the complaints in the Fort Pierce Police Department's file, and having interviewed some of the complainants, Mr. Udell made an "educated strategy decision" not to have any of the witnesses testify about their encounters with Officer Parrish because "it would['ve] be[en] more harmful than helpful." This wasn't an unreasonable strategic decision because a vilification strategy would've been contrary to Mr. Udell's mitigation strategy, his understanding of Indian River County jurors' views on law enforcement, and the facts and circumstances of Kearse's case.

First, blaming Officer Parrish would've worked against Mr. Udell's strategy at resentencing of establishing statutory and non-statutory mental health mitigation. Mr. Udell rebutted the state's closing argument by conceding that no one was to blame other than Kearse:

> [The state] told you a lot about what I'm going to tell you. You listen to what I have to tell you and see if I blame anybody. There's nobody to blame but Billy Kearse. He's the only person on trial here. You're not going to hear me blame [Kearse's mother] or blame the school system or blame [Officer Parrish]. I'm certainly not going to try and minimize his responsibility. He's here, isn't he? He's been convicted of first degree murder. The only question is, does he live the rest of his life in prison or do we execute him? There's no minimalizing responsibility, not from me, I promise you that.

Mr. Udell also focused on the reasonableness of Officer Parrish's actions to emphasize how Kearse's mental disabilities caused him to react to situations differently than normal people:

> No doubt [Officer Parrish] had every right to be mad. He gave him every chance he could. Let's think about where he was coming from and, therefore, what his attitude and what he was conveying to [Kearse]. After

> getting jerked around for about [twenty] minutes he'd had it. You would too. And I believe it's true, I think the evidence supports it, that he said to [Kearse], get out of the car. What was it ... [Pendleton] said he said? If you just tell me that your license is suspended, I'll give you a couple citations and let you go. The normal person would have done that. But that's [Kearse]. He don't [sic] understand. He doesn't reason like you do or I do.

***24** Mr. Udell would've undermined his strategy of showing that Kearse murdered Officer Parrish because of Kearse's severe emotional impairments, poor judgment, brain damage, impulsivity, and inability to reason abstractly had Mr. Udell tried to shift blame to Officer Parrish by calling witnesses to testify about their negative encounters with him. *See* *Tharpe v. Warden*, 834 F.3d 1323, 1343 (11th Cir. 2016) ("[Trial counsel] sought to portray Tharpe as a good guy who made a mistake at an emotionally fraught time but who nonetheless deserved the jury's mercy. The efficacy of that approach may well have been diminished had [trial counsel] simultaneously presented testimony portraying Tharpe as an alcoholic with low intellectual functioning and a troubled past. Instead of crediting Tharpe's unfortunate circumstances as making him less culpable in the murder ..., the jury could have concluded instead that Tharpe was not willing to accept responsibility for his actions, thus sinking Tharpe's credibility and undermining both the good-character defense and the diminished-capacity defense.").

Second, Mr. Udell knew from experience that a strategy of blaming Officer Parrish wouldn't have played well with the jury. Mr. Udell understood that jurors in Indian River County were different than jurors in "New York, Philly, Boston, even West Palm Beach"—they "believe[d] in the integrity of law enforcement" and wouldn't be receptive to attacks on Officer Parrish's character. He also knew that the jury wouldn't place great emphasis on the complaints against Officer Parrish because police officers were often subject to complaints. In other words, Mr. Udell concluded that blaming Officer Parrish for his own murder was likely to backfire. *See, e.g.*, *Black v. Workman*, 682 F.3d 880, 904 (10th Cir. 2012) ("Any effort by counsel to blame the victims would be as likely to backfire as to diminish [the defendant]'s culpability in the jury's eyes."); *Defazio v. Sweeney*, 2019 WL 981646, at *7 (D.N.J. Feb. 28, 2019) ("[R]easonable counsel could have perceived that pursuing ... a blame-the-victim strategy[ ] before the jury could have seriously backfired."); *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004) ("[A] concern about being perceived as blaming the victim for his or her own death is a valid reason for declining to introduce particular evidence.").

And third, Mr. Udell determined that a victim-blaming strategy wasn't possible under the facts and circumstances of Kearse's case. At Kearse's trial, Pendleton—Kearse's passenger on the night of the murder—testified that Officer Parrish said he would let Kearse go

if Kearse gave him his real name and that Officer Parrish hadn't abused Kearse "in any way." Pendleton testified that when she asked Kearse why he shot Officer Parrish, Kearse "said that his probation was suspended and the police were looking for him already." Mr. Udell could have reasonably concluded that blaming Officer Parrish wouldn't have worked because of the evidence that Officer Parrish wasn't hostile or abusive toward Kearse. *See* *Freund v. Butterworth*, 165 F.3d 839, 866–69 (11th Cir. 1999) (en banc) (rejecting the argument that counsel could've pursued an alternative strategy of shifting the blame to the codefendant because the strategy was "not realistic in view of the uncontradicted testimony of the eyewitnesses"); *Oliver v. Wainwright*, 782 F.2d 1521, 1525 (11th Cir. 1986) (rejecting the argument that counsel could've pursued an alternative strategy of shifting the blame to the codefendant—"the alternative strategy ... was not an option available to trial counsel because the facts d[id] not support the theory").

Kearse argues that Mr. Udell was deficient for not "conducting a complete investigation of Officer Parrish's conduct." But Mr. Udell obtained every citizen complaint that had been filed against Officer Parrish. After reviewing the complaints, Mr. Udell and Investigator Evans interviewed "some" of those citizens, including Mr. Jones, who didn't want to testify, and the citizen who called Officer Parrish a "pinhead" and used the "F word." Mr. Udell even contacted Mr. Pullen, who had not filed a complaint with the Fort Pierce Police Department, to learn about his negative encounter with Officer Parrish. But Mr. Pullen had been arrested twenty times, had been in and out of jail, and hadn't filed a complaint despite claiming to have been handcuffed to a tree and bitten by red ants. *Strickland* did not require Mr. Udell to "leave no stone unturned and no witness unpursued." *Raulerson v. Warden*, 928 F.3d 987, 997 (11th Cir. 2019) (quotation omitted). *Strickland*, instead, required a reasonable investigation under the circumstances, *see* *Sullivan v. Sec'y, Fla. Dep't of Corr.*, 837 F.3d 1195, 1204–05 (11th Cir. 2016) ("Counsel's investigation does not fall below *Strickland*'s standard so long as a reasonable lawyer could have decided, under the circumstances, not to investigate particular evidence." (alterations adopted and quotation omitted)), and that is what Mr. Udell did. Once he reviewed every complaint in the Fort Pierce Police Department's file, found additional complaining witnesses, and talked to them about their negative experiences with Officer Parrish—in other words, after he conducted a reasonable investigation under the circumstances—Mr. Udell made a strategic decision not to go with a blame-the-victim strategy that was inconsistent with the mental health mitigation, would have tuned out the jury, and wasn't supported by the evidence. The Florida Supreme Court did not unreasonably apply *Strickland* in determining that Mr. Udell was not deficient for making that strategic decision. *See* *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1302 (11th Cir. 2019) ("It is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence.").

Mr. Udell's failure to obtain
Officer Parrish's personnel file

***25** Kearse argues that Mr. Udell's failure to obtain Officer Parrish's personnel file prejudiced him because the evidence it contained would have, "[a]t a minimum, ... contributed to Kearse's mitigation case" and that "there is, at the very least, a reasonable probability that ... the result of the proceedings would have been different." But the Florida Supreme Court determined that Kearse wasn't prejudiced by the failure to get the personnel file because "any evidence in the file supporting the vilification mitigation could have been countered at trial by other evidence in it of Officer Parrish's good reports and commendations." *Kearse*, 969 So. 2d at 986. The Florida Supreme Court's prejudice determination wasn't an unreasonable application of *Strickland*.

The Florida Supreme Court's prejudice finding wasn't unreasonable because Officer Parrish's personnel file would have undermined a blame-the-victim strategy. The personnel file contained evidence that Officer Parrish was an outstanding police officer. He had a "Memorandum of Commendation," which recognized Officer Parrish's heroism in "helping a juvenile that was threatening suicide and d[e]fus[ing] the situation." And the personnel file had performance evaluations that rated Officer Parrish's "meeting and dealing with the public" as "satisfactory," described Officer Parrish as "an asset to the police department" who was "always working a hundred percent on the streets," and noted that Officer Parrish "donat[ed] time to serve on the Honor Guard." Had Mr. Udell obtained the personnel file and introduced it into evidence, the state would've used the positive material about Officer Parrish to rebut any claims of misconduct.

The Florida Supreme Court's prejudice determination also wasn't unreasonable because the facts of Kearse's case didn't fit a blame-the-victim strategy. As Kearse's expert testified, a police officer's personnel file's relevance would depend on whether there was a dispute about the police officer being the aggressor. And here, there was no evidence that Officer Parrish was the aggressor. The uncontradicted testimony from Pendleton was that Officer Parrish hadn't mistreated Kearse. She testified that Officer Parrish said he would let Kearse go if Kearse gave him his real name, that Officer Parrish hadn't abused Kearse "in any way," and that Kearse told her that he shot Officer Parrish because "his probation was suspended and the police were looking for him already," not because of anything Officer Parrish did.

Because the personnel file contained evidence that would've undermined a blame-the-victim strategy, and because there was no evidence that Officer Parrish mistreated Kearse, the Florida Supreme Court didn't unreasonably apply *Strickland* when it determined that there was no reasonable probability of a different result had Mr. Udell obtained Officer Parrish's personnel file.

Kearse's Claim That His Death Sentence Constitutes Cruel and

Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

The Florida Supreme Court concluded that Kearse's death sentence was constitutional under *Atkins* and *Roper* because he was neither intellectually disabled nor younger than eighteen at the time of the murder. *Kearse*, 969 So. 2d at 981, 990–92. Kearse argues that the Florida Supreme Court unreasonably applied *Atkins* and *Roper* because it "only viewed this matter in light of numbers" and "all of[ ] the Eighth Amendment concerns discussed in *Atkins* and *Roper* are equally applicable to Kearse."[7] We disagree.

***26** "A decision is 'contrary to' clearly established federal law if the state court applied a rule that contradicts governing Supreme Court precedent, or if it reached a different conclusion than the Supreme Court did in a case involving materially indistinguishable facts." *James v. Warden*, 957 F.3d 1184, 1190 (11th Cir. 2020) (citing *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000)). "A state court decision involves an 'unreasonable application' of clearly established federal law if the court identifies the correct legal principle but applies it unreasonably to the facts before it." *Id.* In either case, the phrase "clearly established federal law" refers to the Supreme Court's "holdings." *See Williams*, 529 U.S at 412. "In other words, 'clearly established Federal law' under [section] 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003).

In *Atkins*, the Supreme Court "held that the Eighth Amendment prohibits the imposition of a death sentence on a defendant who is 'mentally retarded.' " *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019); *see also Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (en banc) ("*Atkins* established *only* a substantive Eighth Amendment right for the mentally retarded...."). Kearse concedes that he "does not meet the diagnostic criteria for 'mental retardation' or 'intellectual disability' as understood in *Atkins*." And, although he says that "given his mental impairments, in conjunction with his youth at the time of the offense, the reasons for excluding mentally retarded individuals from the death penalty apply equally to [him]," we've explained that "a constitutional rule exempting the 'functionally mentally retarded' from execution would go beyond the holding of *Atkins*, something this [c]ourt may not do when reviewing [section] 2254 petitions." *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1369 (11th Cir. 2009).

In *Roper*, the Court "held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes." *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016); *see also Loggins v. Thomas*, 654 F.3d 1204, 1221–22 (11th Cir. 2011) ("The holding of *Roper* is simply that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (alteration adopted and quotation omitted)). Kearse admits that he was over the age of 18 when he murdered Officer Parrish, but he argues that "all the criteria in *Roper* apply to him" and urges us to consider "the spirit of *Roper*." But whatever the "spirit"

of *Roper* may be, "the Supreme Court has held that for [section] 2254(d)(1) purposes, only the holdings of its decisions matter." *Loggins*, 654 F.3d at 1224. "A rationale is not a holding any more than a road is a destination," and "[b]ecause implications are not actual holdings, the implications of Supreme Court decisions cannot clearly establish federal law for [section] 2254(d)(1) purposes." *Id.* at 1222, 1224. In short, the Florida Supreme Court correctly identified the Supreme Court's holdings in *Atkins* and *Roper* and reasonably applied them to the facts of this case.

This is not a case, as Kearse argues, in which a state court "unreasonably refuse[d] to extend [a legal] principle to a new context where it should apply." *Williams*, 529 U.S. 407. In *Atkins*, the Supreme Court drew a bright line at "mental retardation." *See* 536 U.S. at 317. In *Roper*, the Supreme Court drew a bright line at the age of 18. *See* 543 U.S. at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."). There was no general legal principle for the Florida Supreme Court to extend because *Atkins* and *Roper* established categorical rules. *See* *Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (citing *Atkins* and *Roper* as examples of cases in which the Supreme Court "has used categorical rules to define Eighth Amendment standards"). For example, a defendant is either eighteen years old at the time he commits the murder, or he is not. Moving the *Roper* line to eighteen years and a few months does not extend the categorical rule; it violates it.

***27** We held as much in *Barwick v. Secretary, Florida Department of Corrections*, 794 F.3d 1239 (11th Cir. 2015). There, the petitioner argued that his death sentence was unconstitutional because, although he was nineteen-and-a-half years old at the time of his offense, "his mental functioning was equivalent to that of an ordinary 11-to-13-year-old person" and "his intellectual functioning [was] equivalent to that of an ordinary 12-to-14-year-old person." 794 F.3d at 1257. In other words, he argued that "sentencing to death one who has reached the chronological age of legal maturity but who possesses the mental and intellectual capabilities of a juvenile would be unconstitutional." *Id.* at 1258.

We rejected the petitioner's argument because he failed to show that the state court's denial of his claim was contrary to or an unreasonable application of clearly established federal law. *Id.* at 1258–59. In doing so, we agreed with the district court's analysis that "the [Supreme Court] ha[d] not extended *Roper* to mental or emotional age" and that *Roper* "drew a bright line" at age 18. *Id.* We also agreed that "[a] reasonable application of *Roper* is that the bright line works the other way, too—executing an individual for committing a crime after age 18 is not, just because of age, unconstitutional[; m]ental or emotional age may be a mitigating factor, but it does not necessarily preclude the death penalty." *Id.*

Because "state courts are not obligated to extend legal principles set forth by the Supreme Court," we couldn't say that the state court unreasonably applied clearly established federal law when it denied the *Barwick* petitioner's claim. *Id.* at 1259; *see also* *Shore*

v. Davis, 845 F.3d 627, 633–34 (5th Cir. 2017) (defendant's claim "that his execution would be cruel and unusual in light of his brain injury" did "not rely on the holding of any Supreme Court precedent but instead [sought] to extend the reasoning of *Atkins* ... and *Roper*"). By the same token, we can't say that the Florida Supreme Court unreasonably applied clearly established federal law in denying Kearse's claim.

We end with a few words about the dissenting opinion. The dissenting opinion says that we, and the Florida Supreme Court, have misconstrued Kearse's Eighth Amendment claim. "The heart of Kearse's argument," the dissenting opinion explains, was a "proportionality claim." Dissenting Op. at 4. In the dissenting opinion's view, Kearse argued "for individual, proportionality-based relief, not for a categorical, bright-line exemption based on his age or intellectual ability." *Id.* at 5 n.5.

But Kearse didn't raise a proportionality claim. He didn't raise a proportionality claim in the Florida Supreme Court. And he didn't raise one here.

In the part of his habeas petition to the Florida Supreme Court arguing that his death sentence was a cruel and unusual punishment, Kearse never used the word "proportional" or "proportionality." *See* Petition for Writ of Habeas Corpus, Kearse v. State, 969 So. 2d 976 (Fla. 2007) (Nos. SC05–1876, SC06–942), 2006 WL 1463594, at *24–*35. Not once.[8] Instead, Kearse argued that his "low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense (eighteen and three months), render[ed] him *categorically* less culpable than the average criminal." *Id.* at *24 (emphasis added and quotation omitted).

***28** In the part of his initial brief arguing that his death sentence was a cruel and unusual punishment under the Eighth Amendment, Kearse never used the word "proportional" or any derivative of it. Not one time.[9] Instead, Kearse argued that his "low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense (eighteen and 84 days), render[ed] him *categorically* less culpable than the average criminal." And, in his reply brief, Kearse didn't use the term "proportionality" a single time or any word related to it. Not even a third cousin. Instead, Kearse argued that the "rationale" of *Atkins* and *Roper* should "extend equally to" him. But we rejected that argument in *Barwick*. *See Barwick*, 794 F.3d at 1259 ("[S]tate courts are not obligated to extend legal principles set forth by the Supreme Court...").

We don't see how the "heart" of his Eighth Amendment argument could have been a "proportionality claim," as the dissenting opinion suggests, when Kearse never uses the word "proportionality." And we don't see how the dissenting opinion can say that Kearse didn't argue "for a categorical, bright-line exemption based on his age or intellectual ability." That's exactly what he argued to the Florida Supreme Court and to us: that he is "*categorically* less culpable than the average criminal" because of his "low level of intellectual functioning and mental and emotional impairments, in combination with

his age at the time of the offense" and that we should "extend" *Atkins* and *Roper* to eighteen-year-olds with borderline intelligence. And that's the claim that we, and the Florida Supreme Court, addressed. The one Kearse actually raised.

In any event, even if Kearse had raised a proportionality claim, the Florida Supreme Court did not unreasonably apply clearly established law. The United States Supreme Court has never held that the death penalty was not a proportional punishment for an eighteen-year-old with borderline intelligence and emotional problems who, during a traffic stop, takes a police officer's gun and shoots him thirteen times (while the officer is begging for his life) because the shooter is on probation and doesn't want to go back to jail. Without a clearly established holding from the United States Supreme Court, there was nothing for the Florida Supreme Court to unreasonably apply. *See* *Reese*, 675 F.3d at 1288 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court." (alteration adopted and quotation omitted)).

CONCLUSION

"Section 2254(d) reflects the view that habeas corpus is a guard against *extreme malfunctions in the state criminal justice systems*, not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102–03 (quotation omitted and emphasis added). There was no extreme malfunction in this case. The Florida Supreme Court's application of *Strickland*, *Atkins*, and *Roper* were not "beyond any possibility for fairminded disagreement." *See* *id.* at 103. Section 2254(d) requires that federal habeas relief be denied and that we affirm that denial.

AFFIRMED.

Wilson, Circuit Judge, Concurring in part and Dissenting in part:

I concur with the majority on Kearse's ineffective assistance claims. [1] But I dissent as to Kearse's Eighth Amendment claim because the Florida Supreme Court unreasonably applied clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

***29** Three justices of the Florida Supreme Court said it best: "The bottom line is that this is clearly not a death case." *Kearse v. State*, 770 So. 2d 1119, 1138 (Fla. 2000) (Anstead, J., dissenting) (analyzing proportionality under Florida law). The bottom line is the same under federal law. You need not be an Eighth Amendment scholar to see why:

> [T]he killing resulted from the impulsive act of an eighteen-year-old [Kearse] who functions on a low average-borderline intelligence level and has a documented history of emotional problems. Importantly, there is no evidence that Kearse set out that night intending to commit any crime, let alone

> murder. In fact, he had just picked up a pizza and was returning home to eat it with friends when this tragic incident took place.

Id. at 1136.

If that much was clear in 2000, when the Florida Supreme Court considered the proportionality of Kearse's sentence under Florida law, then it was certainly clear in 2007, when the same court purportedly addressed Kearse's Eighth Amendment claim. The court held that Kearse's death "sentence is not unconstitutional under *Atkins*" because he is "not mentally retarded," and that "Kearse does not qualify for exemption from execution under *Roper*" because he was eighteen at the time of his crime. *Kearse v. State*, 969 So. 2d 976, 991–92 (Fla. 2007) (per curiam). But—as Kearse points out—that's not what he argued,[2] and those two cases are not the be-all and end-all of the Supreme Court's Eighth Amendment precedent. Case-by-case proportionality remains the Eighth Amendment's polestar.

The court failed to analyze whether Kearse's death sentence was proportional or unconstitutionally excessive given the facts of his case. But it should have. Kearse so argued, and as of 2007, Supreme Court precedent called for such an analysis. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 788–801 (1982) (analyzing a death sentence for proportionality under the Eighth Amendment's Cruel and Unusual Punishments Clause, with discussion of retribution and deterrence); *see also Lockyer v. Andrade*, 538 U.S. 63, 72–73 (2003) (holding that a "gross disproportionality principle" is clearly established Eighth Amendment law for analyzing a sentence for a term of years under § 2254(d)(1)); *Solem v. Helm*, 463 U.S. 277, 284–303 (1983) (analyzing a sentence of life without possibility of parole for proportionality under the Eighth Amendment).[3]

***30** The majority disagrees that more analysis was required. It says that Kearse framed his Eighth Amendment claim as a *Roper* and *Atkins* challenge and that the Florida Supreme Court answered that issue; case closed. The Florida Supreme Court's synopsis of Kearse's arguments would certainly lead one to think that this case is as simple as that. *See Kearse*, 969 So. 2d at 991–92. Yet Kearse's state petition shows otherwise—it makes clear that the Florida Supreme Court's synopsis is a patently unreasonably narrow characterization of Kearse's Eighth Amendment argument.[4]

Contrary to what the majority says, Kearse made a much broader Eighth Amendment argument than the Florida Supreme Court said he did. The heart of Kearse's argument was not *Roper* and *Atkins*; it was proportionality. The thrust of his argument was that his crime and circumstances do not warrant death. He argued that neither the penological purpose of deterrence nor retribution would be served in his case. (And, by my count, he relied on eight other Supreme Court cases to help make these points—not including citations in parentheticals.)

To be sure, Kearse relied on *Atkins* and *Roper* heavily. But those cases were mere vehicles for his proportionality claim, examples of constitutional reasoning that he says protects

him from execution. In fact, before us, Kearse concedes that he does not meet the criteria of *Atkins*'s or *Roper*'s bright-line rule. Why would Kearse concede the heart of his state-court argument when attacking the related state-court decision in federal court? The answer is the simplest one: That was never the heart of his argument. [5]

"What eighteen-year-old Kearse did was horrible—but his actions in light of the bizarre circumstances in this case do not warrant the ultimate penalty of death." *Kearse*, 770 So. 2d at 1138 (Anstead, J., dissenting). No matter whether the Florida Supreme Court ultimately agreed with that sentiment in the postconviction appeal for Kearse's Eighth Amendment claim, it should have squarely addressed the claim as it was made and analyzed Kearse's sentence for proportionality. Its failure to do so was "objectively unreasonable." *See Lockyer*, 538 U.S. at 75–76. Therefore, I dissent.

All Citations

Not Reported in Fed. Rptr., 2022 WL 3661526

Footnotes

1 Rule 3.202 first became effective on January 1, 1996. *See Amends. to Fla. Rule of Crim. Proc. 3.220—Discovery (3.202—Expert Testimony of Mental Mitigation During Penalty Phase of Cap. Trial)*, 674 So. 2d 83, 83–84 (Fla. 1995). It was later amended on May 2, 1996. *Id.* at 85. At the time of Kearse's resentencing, rule 3.202 provided that, "in those capital cases in which the state gives notice of its intent to seek the death penalty within 45 days from the date of arraignment ... the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state." *Id.*

2 The non-statutory mitigating factors related to Kearse's mental health included "[f]etal alcohol effect including hyperactivity, attention deficit disorder, poor judgment and delayed learning," "[o]rganic brain damaged," "[l]ow I.Q., impulsive, and unable to reason abstractly," "mildly retarded and functioned at a third or fourth grade level," and "severely emotionally handicapped."

3 Although we summarize and discuss Mr. Norgard's testimony here and elsewhere, we so do with the understanding that, as an "experienced capital defense attorney[ ]," his "views of what constitutes effective assistance in capital cases" are "not dispositive," and, indeed, they have little, if any, weight in our analysis. *See Newland v. Hall*, 527 F.3d 1162, 1208 (11th Cir. 2008); *see also Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ("Our ... decisions establish that the reasonableness of a strategic choice is a question of law to be decided by the

court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable.").

4 Kearse also called two investigators to testify about their conversations with Pastor James Newton. According to the investigators, Pastor Newton knew Officer Parrish from church and thought that Officer Parrish "had a hot temper," "had a reputation for provoking people at traffic stops," "pushed the envelope in every situation," was "racist," "[b]igoted[,] and ignorant," and "used derogatory slurs," including the N-word. The state postconviction court declined to consider the evidence of Pastor Newton's comments about Officer Parrish because the comments were "inadmissible hearsay." Kearse does not challenge the exclusion of the evidence of Pastor Newton's statements on appeal.

5 "There is no constitutional right to discovery in a criminal case in Alabama." *Ex parte State*, 287 So. 3d 384, 394 (Ala. 2018) (quotation omitted). Depositions may be taken in criminal cases only by court order under "exceptional circumstances" pursuant to a motion of the party offering the witness, Ala. R. Crim. P. 16.6(a); *see also* Ala. Code § 12-21-264, or by agreement of the parties and with consent of the court, Ala. R. Crim. P. 16.6(g).

6 In Georgia, "[n]o broad right of discovery exists ... in criminal cases; the common law recognized no right of discovery in such cases, and it has been held that unless introduced by appropriate legislation, the doctrine of discovery is a complete and utter stranger to criminal procedure." *See Sears v. State*, 356 S.E.2d 72, 76 (Ga. Ct. App. 1987) (quotation omitted), *overruled on other grounds by State v. Lane*, 838 S.E.2d 808 (Ga. 2020). Although criminal defendants have a right to interview a state witness before trial, that right is subject to the witness's consent. *See id.* Depositions may be taken in criminal cases only by court order under certain limited circumstances, *see* Ga. Code Ann. § 24-13-130, or by agreement of the parties and with consent of the court, *see id.* § 24-13-138; *see also Evans v. State*, 503 S.E.2d 344, 346–37 (Ga. Ct. App. 1998) ("The General Assembly has prohibited trial courts from ordering depositions in criminal cases except in several specific situations....").

7 Although Kearse argues that the Florida Supreme Court "misconstrued" and "misse[d] the gravamen" of this claim, he concedes that the claim is subject to deference under the Antiterrorism and Effective Death Penalty Act. Indeed, rather than arguing the issue de novo, he specifically argues that the Florida Supreme Court's decision was "contrary to and an unreasonable application of *Atkins* ..., *Roper* ..., and the Eighth Amendment." Like Kearse, we focus only on whether the

Florida Supreme Court's decision was contrary to, or an unreasonable application of, *Atkins* and *Roper* as required by section 2254(d).

8 Kearse quoted *Atkins*, once, using the word "proportioned" and cited *Roper* for its holding that the death penalty is a "disproportionate" punishment for juveniles. *See* Petition for Writ of Habeas Corpus, 2006 WL 1463594, at *26, *31. But those references are *Atkins*- and *Roper*-specific. Neither one of them argued for a non-categorical holding that it violates the Eighth Amendment to sentence Kearse to death given the specific facts of this case, which fall outside the holdings of those two decisions.

9 Kearse cut and pasted the same quote from *Atkins* and the same description of *Roper*'s holding from his habeas petition to the Florida Supreme Court.

1 However, I am skeptical of the Florida Supreme Court's application of *Strickland* to the ineffective assistance claim regarding Dr. Daniel Martell. As the majority notes, Kearse's counsel chose not to depose Dr. Martell but spoke informally to Dr. Martell and the state attorney along with other lawyers in the community and his experts. Although I think no competent counsel with a 9-day window of opportunity would have failed to depose the only state mental health expert in a death case that turned on mental health mitigation, that is not what *Strickland* requires. Rather, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Considering what *Strickland* requires and our "doubly" deferential standard of review, I reluctantly concur with the majority on this claim.

2 Kearse has consistently and specifically argued that the Florida Supreme Court misconstrued his state habeas Eighth Amendment claim in a legally significant way —unlike the petitioner in *Barwick v. Secretary, Florida Department of Corrections*, 794 F.3d 1239 (11th Cir. 2015) (per curiam). As the State of Florida notes in a supplemental authority letter, in *Barwick*, we rejected a similar Eighth Amendment habeas claim. *Id.* at 1257–59. But there the petitioner never argued that the Florida Supreme Court misconstrued his petition at all, much less in a legally significant way. Therefore, our holding that the Florida Supreme Court did not unreasonably apply clearly established law in *Barwick* has no bearing here. *See id.*

3 In its supplemental authority letter, the State of Florida draws our attention to *Pulley v. Harris*, 465 U.S. 37, 44–51 (1984), and argues that there "the Supreme Court explained that a proportionality review is merely an 'additional safeguard against arbitrarily imposed death sentences,' but not one of constitutional necessity." But the State misapprehends *Pulley*; in fact, the case proves my point. *Pulley* describes two types of proportionality review. *Compare id.* at 42–43 (describing "traditional"

proportionality review "of the appropriateness of a sentence for a particular crime") *with* *id.* at 43–44 (describing a "different sort" of proportionality review where a court "presumes that the death sentence is not disproportionate to the crime in the traditional sense" and "purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime"). The point of my dissent is that the former is clearly established federal law, and that Kearse invoked it here—but only the latter was at issue in *Pulley*. *See* *id.* at 43–44. So, if anything, *Pulley* further supports my dissent and disagreement with the State's position.

4 *See* Petition for Writ of Habeas Corpus at 24–35, *Kearse v. Florida*, 969 So. 2d 976 (Fla. 2007) (Nos. SC05–1876, SC06–942), 2006 WL 1463594.

5 Certainly, Kearse phrased *some* analysis in terms of membership in a class that he argues should be categorically ineligible for death. But at bottom, he was arguing for individual, proportionality-based relief, not for a categorical, bright-line exemption based on his age or intellectual ability.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15228-P

BILLY LEON KEARSE,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, LUCK, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-14240-CIV-ZLOCH

BILLY LEON KEARSE,

Petitioner,

O R D E R

vs.

MICHAEL D. CREWS, Secretary,
Florida Department of
Corrections,

Respondent.[1]
_____/

THIS MATTER is before the Court upon the Mandate of the United States Court of Appeals for the Eleventh Circuit (DE 51). The Court has carefully reviewed said Mandate, the entire court file and is otherwise fully advised in the premises.

Petitioner Billy Leon Kearse (hereinafter "Petitioner") is on death row at the Union Correctional Institution in Raiford, Florida, following his convictions in 1991 for first-degree murder and robbery. DE 1, p.2. On November 22, 2010, the Court dismissed Petitioner's Petition For Writ Of Habeas Corpus By A Person In State Custody (DE 1) as untimely. See DE 14. On December 20, 2010, Petitioner filed his Motion To Alter Or Amend Pursuant To Fed. R. Civ. P. 59(e) (DE 15), which this Court denied. See DE 21.

[1] During the course of these proceedings, Julie L. Jones was replaced as the Secretary of the Florida Department of Corrections by Michael D. Crews, who is now the proper respondent in this proceeding. Crews should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Court will, therefore, direct the Clerk of the Court to change the designation of Respondent.

On May 12, 2011, Petitioner filed his Notice of Appeal (DE 22). On May 23, 2011, Petitioner filed an Application (DE 24) requesting that the Court issue a Certificate of Appealability as to "whether Petitioner's petition for writ of habeas corpus was properly dismissed as untimely." On June 6, 2011, the Court granted said Application. See DE 27. On November 3, 2011, the United States Court of Appeals for the Eleventh Circuit vacated and remanded the above-styled cause for "consideration of whether Kearse can present clear and convincing evidence to rebut the state court's factual finding that a verification page was not attached to Kearse's initial motion." DE 31. The Mandate of the United States Court of Appeals for the Eleventh Circuit (DE 31) then issued on March 16, 2012.

On remand, the Court again dismissed Petitioner's Petition For Writ Of Habeas Corpus (DE 1) as untimely. See DE 38. On September 25, 2012, Petitioner filed his second Motion To Alter Or Amend Pursuant To Fed. R. Civ. P. 59(e) (DE 41), which this Court denied. See DE 43. On December 2, 2013, the United States Court of Appeals for the Eleventh Circuit "reverse[d] the district court's determination that Kearse's federal habeas petition was time-barred and remand[ed] for adjudication of the merits of his petition." DE 51. The instant Mandate (DE 51) issued on January 3, 2014. The Court now considers the merits of Petitioner's claims.

I. FACTUAL BACKGROUND

> Kearse was charged with robbery with a firearm and first-degree murder in the death of Fort Pierce police officer Danny Parrish on January 18, 1991. After 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 v. State, 662 So.2d 677, 680 (Fla. 1995) (hereinafter Kearse I).

II. PROCEDURAL BACKGROUND

On October 22, 1991, a jury convicted Petitioner of first-degree murder and recommended the death penalty by a vote of eleven to one. Id. When sentencing Petitioner to death, the judge found four aggravating circumstances: (1) the murder was committed while Petitioner was engaged in a robbery; (2) the murder was committed to either avoid arrest or hinder the enforcement of laws; (3) the

murder was especially heinous, atrocious, or cruel (HAC); and (4) the victim of the murder was a law enforcement officer engaged in the performance of his official duties. The judge found two statutory mitigating circumstances: (1) the murder was committed while Petitioner was under the influence of extreme mental or emotional disturbance; and (2) Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The judge also found three nonstatutory mitigating circumstances: (1) Petitioner's impoverished and culturally deprived background; (2) Petitioner was severely emotionally disturbed as a child; and (3) Petitioner's IQ is just above the mentally retarded line. Ultimately, the judge determined that none of the mitigating circumstances were "substantial or sufficient to outweigh any aggravating circumstance." Id. Petitioner was sentenced to death. On direct appeal, Petitioner raised twenty-five issues.

> On appeal, Kearse raises the following issues: 1) the denial of the requested limiting instruction on the consideration of duplicate aggravating circumstances; 2) the aggravating circumstances of murder of a law enforcement officer and avoid arrest or hinder enforcement of laws constituted improper doubling; 3) the court's failure to find Kearse's age to be a mitigating factor; 4) the consideration of the aggravating circumstance of committed while engaged in the commission of a robbery; 5) finding that the murder was HAC; 6) the denial of the requested instruction on the cold, calculated, and premeditated (CCP) aggravating circumstance; 7) the prosecutor engaged in misconduct during the penalty phase; 8) the aggravating circumstance of committed while engaged in the commission of a robbery was based on the same aspect of the offense as the other

> aggravating circumstances; 9) the death penalty is not proportional; 10) the admission of evidence regarding Kearse's emotional state during the penalty phase; 11) the giving of the State's special requested instruction on premeditated murder over defense objection; 12) instructing the jury on escape as the underlying felony of felony murder; 13) the denial of defense challenges for cause of prospective jurors; 14) the admission of testimony regarding the purpose of a two-handed grip on a gun; 15) the denial of defense motions to suppress evidence on the basis that Kearse's warrantless arrest was not based on probable cause; 16) the instruction on reasonable doubt denied Kearse due process and a fair trial; 17) the admission of hearsay evidence during the guilt phase; 18) the introduction of evidence in the penalty phase that Kearse had been previously convicted of robbery; 19) the admission of Kearse's alleged disciplinary record during the penalty phase; 20) the constitutionality of the felony murder aggravating circumstance; 21) the denial of the requested instruction regarding the weight to be afforded [to] the jury's recommended sentence; 22) the denial of the requested instruction regarding mitigating circumstances; 23) the denial of the requested instruction regarding the burden of proof in the penalty phase; 24) the constitutionality of Florida's death penalty statute; and 25) the constitutionality of the aggravating circumstances found in this case.

Kearse I, 662 So.2d at 680-81.

The Florida Supreme Court affirmed the convictions but "vacate[d] Kearse's death sentence and remand[ed] to the trial court with directions to empanel a new jury, to hold a new sentencing proceeding, and to re-sentence Kearse." Id. at 686. The court found "several [penalty phase issues] constituted error that require[d] a new sentencing proceeding before a jury." Id. at 685. Specifically, the court found error with "the penalty phase instructions and the improper doubling of aggravating circumstances." Id.

After the conclusion of the new sentencing hearing, the jury unanimously recommended that Petitioner be sentenced to death. The trial court followed that recommendation and imposed the death sentence upon Petitioner. The trial court found the existence of two aggravating circumstances: (1) the murder was committed during a robbery; and (2) merging into one factor, the murder was committed to avoid arrest and hinder law enforcement, and the victim was a law enforcement officer engaged in performance of his official duties. The court found Petitioner's age to be a statutory mitigating circumstance and gave it "some but not much weight." Kearse v. State, 770 So.2d 1119, 1123 (Fla. 2000) (hereinafter Kearse II). Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: (1) Petitioner exhibited acceptable behavior at trial and (2) he had a difficult childhood, which caused Petitioner's psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances." Id. Petitioner then appealed.

On appeal, Petitioner raised the following twenty-two alleged issues of error:

> (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) [that] electrocution is cruel and unusual punishment.

Id.

The Florida Supreme Court rejected these claims and affirmed the trial court's sentence of death. Next, Petitioner sought postconviction relief from the trial court pursuant to Fla. R. Crim. P. 3.851. Petitioner raised ten claims.[2] Kearse v. State,

[2] Petitioner claimed the following: (1) that public records were withheld; (2) that defense counsel failed vigorously to advance Petitioner's position, to cross-examine witnesses at trial and at the

969 So.2d 976 (Fla. 2007) (hereinafter Kearse III). The trial court held an evidentiary hearing on some of the claims and, subsequently, denied relief on all claims. Id. at 982. Petitioner appealed to the Florida Supreme Court raising only the following four issues:

> (A) that trial counsel provided constitutionally ineffective assistance, (B) that the circuit court erred in denying Petitioner's claim of newly discovered evidence warranting a new penalty phase, (C) that the trial court erred in denying Petitioner's public records requests, and (D) that the trial court erred in summarily denying several of his postconviction claims.

Id.

At the same time, he filed a state petition for writ of habeas corpus. Petitioner asserted two claims for habeas relief.

Motion To Suppress Hearing, to consult with crime scene, firearm, and medical experts, to request co-counsel at the second penalty phase, to prepare witnesses to testify at the resentencing, to object to the admission of evidence, to argue the mitigating factor of Petitioner's age, to present evidence regarding the victim's prior misconduct, to obtain Petitioner's consent to concede aggravating factors, and cumulative error; (3) that the trial court erred in denying a cause challenge and counsel's motion for co-counsel and in rejecting two statutory mental health mitigating factors; (4) that the State knowingly withheld evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (5) that newly discovered evidence demonstrates the State's expert was biased for the prosecution; (6) that Petitioner's rights under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), were denied through the ineffective assistance of counsel and inadequate assistance of mental health experts; (7) that Petitioner's death sentence is fundamentally unfair; (8) that Petitioner was denied the right to a fair trial because of pretrial publicity, the lack of adequate venue, and events in the courtroom at trial; (9) that Florida's death penalty scheme violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (10) that his death sentence is unconstitutionally based on an automatic aggravator; and (11) that Petitioner is insane and, thus, cannot be executed.

Petitioner contended: (1) that appellate counsel was ineffective for failing to raise two meritorious claims, and (2) that both his death sentence and lethal injection are unconstitutional. Id. at 990. The Florida Supreme Court affirmed the trial court's denial of the Rule 3.851 motion and denied habeas relief. See id. The court also denied rehearing on November 30, 2007. Petitioner then filed a successive postconviction motion, which was denied. On May 22, 2009, the Florida Supreme Court affirmed the denial of Petitioner's state habeas petition.

On July 17, 2009, Petitioner filed the instant Petition For Writ Of Habeas Corpus (DE 1), asserting fifteen claims with multiple sub-claims. This matter is now ripe, and the Court will review the merits of his claims.

III. STANDARD OF REVIEW

In reviewing Petitioner's Petition For Writ Of Habeas Corpus (DE 1), the Court is bound by the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), which significantly changed the standards of review that federal courts apply in habeas corpus proceedings. Under the AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United

States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard." Maharaj v. Sec'y, Dept. of Corr., 432 F.3d 1292, 1308 (11th Cir. 2005).

Pursuant to § 2254(d)(1), a state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." Williams v. Taylor, 529 U.S. 362, 405 (2000). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." Id.

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409; see also Wiggins v. Smith, 539 U.S. 510, 520-21 (2003). Significantly, an "objectively unreasonable application of federal law is different from an incorrect application of federal law." Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (quoting Williams, 529 U.S. at 410) (emphasis in original). An "unreasonable application" can also occur if a state

court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's determination of the facts, however, is entitled to deference," under § 2254(e)(1). Maharaj, 432 F.3d at 1309. Thus, a federal habeas court must presume that findings of fact by a state court are correct. A habeas petitioner must rebut that presumption by clear and convincing evidence. See Hunter v. Sec'y, Dept. of Corr., 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a de novo review standard, relief must be denied under the much narrower AEDPA standard." Jefferson v. Fountain, 382 F.3d 1286, 1295 n.5 (11th Cir. 2004). Even if the Court believed the Florida Supreme Court's determination to be an incorrect one, under AEDPA deference that alone is not enough to grant habeas relief, the Court must also find that "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents." Harrington v. Richter, 131 S.Ct. 770, 786 (2011). In other words, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in

federal court was so lacking in justification that there was an error well understood and comprehended in existing law, beyond any possibility for fairminded disagreement. See id.

IV. ANALYSIS

Petitioner asserts the following fifteen claims as grounds for federal habeas relief: (1) Petitioner contends that he was provided ineffective assistance of counsel during the guilt and penalty phases of trial; (2) Petitioner asserts that his appellate counsel was ineffective for failing to raise numerous meritorious issues on direct appeal; (3) Petitioner argues that his death sentence constitutes cruel and unusual punishment; (4) Petitioner asserts that the trial court erred when failing to find the statutory mitigating circumstance of his age at the time of the offense; (5) Petitioner contends that the trial court erred in instructing the jury on escape as the underlying felony of felony murder; (6) Petitioner argues that his constitutional rights were violated when he was not tried in the county where the offense occurred; (7) Petitioner asserts that the trial court erred when it denied his motion to disqualify the prosecutor; (8) Petitioner contends that the trial court erred in denying his motion for mistrial based on improper and inflammatory comments to the jury; (9) Petitioner alleges that the trial court erred in granting the State's cause challenge against a prospective juror; (10) Petitioner asserts that the trial court erred in denying his cause challenges of two prospective jurors; (11) Petitioner contends that the trial court

erred in denying an evidentiary hearing on a claim of judicial error; (12) Petitioner alleges that his due process and equal protection rights were violated because correspondence between the prosecutor and trial counsel was withheld; (13) Petitioner asserts that the trial court erred in considering an aggravating circumstance which was based on the same set of facts as other aggravating circumstances; (14) Petitioner contends the trial court erred in considering the aggravating circumstance that the crime was committed while he was engaged in the commission of the crime of robbery; and (15) Petitioner argues that the Florida Capital Sentencing procedure deprived him of his right to notice, a jury trial, and due process. The Court will address each claim and sub-claim in turn and, for the reasons that follow, will deny Petitioner's Petition For Writ Of Habeas Corpus (DE 1).

A. Ineffective Assistance Of Trial Counsel

At trial, in both the initial guilt and penalty phases, Petitioner was represented by Robert G. Udell, Esq. (hereinafter "Mr. Udell" or "Trial Counsel").[3] Mr. Udell also represented Petitioner at the resentencing after the Florida Supreme Court remanded the case for a new penalty phase. Petitioner asserts that Mr. Udell's performance was deficient in four specific areas. According to Petitioner, Mr. Udell failed to: (1) adequately

[3] Mr. Udell was admonished by the Florida Bar on December 14, 2006; issued a public reprimand on September 6, 2007; and was permanently disbarred by order of the Florida Supreme Court on October 29, 2009. See https://www.floridabar.org/names.nsf (last visited April 22, 2014).

prepare defense experts; (2) investigate and prepare for testimony of the State's mental health expert; (3) investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public; and (4) prepare lay witness testimony. Petitioner does not precisely delineate whether these deficiencies occurred during the guilt phase, the penalty phase, or both. However, all of these claims were exhausted in Petitioner's Rule 3.850 motion, following his resentencing. As such, the Court considers each of these as claims of ineffective assistance of counsel during the resentencing.

i. The Strickland Standard

Petitioner's claim of ineffective assistance of trial counsel is governed by Strickland v. Washington, 466 U.S. 668 (1984), as well as by the deferential standards of the AEDPA. In Strickland, the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id. Moreover, "[i]t is not enough for the defendant to show that the

errors had some conceivable effect on the outcome of the proceeding." Id. at 693.

> In Strickland, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S. at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689, 104 S.Ct. 2052.

Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011). Accordingly, the Court reviews Petitioner's claims with the clearly established federal law of Strickland and its progeny, while also applying deference to the state court's decisions as required by the AEDPA.

ii. Underlying Facts Of Petitioner's Ineffective Assistance Of Trial Counsel Claim

The Court has reviewed the entire transcript from the resentencing proceeding and from the postconviction evidentiary hearing. On December 12, 1996, Petitioner's resentencing began. The State called fifteen witnesses. These witnesses were eyewitnesses, police officers, a firearms expert, and the victim's mother. Petitioner called twelve witnesses, consisting of guidance counselors and teachers from Petitioner's elementary schools, family members, mental health experts, and Petitioner himself. The State also called one rebuttal witness, Dr. Daniel Martell.

The State's summary of the evidence was that Petitioner was proceeding the wrong way on a one way street when Officer Parrish stopped him. The State argued that Officer Parrish was well within his rights to arrest Petitioner based simply on the fact that Petitioner did not have a driver's license. The State asserted that Petitioner's version of the traffic stop was self-serving and false. The overall theme of the State's case was that Petitioner was a proven liar, demonstrated not only by the psychological testing that was done by Dr. Martell, but also by Petitioner's own words. The State argued that Petitioner had not met the requirements needed for the jury to find he proved statutory mitigation. In addition, the State argued that even if the jury accepted all the mitigation evidence as true, such a finding did not outweigh the strong aggravation evidence presented.

In his defense, Petitioner argued that the crime was not a premeditated, cold-blooded killing. Petitioner contended that he panicked and made a poor decision because of his severe emotional impairment. Petitioner also asserted that the evidence showed that he could not conform his conduct to the requirements of the law because he was substantially impaired due to brain dysfunction. See DE 10, Ex. B, 2R-29, at 2658. Petitioner further maintained that Dr. Martell's analysis and diagnosis of Petitioner was "sophomoric and simplistic." Id. at 2662.

At the conclusion of each Party's argument, the jury

recommended death by a unanimous vote. Id. The judge followed the jury's recommendation and sentenced Petitioner to death.

During the postconviction evidentiary hearing, Petitioner called sixteen witnesses to the stand.[4] These witnesses included attorneys, mental health experts, Petitioner's family members, and citizens who had filed complaints against Officer Parrish. The State called one witness in rebuttal, Dr. Martell.

iii. Trial Counsel's Failure To Adequately Prepare Defense Experts[5]

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[4] Two witnesses proffered their testimony for the record because it was hearsay testimony that the State did not have an opportunity to rebut. DE 10, Ex. D, 1PCR-49.

[5] While this sub-claim is entitled "failure to adequately prepare defense experts," Petitioner also makes a cursory argument that Trial Counsel "neglected to call available expert witnesses." DE 1 at 32. Specifically, Petitioner references Dr. Alan Friedman. The Florida Supreme Court found the claim to be without merit.

> Kearse also claims that defense counsel should have presented more mitigation or chosen different experts. This claim simply ignores the extensive mental health mitigation outlined above that was presented at resentencing through a psychologist, a neuropharmacologist, a licensed mental health counselor, several educators, and family members. Further, as the trial court pointed out, and Kearse does not dispute, Kearse's experts at the postconviction hearing largely testified in conformity with the testimony defense counsel presented at the resentencing. We can think of no other case——and Kearse has not cited one——in which defense counsel has presented so much expert testimony and other mitigation, but has been found ineffective for failure to present mitigation. Accordingly, we hold that Kearse's claim fails to meet Strickland's requirements.

Kearse III, 969 So.2d at 986. The Florida Supreme Court's determination does not appear unreasonable. Regardless, the Court finds this sub-claim was insufficiently pled in the instant Petition (DE 1). Petitioner did not assert that he was prejudiced by Counsel's decision not to call Dr. Friedman and only makes a conclusory argument that it was deficient to "rely on another witnesses [sic] without adequate expertise to relay Dr. Friedman's opinions to the sentencing

Petitioner's first sub-claim of ineffective assistance of trial counsel is that Mr. Udell "failed to prepare his own mental health experts." DE 1 at 29. Petitioner asserts that Trial Counsel did not provide the experts with the information necessary to support their opinions, nor did Trial Counsel prepare his experts to rebut the claims of the State's expert. Finally, Petitioner contends that Trial Counsel "improperly attempted to introduce the opinions of a psychologist through his expert neuropharmacologist, even though the psychologist was available to testify." Id. Petitioner contends that Mr. Udell was deficient in "failing to communicate with his experts and allow [sic] experts to communicate with each other." Id. at 30. Petitioner asserted this claim during the state postconviction proceedings, and an evidentiary hearing was held. Thereafter, the trial court denied this claim, which the Florida Supreme Court affirmed.

> Kearse first argues that defense counsel failed adequately to prepare Dr. Lipman, a neuropharmacologist, to testify by failing to provide him with necessary information and did not provide Dr. Lipman with the defense neuropsychologist's assistance in preparing part of an analysis in support of Dr. Lipman's testimony. Competent, substantial evidence supports the circuit court's finding that defense counsel provided Dr. Lipman with necessary materials. Further, Dr. Lipman testified at resentencing that counsel inundated him with information, and at the postconviction hearing testified that he would not change his testimony now that he had seen further information. Finally, Dr. Lipman testified that when he needed expert assistance, he simply consulted another neuropsychologist. Accordingly, Kearse

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judge and jury." DE 1 at 34.

> failed to establish either deficiency or prejudice.
>
> Kearse raises another ineffective assistance claim regarding Dr. Lipman's testimony. At the resentencing, Lipman testified that Kearse suffered from fetal alcohol effect, explained Kearse's resulting neurodevelopmental problems, and related these factors to Kearse's actions on the day of the murder. Kearse alleges that Dr. Lipman was not qualified to testify regarding his consultations with other experts about Kearse's psychological testing. The resentencing record demonstrates, however, that as a neuropharmacologist, in making his diagnoses Dr. Lipman always relies on medical doctors and psychologists. We agree with the circuit court that Dr. Lipman was not barred from testifying about his reliance on other experts. Thus, Kearse fails to meet either requirement of Strickland.

Kearse III, 969 So.2d at 983-84.

The Court must decide if the Supreme Court of Florida's determination was an unreasonable application of clearly established federal law. In doing so, the Court considers the relevant testimony given at the resentencing and at the postconviction evidentiary hearing on this issue.

At resentencing, Petitioner presented a series of witnesses. One of them was the previously referenced neuropsychologist, Dr. Jonathan Lipman. DE 10, Ex. B, 2R-26 at 2239. Dr. Lipman testified that he conducted an evaluation of Petitioner, which included reviewing his school and other records. Dr. Lipman also interviewed Petitioner's mother, Bertha Kearse. Mrs. Kearse advised Dr. Lipman that she drank alcohol throughout her pregnancy. After a review of the information provided by his mother and the school records, Dr. Lipman concluded that Petitioner has "Fetal

Alcohol Effect, a milder form of Fetal Alcohol Syndrome." Id. at 2250. Dr. Lipman suggested that MRI, PEC, and SPEC scans be performed on Petitioner. Dr. Lipman reviewed and interpreted the SPEC scan. However, he referred the other two test results to Dr. Bennet Blumenkov at the Department of Neurological Surgery at Vanderbilt University. Id. at 2256. Dr. Lipman also reviewed institutional evaluations conducted by Dr. Petrilla. Dr. Lipman testified that all the testing he reviewed confirmed that Petitioner "had a pervasive development[al] abnormality that was very early onset." Id. at 2261. Dr. Lipman also testified that he consulted literature on the subject of fetal alcohol effect. Finally, Dr. Lipman testified about the review he conducted and the findings of Dr. Martell. Id. at 2272.

During Dr. Lipman's testimony, the State raised an objection, arguing that the doctor was testifying outside the scope of his expertise and utilizing information that was given to other doctors for use in their expert analysis in their fields of expertise, outside that of Dr. Lipman's. The trial court overruled the objection, finding "what experts can testify to under normal circumstances is really very, very broad, and we're [sic] operating under a proceeding here where the exclusionary rules of evidence are sort of waived." DE 10, Ex. B, 2R-27 at 2286.

Dr. Lipman continued to testify and advised the jury that, when consulting other doctors as part of his rendering an opinion,

"I chose my consultants carefully for their expertise." Id. at 2289. Dr. Lipman testified that he consulted with Drs. Alan Friedman and Lawrence Levine and reviewed the report of Dr. Kushner before forming his expert opinion.

At the postconviction hearing, Mr. Udell and Dr. Lipman both testified. DE 10, Ex. D, 1PCR-44-47. Mr. Udell testified that he hired Dr. Lipman to "testify as to what we call fetal alcohol effect or fetal alcohol syndrome." DE 10, Ex. D, 1PCR-44 at 540. Mr. Udell also testified that he hired Dr. Petrilla and Dr. Lipman to work together "as a team" because it seemed "smart to bring them together." DE 10, Ex. D, 1PCR-45 at 626. Trial Counsel stated that he provided Dr. Lipman with Petitioner's school records, all health records, and that he had been keeping Dr. Lipman "abreast of the case" by both sending him materials and having him consult with Dr. Petrilla. Id. at 635. Finally, Mr. Udell testified that he sent Dr. Lipman a great deal of information and that he spent "a lot of hours . . . over a number of days" preparing Dr. Lipman for trial.

Dr. Lipman also testified during the postconviction evidentiary hearing. See DE 10, Ex. D, 1PCR-47 at 942. Dr. Lipman testified that he had consulted and worked with Dr. Petrilla regarding Petitioner and that, when he did not agree with Dr. Petrilla, he consulted with an additional expert in the field, Dr. Friedman. Id. at 951. According to Dr. Lipman, Dr. Friedman is a

well-recognized expert in the field of malingering. In addition, Dr. Lipman testified that he also consulted with Dr. Levine about the results of the neuropsychological testing and with Dr. Blumenkov about the results of certain brain scans that had been performed on Petitioner. Id. at 953.

At the hearing, a letter written by Dr. Lipman to Mr. Udell was admitted into evidence. The letter described additional information and testing that Dr. Lipman would have liked to have had done. Mr. Udell neither provided that information to Dr. Lipman nor retained the experts who could have performed the additional testing. Id. at 958-62. However, on cross-examination, Dr. Lipman testified that he "had sufficient information to support [his] opinion." Id. at 966. Dr. Lipman further testified that the lack of additional test results or witness interviews, as complained of postconviction by Petitioner, did not affect the accuracy of his diagnosis and testimony at the resentencing. Id.

Given the testimony during the penalty phase and postconviction, the Court does not find that the Florida Supreme Court's determination was an unreasonable application of clearly established federal law or an unreasonable determination of fact. While it may be that Dr. Lipman did not have all the documents or information that he would have liked, he testified that the lack of information did not impede his ability to accurately diagnose or testify. Likewise, the record shows that the jury heard testimony

from Dr. Lipman about his consultation with other experts. There is nothing in the record to suggest that Dr. Lipman was unable to testify as to Petitioner's neurodevelopmental problems because he was not a psychologist.

More importantly, even if the Court were to conclude that Mr. Udell's actions were deficient, Petitioner has failed to show that he was prejudiced. In order to show prejudice, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In other words, Petitioner must show that he would not have been sentenced to death. Petitioner has done little, if anything, to meet this standard.[6] Therefore, the Court will deny habeas relief as to this claim.

iv. Trial Counsel's Failure To Investigate And To Prepare For The Testimony Of The State's Mental Health Expert

Petitioner's second sub-claim of ineffective assistance of trial counsel is that Trial Counsel was ineffective for failing to prepare for the State's expert witness's testimony. DE 1 at 34. Petitioner asserts that Mr. Udell "made no effort to investigate Dr. Daniel Martell" nor did he "attempt to verify Dr. Martell's

[6] The bulk of Petitioner's prejudice argument is simply block quotes of Dr. Lipman's testimony and the prosecutor's closing statements. DE 1 at 42-48. Petitioner has not offered a specific explanation as to how he was prejudiced.

credentials or ascertain what testimony Dr. Martell was going to offer." Id. Petitioner raised this claim on appeal to the Florida Supreme Court.

> Having summarized the evidence at the resentencing, we now address Kearse's claim that defense counsel was deficient for failing to depose Dr. Martell, the State's mental health expert. The record shows that Dr. Martell examined Kearse on the Thursday before the resentencing proceedings began the following Monday, and that defense counsel's motion for a continuance was denied. Upon receipt of Dr. Martell's raw data and report, defense counsel forwarded these to his experts and consulted with them about the information. He also consulted the state attorney regarding Martell's upcoming testimony. At the postconviction hearing, defense counsel testified that despite not having deposed Martell, he knew what Dr. Martell's testimony would be regarding statutory mitigators, what his test results supposedly revealed, and where Martell's testimony would differ from his own experts' testimony. As evidenced from the foregoing summary, the evidence shows that Udell correctly anticipated Martell's testimony. Kearse thus has not demonstrated anything material that defense counsel did not anticipate or could have done differently had he deposed Dr. Martell.

Kearse III, 969 So.2d at 985-86.

The Court has reviewed the testimony of Dr. Martell during the penalty phase and Mr. Udell during the postconviction hearing. Dr. Martell testified that Petitioner is a pathological liar and has anti-personality disorder. He did not find evidence, however, that Petitioner was under an extreme mental or emotional disturbance at the time of the crime. Dr. Martell further concluded that Petitioner attempted to "fake crazy in order to avoid responsibility." DE 10, Ex. B, 2R-28 at 2406. On cross-examination, Mr. Udell challenged Dr. Martell's findings. Mr.

Udell sought to discredit Dr. Martell regarding a series of witnesses whom the doctor did not interview, including but not limited to Petitioner's mother. Id. at 2442. Mr. Udell effectively cross-examined Dr. Martell about the possibility that Petitioner could have Fetal Alcohol Effect based on the amount of alcohol that his mother ingested during her pregnancy. Id. at 2455. Mr. Udell vigorously cross-examined Dr. Martell about his lack of research and review of certain documents related to Petitioner. Mr. Udell was quick to point out inconsistencies and contradictions in Dr. Martell's testimony. It is true that Mr. Udell did struggle with the acronyms for the vast array of psychological tests which were administered to Petitioner over the years. Id. at 2480-84. Nevertheless, Mr. Udell had Dr. Martell ultimately concede that Petitioner was "slow and behind where he should be for his age." Id. at 2474. Dr. Martell found Petitioner's IQ to be 80.

During postconviction, Mr. Udell testified about his preparation for Dr. Martell's testimony. DE 10, Ex. D, 1PCR-44 at 494. Mr. Udell did not do any specific research into Dr. Martell's background. Mr. Udell testified that he spoke with other lawyers in the community about the doctor to see if they knew or interacted with him. Mr. Udell testified that he briefly attended the compelled mental health evaluation of Petitioner, but he left after voicing an objection on the record. Mr. Udell did not depose Dr.

Martell. Mr. Udell testified that he was "a firm believer of doing very little discovery on the record in the presence of the State Attorney." Id. at 555. Mr. Udell further testified that he likely did not order the videotape of the evaluation nor did he have an independent recollection of obtaining a copy of the expert report. Mr. Udell testified that he often would have an informal conversation with the prosecutor about the anticipated testimony of the expert. On cross-examination, Mr. Udell testified that he provided Dr. Martell's raw data to defense experts for interpretation and that he put Dr. Lipman on the stand to rebut Dr. Martell's testimony regarding potential malingering. DE 10, Ex. D, 1PCR-46 at 754. Mr. Udell testified that he worked with his two expert witnesses to learn about the mental health testimony and that he "didn't go into this uneducated." Id. at 759.

It is of moment that this sub-claim is about ineffective assistance of counsel during a penalty phase proceeding. The theory of the defense's case for life imprisonment is relevant to the analysis. Here, the defense strategy was to establish statutory and nonstatutory mental health mitigation to spare Petitioner a death sentence. The State retained Dr. Martell to rebut the argument that Petitioner qualified for such mitigation. In doing so, the State was granted the opportunity to conduct a mental health evaluation of Petitioner immediately before resentencing.

Given the defense strategy, the Court has difficulty finding that Mr. Udell's brief attendance at the compelled mental health evaluation of his client, failure to review the videotapes of the evaluation, failure to review the State's expert's report, and failure to depose the expert——relying in on the informal summary given to him by his adversary at the State's Attorney's Office——constitute sound trial preparation. 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.

> The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]——whether what . . . [this attorney] did was within the wide range of reasonable professional assistance.

Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (internal citations omitted). However, the Court's opinion on Trial Counsel's performance matters little because Petitioner must also show prejudice resulting from Trial Counsel's ineffectiveness. He has not done so with regard to this sub-claim. The Court will not expound on the deficiency prong further, as the claim is resolved on the prejudice prong. See Hall v. Head, 310 F.3d 683, 699 (11th Cir. 2002) ("[A]lthough there is evidence in the record

to support the district court's finding of deficient performance, we need not and do not reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.") (internal citations omitted). Based on the record before the Court, the Court does not find that a reasonable probability of a different result at sentencing exists.

Petitioner provided postconviction testimony from additional experts who could have rebutted Dr. Martell. However, there is little evidence that these experts would have added anything additional to the penalty phase to which Dr. Lipman or Dr. Petrilla did not already testify. In assessing prejudice, "we consider the 'totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009)(citing Williams v. Taylor, 529 U.S. 362, 397-98 (2000)). To establish prejudice under Strickland, Petitioner "must show that there is a reasonable probability that, but for Trial Counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In determining prejudice from failure to present mitigating evidence, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins v.

Smith, 539 U.S. 510, 534 (2003). To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 131 S.Ct. 770, 792 (2011).

Given the strong aggravation evidence presented that was in comparison with the mitigation evidence that was presented and could have been presented had Trial Counsel not rendered a deficient performance, the Court finds that there was not a reasonable probability of a different result. Petitioner's claim fails even under a less stringent standard than the AEDPA. See Berghuis v. Thompkins, 560 U.S. 370, 390, 130 S.Ct. 2250, 2265, 176 L.Ed.2d 1098 (2010) ("[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review."); Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1291 (11th Cir. 2012) (explaining that, even when it is clear that AEDPA deference applies, the court may affirm the denial of federal habeas relief based solely on de novo review). Accordingly, the Court will deny Petitioner's Petition (DE 1) for habeas relief based on this sub-claim.

v. Trial Counsel's Failure To Investigate And Present Evidence Of Officer Parrish's Prior Misconduct And Difficulties Dealing With The Public

Petitioner's third sub-claim of ineffective assistance of trial counsel is that Mr. Udell was ineffective for failing to obtain Officer Parrish's personnel records and for failing to call several citizen complainants to testify. DE 1 at 59. Petitioner

argues that Officer Parrish had a record of being ill-tempered with African-Americans and a "tendency to get impatient in his dealings with the public." Id. Petitioner asserts that Trial Counsel should have used this information at both the guilt and penalty phases. Petitioner raised this claim on appeal to the Florida Supreme Court:

> Kearse next claims that defense counsel was ineffective for insufficiently investigating and by failing to use a mitigation strategy to vilify the victim. Kearse argues that evidence of Officer Parrish's prior misconduct suggested that he provoked the incident resulting in his death and that presentation of this mitigation would have resulted in a life sentence. Defense counsel considered this strategy and investigated citizen complaints against Officer Parrish. Counsel testified that after considering several factors——including the refusal of some witnesses to testify, the lack of substance of some testimony, and determinations by the Fort Pierce police that formal complaints against the officer were unfounded——he ultimately decided not to use this strategy. In addition, he considered the potential that the strategy would backfire, especially in light of the facts, such as Kearse's firing thirteen bullets into the officer as the officer pled for his life and Kearse's passenger's testimony that at all times Officer Parrish was friendly and polite. Defense counsel admitted that he did not request the officer's personnel file. However, the evidence at the postconviction hearing showed that any evidence in the file supporting the vilification mitigation could have been countered at trial by other evidence in it of Officer Parrish's good reports and commendations. We find that counsel's decision not to present this mitigation strategy was reasonable. Further, Kearse has not demonstrated prejudice from counsel's failure to obtain the personnel record. Accordingly, we affirm denial of relief on this claim.

Kearse III, 969 So.2d at 987-88. The Florida Supreme Court reviewed the testimony from the evidentiary hearing and found that

Mr. Udell made a reasonable, strategic decision. The Court reviews the record to determine if the decision of the Florida Supreme Court was a reasonable one.

At the evidentiary hearing, Mr. Udell testified that, in advance of trial, he sent a written request to the Fort Pierce Police Department asking for any citizen complaints that had been lodged against Officer Parrish. DE 10, Ex. D, 1PCR-44 at 515. Mr. Udell did not request Officer Parrish's entire personnel file. At the evidentiary hearing, Mr. Udell was unable to articulate a specific reason why he only requested the citizen complaints.

After receiving copies of the complaints, Mr. Udell went over said complaints with one or both of the investigators that he had retained to assist him with Petitioner's case. Mr. Udell recalled that the investigators were able to locate the citizens who had lodged complaints and spoke with some of them. Id. at 517-18. However, Mr. Udell testified that "[w]hen push came to shove everybody backed off of what they said; well, Mr. Udell, it wasn't really as bad as we suggested. And the general analysis was it was not helpful, it would be more harmful than helpful." Id. at 526. Mr. Udell described his decision not to call any of the complainants as an "educated strategy decision" because he did not think that the witnesses would come forward or "what they were willing to say just didn't reach that tipping point where we felt it would help." Id. Mr. Udell testified that he believed "if

you're going to slam a victim, you'd better be able to pull it off." Id. Mr. Udell had subpoenaed two of the complainants to testify but ultimately decided not to call them.

During cross-examination by the State on this issue, for the second time, Mr. Udell testified, "[Vilifying the defendant] helps if you can pull it off, if you have an evidentiary basis for it. We just didn't, we didn't think in this case." DE 10, Ex. D, 1PCR-46 at 752.

The record is clear that Mr. Udell viewed not calling the citizen complainant witnesses to the stand as a strategic one. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, but those made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." Strickland, 466 U.S. at 690-691. Here, Mr. Udell or his investigators met with all the citizen complainants that they could find and, after conferring with those witnesses, decided not to call them. The Court finds that Counsel's decision was reasonable.

Yet, Mr. Udell also testified that he recognized that he should have requested the officer's entire personnel file, in addition to the citizen complaints, because there was some damning evidence about the officer's demeanor and his dealings with the public made by his fellow law enforcement personnel. DE 10, Ex. D,

1-PCR-45 at 606. Mr. Udell was of the opinion that testimony of law enforcement regarding one of their own at Petitioner's trial, as opposed to "maybe people who had a grudge against law enforcement," would have been the better testimony had he decided to vilify the victim. Id. at 606.

However, Trial Counsel did not call any law enforcement officers to testify at the postconviction evidentiary hearing and, without more, the Court cannot speculate as to what or how they would have testified, if had they been asked about Officer Parrish's dealings with the public. This failure makes it virtually impossible to conclude that the Florida Supreme Court's determination was unreasonable. As this is a Strickland claim analyzed under the deferential lens of § 2254(d), the Court's review of the Florida Supreme Court's decision on deficiency is "doubly deferential." See Knowles v. Mirzayance, 129 S.Ct. 1411, 1420 (2009). Thus, the Court must give deference to the strategic decisions of Trial Counsel and also to the decision of the Florida Supreme Court. "The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Harrington, 131 S.Ct. at 788 (citing Strickland, at 689; Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997); and Knowles, 129 S.Ct. at 1420)). Petitioner has offered no evidence of what or how law enforcement would have testified at trial had Mr. Udell subpoenaed Officer Parrish's personnel file.

After a thorough review of the state court record, the Court concludes that Petitioner has not met his burden to show that the Florida Supreme Court's determination was unreasonable. Therefore, the Court will deny habeas relief to the extent Petitioner relies on this sub-claim.

vi. Trial Counsel's Failure To Prepare Lay Witness Testimony

Petitioner's final sub-claim of ineffective assistance of counsel is that "[Mr. Udell] failed to adequately prepare lay witnesses for their testimony." DE 1 at 40. Specifically, Petitioner asserts that trial counsel's performance was deficient because he allegedly failed to adequately prepare Pamela Baker, Peggy Jacobs, and Ernest Jacobs, as well as Petitioner, prior to their testimony. Petitioner also asserts that Mr. Udell was deficient in allegedly failing to conduct a thorough cross-examination of Derrick Dickerson and Rhonda Pendleton. Id. at 41. Petitioner raised these claims in his Rule 3.850 postconviction motion and on appeal in the state courts. The Florida Supreme Court denied relief.

> Kearse alleges that defense counsel failed to prepare him, Pamela Baker, and his aunt and uncle to testify. Kearse's claim that counsel failed to prepare him is based on an exchange at resentencing in which defense counsel asked Kearse where he had been incarcerated before his arrest for the murder. Kearse answered that he had been on death row at Raiford, which is where he was incarcerated after the trial. This answer was unresponsive to the question. Accordingly, Kearse fails to demonstrate that counsel was deficient. Kearse's claim regarding his relatives was not raised in his

> postconviction motion and thus it is unpreserved for appeal. Further, in his brief the claim is conclusory, meeting neither prong of Strickland. Kearse's claim that counsel was ineffective for allowing Ms. Baker to testify regarding his juvenile record is also conclusory and meritless. He claims without explanation that the evidence was not admissible. As the testimony at the postconviction hearing made clear, the evidence was admissible and defense counsel chose to admit it through Ms. Baker who could present it in context with Kearse's mental health and social services history. Accordingly, the trial court was correct to deny relief on all of these claims.FN5
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> FN5. Kearse also argues that defense counsel was ineffective for failing to cross-examine two witnesses at the motion to suppress hearing. He claims that on the day of the murder the eyewitness passenger (Rhonda Pendleton) was his girlfriend who was staying at her brother's home. Kearse argues that the police search of that house was invalid because he was an overnight guest there. This is not the argument Kearse made in his postconviction motion, and it is thus not preserved. Second, we held in Kearse I that exigent circumstances provided probable cause for the warrantless arrest and that physical evidence seized at the scene was not subject to suppression. Kearse I, 662 So.2d at 684.

Kearse III, 969 So.2d at 987.

At the outset, the Court will not consider the issue of the cross-examination of the witnesses and the failure to prepare Peggy and Ernest Jacobs on the merits. The Florida Supreme Court rejected this aspect of the claim as having not been preserved for appeal because Petitioner failed to make this argument at the circuit court level. This is an independent state law ground by which this Court must abide. If a state court finds that a petitioner's claims are procedurally defaulted after applying an adequate and independent state law, a federal court is obligated to

respect the state court's decision, unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider his claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). Here, Petitioner has neither asserted any cause for the default nor argued actual prejudice. Therefore, the Court will not further consider this sub-claim.

As to Petitioner's remaining argument——specifically, that Mr. Udell failed to prepare him and Pamela Baker to testify——the Court finds the Florida Supreme Court's determination reasonable. Petitioner's claim, as written, is based almost entirely on supposition. It presumes that had Mr. Udell prepared the witnesses, said witnesses would not have said the things that Petitioner now finds objectionable. Without more, the Court finds this claim is pure speculation.

As noted, supra, when Petitioner was on the stand, he responded to a question about where had he been incarcerated "prior" to his arrest for the murder of Officer Parrish. Petitioner responded that he had been incarcerated on death row. DE 10, Ex. B, 2R-24 at 1833. It is difficult to know if Petitioner did not understand the question or if he simply did not hear it correctly. Regardless, it is not clear that his ill-conceived answer was caused by a lack of preparation on the part of Mr.

Udell. This argument is made on an inference that, if Petitioner testified erroneously, then it must have been due to Mr. Udell's failure to properly prepare Petitioner to testify. The Court finds no support in the record for this inference. Moreover, Petitioner fails to show how he was prejudiced. Accordingly, the Florida Supreme Court was not unreasonable in denying this claim regarding Mr. Udell's allege failure to prepare Petitioner to testify.

As to the claim regarding Pamela Baker, Petitioner asserts that Mr. Udell had Ms. Baker testify to Petitioner's juvenile infractions "which were otherwise inadmissible." DE 1 at 40. Without considering whether to not the evidence was, in fact, inadmissible, the record shows that Trial Counsel had Ms. Baker testify regarding Petitioner's juvenile record as part of her testimony about his social and emotional disturbances as a child. The Court notes that Petitioner's mental and emotional health were at issue during the resentencing. Therefore, Mr. Udell was not deficient for eliciting information regarding Petitioner's juvenile offenses. The decision of the Florida Supreme Court was not unreasonable. The Court, therefore, will not grant habeas relief based on this sub-claim.

B. Ineffective Assistance of Appellate Counsel

Petitioner's second basis for habeas relief is that his Appellate Counsel was ineffective. Petitioner asserts two specific areas of deficiency. First, he maintains that Appellate Counsel

failed to argue trial court error on direct appeal for the denial of a "cause challenge to Juror Matthews who was biased." DE 1-1 at 2. Second, Petitioner asserts Appellate Counsel failed to argue trial court error for failure to grant Trial Counsel's request for co-counsel. Id. at 8. Petitioner first raised this claim in his state petition for writ of habeas corpus.

i. Denial Of Cause Challenge

Petitioner asserts that his Appellate Counsel was ineffective for failing to argue on direct appeal that the trial court erred in denying a cause challenge to Juror Matthews. While Appellate Counsel raised claims regarding other jurors, said Counsel did not raise a claim as to Juror Matthews. Petitioner contends that Juror Matthews should have been excused for cause because Juror Matthews was an insurance agent who had sold insurance policies to the prosecutor, Assistant State Attorney David Morgan (hereinafter "Mr. Morgan" or "the Prosecutor").[7] DE 1-1 at 3. Juror Matthews also advised that the lead crime scene detective on the case is the uncle of her husband. Id. Juror Matthews described the limited knowledge she had from the news media and her family, but she also stated that she had heard some facts of the case. Id. at 4-5.

Here, Petitioner acknowledged that the Florida Supreme Court

[7] The Florida Supreme Court found that Petitioner had not preserved this aspect of the claim for appellate review. Kearse III, 969 So.2d at 991, n.7. The court did not consider this fact in its analysis; thus, nor will this Court.

"identified Strickland but unreasonably applied the facts of this case in reaching its unreasonable conclusion." Id. at 7. In denying state habeas relief to Petitioner, the Florida Supreme Court applied the following standard:

> The requirements for establishing a claim based on ineffective assistance of appellate counsel parallel the standards announced in Strickland. "[The][p]etitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985). Counsel ordinarily is not deemed ineffective under this standard for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. See id.

Kearse III, 969 So.2d at 990. The Court finds that the Florida Supreme Court correctly interpreted clearly established federal law when denying Petitioner's claim. Of course, the key factor in this analysis is whether the facts support the Florida Supreme Court's determination. The Florida Supreme Court found as follows:

> Kearse alleges first that appellate counsel was ineffective for failing to raise the trial court's denial of Kearse's cause challenge to juror Matthews. Kearse's resentencing, like the 1991 trial, was held in Indian River County instead of St. Lucie County. During jury selection, defense counsel moved to strike Matthews for cause based on her knowledge of facts of the case and her relationship to a testifying detective.FN7 After the court denied the strike, defense counsel took the necessary steps to preserve the issue by requesting additional peremptories and renewing the motion before

the jury was sworn. See Trotter v. State, 576 So.2d 691 (Fla. 1990) (explaining the requirements for preserving a cause challenge). On direct appeal, appellate counsel raised the denials of other cause challenges, but did not raise the preserved claim regarding Matthews, who actually served on the jury. See Kearse II, 770 So.2d at 1128–29. Accordingly, contrary to the State's argument, this claim of ineffective assistance of appellate counsel is properly raised by habeas petition in this Court. Nevertheless, we deny the claim.

FN7. Kearse's contention on appeal that the juror was not qualified because she was the prosecutor's insurance agent was not preserved for review.

During individual questioning by the attorneys, Matthews indicated that she remembered a media report from several years before in which a Fort Pierce officer was "shot about 14 times" and "[t]here was like a trail where he tried to get away." She repeated that she was uncertain these facts concerned this case and had made the tentative connection based on the questioning during jury selection. Matthews also volunteered that, the night before, she learned from her husband's parents that her father-in-law's half brother, a retired Fort Pierce police officer, was coming to Florida for Christmas and to testify at a trial involving the murder of an officer. Matthews stated that she had not seen Detective Raulerson in three years and did not know him well. She assured the court that this would have no effect on her impartiality in the resentencing proceeding. At the resentencing, Raulerson, who was lead crime scene detective in the investigation of Officer Parrish's murder, testified regarding the gathering of physical evidence in the case.

We find that neither Matthews's vague memories about the crime, nor her attenuated relationship to a testifying detective, either separately or cumulatively, raises a reasonable doubt about her ability to be fair and impartial in light of her unwavering statements during voir dire of the need for a fair sentencing proceeding and her ability to be impartial. See Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984) ("The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court."); Singer v. State, 109 So.2d 7, 24

> (Fla. 1959) (announcing test for juror competency). Accordingly, the trial court did not err in denying the cause challenge, and appellate counsel was not ineffective for failing to raise the preserved claim.

Kearse III, 969 So.2d at 990-91. The Court has reviewed the transcript of the voir dire and finds the Florida Supreme Court's determination of facts reasonable.

During voir dire, Juror Matthews was asked if her professional relationship with the Prosecutor would "tip the scale on his side." DE 10, Ex. B, 2R-R17 at 861. Juror Matthews responded that she did not feel that her respect for Mr. Morgan or "anybody in that profession" would "tip the scales or sway my opinion at all." Id. at 861. When asked about her knowledge of the case, Juror Matthews responded that "in conversations with a family member last night, I learned of another family member who was coming into town for the holidays only because he had to testify in a trial where a cop was killed." Id. at 867. Juror Matthews identified that family member as her father-in-law's half-brother, Les Raulerson. At that point in time, Officer Raulerson had retired to Tennessee, and Juror Matthews had not seen him in three years. Id. at 869. Juror Matthews testified that the only day she would see Officer Raulerson was Christmas Day, which was after the penalty phase. When questioned by Trial Counsel about her ability to face Officer Raulerson, should she vote for life imprisonment, Juror Matthews said, "I would stand by my conviction, whatever it was." Id. at 872. Later, Juror Matthews was questioned about pre-trial

publicity and her knowledge of the case. She stated that she had some vague knowledge of a police officer having been shot in Fort Pierce, but that she did not "know if this is the same incident or not." DE 10, Ex. B, 2R-18 at 1008. Juror Matthews testified that she had no idea what happened to the person she thought had shot the Fort Pierce police officer nor did she know what happened at trial or anything that happened since then. See id. at 1010.

When the Prosecutor inquired, Juror Matthews testified that she would "decide this case based on what [she] hear[d] from the witness stand here in the courtroom." Id. at 1013. Juror Matthews also testified that she would decide the case based on the testimony and the instructions from the judge, that she had no preconceived notions regarding the case, that she believed that Petitioner deserved a fair hearing, and that she could consider all the facts in aggravation and mitigation and weigh them as directed. See id. at 1013-16.

Claims of ineffective assistance of appellate counsel are governed by the standard articulated in Philmore v. McNeil:

> In assessing an appellate attorney's performance, we are mindful that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." Heath v. Jones, 941 F.2d 1126, 1130-31 (11th Cir. 1991). Rather, an effective attorney will weed out weaker arguments, even though they may have merit. See id. at 1131. In order to establish prejudice, we must first review the merits of the omitted claim. See id. at 1132. Counsel's performance will be deemed prejudicial if we find that "the neglected claim would have a reasonable probability of success on appeal." Id.

575 F.3d 1251, 1264-65 (11th Cir. 2009).

Based on the record before the Court, the Court finds that the Florida Supreme Court's determination of facts was a reasonable one. Indeed, Juror Matthews' statements regarding her impartiality were "unwavering." Kearse III, 969 So.2d at 991. Moreover, Juror Matthews clearly stated her belief in Petitioner's right to a fair trial. Further, given the extensive voir dire that occurred and Juror Matthews's statements, the Court finds that the Florida Supreme Court was reasonable in determining that Appellate Counsel was not ineffective. If the underlying claim was without merit, Appellate Counsel cannot be deemed deficient for not raising a meritless claim. Therefore, the Court will deny habeas relief based on this sub-claim.

ii. Appointment Of Co-counsel

Petitioner's second sub-claim for federal habeas relief is that his Appellate Counsel was ineffective for failing to argue trial court error when Trial Counsel's motion for co-counsel was denied. DE 1-1 at 8. Petitioner asserts that Appellate Counsel's "failure to raise this point on direct appeal is deficient performance." Id. at 13. However, Petitioner cites to no state or federal law which provides that a capital defendant is entitled to the appointment of co-counsel. Therefore, it is difficult, if not impossible, to find that Appellate Counsel was ineffective for failing to assert a claim that has no basis in law. Moreover, the

Florida Supreme Court adjudicated this claim on the merits——a determination to which this Court must give AEDPA deference.

> Kearse next argues that appellate counsel was ineffective for failing to raise on appeal the trial court's denial of defense counsel's motion for appointment of co-counsel at the 1991 trial. Shortly after his appointment, defense counsel moved for appointment of co-counsel on numerous grounds. After a hearing, the trial court denied the motion and denied the renewed motion before the first penalty phase.
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> In Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994), we stated that the question of appointment of additional counsel rests within the discretion of the trial court "and is based on a determination of the complexity of a given case and the attorney's effectiveness therein." The record shows that trial counsel agreed with the trial court that the case was not complex, and Kearse does not claim here that it was. Accordingly, Kearse has not established that the motion for co-counsel would have been found meritorious on direct appeal and thus has failed to establish ineffective assistance of appellate counsel.

Kearse III, 969 So.2d at 991.

In order to prevail on this claim, Petitioner must show that Appellate Counsel was deficient and that he was prejudiced by the deficiency. Petitioner must also show that the state court determination, supra, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Although whether Appellate Counsel was constitutionally ineffective is a question of federal law, when the answer to the question turns on whether said Counsel should have raised issues of state law on appeal, § 2254(d)

requires that this Court defer to the state court's decision regarding its own laws. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984) (superceded by statute on other grounds).

The Florida Supreme Court reviewed the underlying claim regarding the appointment of co-counsel and found that it lacked merit as a matter of state law. "The Florida Supreme Court's interpretation of state law is binding on federal courts." Reaves v. Sec'y, Dep't of Corr., 717 F.3d 886, 903 (11th Cir. 2013). "The United States Supreme Court has instructed us that 'state courts are the ultimate expositors of state law' and federal courts 'are bound by their constructions' except in rare and extreme circumstances." Id. (quoting Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975)). The Court, therefore, defers to this determination. Because the Florida Supreme Court found no error in state law, Appellate Counsel cannot be said to have been ineffective when failing to raise a nonmeritorious claim. Thus, the Court will deny the relief sought in Petitioner's Petition (DE 1) on this basis.

C. Petitioner's Death Sentence Constitutes Cruel And Unusual Punishment

Petitioner's third claim for federal habeas relief is that his "low level of intellectual functioning and mental and emotional impairments, in combination with his age at the time of the offense, render him 'categorically less culpable than the average criminal.'" DE 1-1 at 14. Essentially, Petitioner argues that

Atkins v. Virginia, 536 U.S. 304 (2002), and Roper v. Simmons, 543 U.S. 551 (2005), collectively, provide for an exemption from the imposition of capital punishment against persons who do not meet the specific criteria defining mental retardation or the juvenile age limitation. The Florida Supreme Court rejected this claim, see infra, treating it as two separate legal arguments and concluding that Petitioner did not meet the requirements of either Atkins or Roper.

> Kearse claims that his death sentence is unconstitutional on various grounds. First, he argues that because of his age, low level of intellectual functioning, and mental and emotional impairments he cannot be executed under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which prohibited execution of people with mental retardation. However, Kearse's own expert at the resentencing testified that he was not mentally retarded, and he presented no evidence at his postconviction hearing that he was. Thus, his sentence is not unconstitutional under Atkins. See Hill v. State, 921 So.2d 579, 584 (Fla.), cert. denied, 546 U.S. 1219, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006).
>
> Next, he argues that because he was only eighteen years and three months old at the time of the crime and had low level intellectual functioning and mental and emotional impairments, he cannot be executed under Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Roper prohibited execution of any defendant who was under age eighteen at the time of the crime. Accordingly, Kearse does not qualify for exemption from execution under Roper. See Hill, 921 So.2d at 584.

Kearse v. State, 969 So.2d 976, 992 (Fla. 2007).

In order for Petitioner to prevail on this claim, he must demonstrate that the above-cited conclusion of the Florida Supreme Court was an unreasonable application of clearly established

federal law. 28 U.S.C. § 2254(d)(1). The Court finds that Petitioner is unable to do so. Petitioner does not claim that he was a juvenile at the time of the crime or that he is mentally retarded. Rather, his claim is, essentially, that because he almost meets the criteria under Atkins and Roper, this combination should preclude the imposition of capital punishment. However, there is no clearly established federal law which provides that it would be cruel and unusual punishment for someone who is close in age to that of a juvenile and close in intelligence quotient to someone with mental retardation to be sentenced to death. As to Atkins and Roper, individually, the Florida Supreme Court identified the correct Supreme Court precedent and made a reasonable application of the facts in light of the facts presented. 28 U.S.C. § 2254(d)(1)-(2). Thus, because Petitioner's argument lacks any support in the law, the Court will deny habeas relief on this ground.

D. Petitioner's Age As A Statutory Mitigating Circumstance

Petitioner's fourth claim for federal habeas relief is that the trial court erred when it failed to find that Petitioner's age constituted a statutory mitigating factor.[8] DE 1-1 at 24.

[8] Petitioner again cites both Atkins and Roper in support of this claim. The Court finds neither case applicable here, as the instant claim is one regarding trial court error for its alleged refusal to find mitigating circumstances; unlike Atkins or Roper, it is not a claim contesting whether juveniles or the mentally retarded can be executed under the Eighth Amendment. Moreover, neither case relied upon by Petitioner was clearly established law at the time of Petitioner's direct appeal in 2000. "It is hornbook AEDPA law that the only Supreme Court

Specifically, Petitioner asserts that, although he was over the age of eighteen by three months at the time of the crime, his low intellect renders him a "borderline juvenile." Id. Therefore, Petitioner contends that the trial court erred when it failed to find statutory mitigation based on his age at the time of the crime.

The Court notes, however, that Petitioner's argument is based on the first sentencing order entered by the Honorable Marc A. Cianca on November 8th, 1991. DE 10, Ex. A., 1R-13 at 2728-29. The Florida Supreme Court vacated said order in 1995. See Kearse I, 662 So.2d at 686. Petitioner was then re-sentenced to death by the Honorable C. Pfeiffer Trowbridge on March 24, 1997. DE 10, Ex. B, 2R-5 at 709. In direct contradiction to Petitioner's contentions in his federal habeas petition, Judge Trowbridge found that "the age of the defendant at the time of crime" was a mitigating circumstance that was "entitled to some but not much weight." Further, the Florida Supreme Court denied relief on this claim on direct appeal:

> Finally, Kearse claims that the court erred in its evaluation of his age (18 years and 3 months at the time of the shooting) as a mitigator (claim 18). Where a defendant is not a minor, no per se rule exists which

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decisions against which a state court decision is to be measured are those on the books at the time the state court decision was issued." Greene v. Fisher, 132 S.Ct. 38, 45 (2011)(holding a Supreme Court decision issued three months after the last state court decision on the merits of a federal constitutional issue cannot be considered in determining clearly established federal law for § 2254(d)(1) purposes).

> pinpoints a particular age as an automatic factor in mitigation. See Shellito v. State, 701 So.2d 837, 843 (Fla. 1997), cert. denied, 523 U.S. 1084, 118 S.Ct. 1537, 140 L.Ed.2d 686 (1998). Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing. See id. Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard. See Cole v. State, 701 So.2d 845, 852 (Fla. 1997). This Court has held that the trial judge is in the best position to judge a non-minor defendant's emotional and maturity level, and this Court will not second-guess the judge's decision to accept age in mitigation but assign it only slight weight. See Shellito, 701 So.2d at 844.

Kearse, 770 So.2d at 1133.

Therefore, Petitioner's argument is not only moot but also lacks merit, and the Court will deny habeas relief on this ground to the extent raised in the instant Petition (DE 1).

E. Trial Court Error in Jury Instructions

Petitioner's fifth claim for federal habeas relief is that the trial court erred in instructing the jury on escape as the underlying felony of felony murder. DE 1-1 at 29. Petitioner asserts that he was given no notice of the State's intention to rely on escape as the underlying felony for its theory of felony murder. Additionally, Petitioner asserts that he was not even given notice of the felony murder charge. The indictment in this case charged premeditated murder. Petitioner argues that the "failure to properly charge the offense was a violation of Petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution." DE 1.

Petitioner raised these arguments on direct appeal, and the Florida Supreme Court found no error. As to the notice claim, the Florida Supreme Court found:

> The State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder. O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983); Knight v. State, 338 So.2d 201, 204 (Fla. 1976). In O'Callaghan, we concluded that the defendant was not prejudiced by the lack of a felony murder charge in his indictment or by the instructions given to the jury on the crime as charged in the indictment. 429 So.2d at 695. Because the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder. As we explained in O'Callaghan, "because of our reciprocal discovery rules, [a defendant has] full knowledge of both the charges and the evidence that the state [will] submit at trial." Id. Moreover, the underlying felonies that the State can rely upon to prove felony murder are limited by statute. See Fla. Stat. § 782.04(1)(a)(2) (1991). Thus, a defendant also has statutory notice of the possible underlying felonies, including escape. See § 782.04(1)(a)(2)(g)).

Kearse I, 662 So.2d at 682.

Regarding the elements of escape, Petitioner argued on appeal that the element of arrest was not proven because, absent his confession, there was no evidence that Officer Parrish communicated Petitioner was under arrest. See Kearse I, 662 So.2d at 682; see also, Kyser v. State, 533 So.2d 285, 287 (Fla. 1988) ("For there to be an escape, there must first be a valid arrest."). The Florida Supreme Court found as follows:

> Rhonda Pendleton, Kearse's companion in the car at the time of the stop, testified that Officer Parrish told

> Kearse that he would "haul his ass in" if Kearse did not tell him his correct name or admit that his license had been suspended. When Kearse was not forthcoming, Parrish asked him to get out of the car and to put his hands on top of the car. Parrish's handcuffs were found on the ground at the scene. Pendleton also testified that Kearse explained that he shot Parrish "because his probation was suspended and the police was [sic] looking for him already." These facts constitute competent, substantial evidence of the arrest element of escape independent of Kearse's confession. Thus, the court did not err by giving the escape instruction. Moreover, had the court erred in giving this instruction, the error would be harmless beyond a reasonable doubt in light of the evidence establishing premeditated murder and felony murder based on the underlying felony of robbery.

Kearse I, 662 So.2d at 683.

Petitioner's instant claim is an issue of state law, and "[o]rdinarily, issues of state law are immune from federal review." Francois v. Wainwright, 741 F.2d 1275, 1281 (11th Cir. 1984). "The ultimate source of any state's law is found in the decisions of its highest court." Ford v. Strickland, 696 F.2d 804, 810 (11th Cir. 1983); Knight v. Dugger, 863 F.2d 705, 724 (11th Cir. 1988). Further, the Eleventh Circuit has long recognized that, under Florida law, it is permissible for the prosecution to proceed on either a felony murder or premeditated murder theory when the indictment charges only the offense of first-degree murder or premeditated murder. See Knight, 863 F.2d at 724. The Court will, therefore, deny the instant Petition (DE 1) to the extent it raises this claim.

F. Trial Outside of the County Where the Offense Occurred

Petitioner's next ground for habeas relief is, essentially,

that his due process rights were violated when Petitioner was not permitted to withdraw his waiver of venue and the guilt and penalty phases of his case were, as a result, heard in Indian River County, as opposed to St. Lucie County, where the underlying conduct occurred. When he was initially tried for the murder in 1991, Petitioner waived his constitutional right to be tried in St. Lucie County. Upon remand from the Florida Supreme Court for a new sentencing hearing held in 1997, Petitioner attempted to withdraw his waiver and requested that he be resentenced in St. Lucie County.

The record shows that the trial court held several pretrial hearings on this issue. The final hearing was held on August 26, 1996. DE 10, Ex. B, 2R-10 at 103. At such time, Petitioner requested that the venue for the resentencing proceedings be moved outside of the Nineteenth Judicial Circuit entirely based on pretrial publicity and preconceived opinions within the community. However, if that request was denied, Petitioner wanted venue to be in St. Lucie County as opposed to Indian River County. Id. at 105. During the course of the hearing, Petitioner withdrew the request to move the case outside the Nineteenth Judicial Circuit and requested that the court proceed solely on the issue of the venue being in St. Lucie County. The trial judge denied the motion finding that "it's got to be easier to try this case to get an impartial jury in Indian River County" and because "Petitioner

waived his privilege to be tried in St. Lucie County when he made the initial motion, and I don't think he can withdraw that and regain it, but we'll find out on appeal if need be." DE 10, Ex. B, 2R-10 at 123. On direct appeal, the Florida Supreme Court determined:

> A motion for a change of venue is addressed to the trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion. Cole v. State, 701 So.2d 845, 854 (Fla. 1997), cert. denied, 523 U.S. 1051, 118 S.Ct. 1370, 140 L.Ed.2d 519 (1998). Given the trial court's articulated reasons for denying a change of venue back to St. Lucie County and Kearse's original request for the change to Indian River County, the denial here cannot be deemed an abuse of discretion and thus we find no merit to this issue.

Kearse II, 770 So.2d 1119, 1124 (Fla. 2000).

Petitioner asserts that the Florida Supreme Court's determination was "absurd" and that it unreasonably applied federal law. In support of this argument, Petitioner attempts to analogize a waiver of venue with Supreme Court precedent regarding general principles of waiver of constitutional rights. DE 1-1 at 36. However, the Court does not see this an accurate comparison. In the cases on which Petitioner relies, the defendant had a right which he then chose to waive. At the time of resentencing, when Petitioner sought to regain his right to be tried in St. Lucie County, said right had already been waived by Petitioner. Indeed, if the courts were to retry all the cases where a defendant who made a knowing and voluntary relinquishment of a right decided later it would be strategically advantageous to assert the waived

right, the concept of knowing and voluntary waivers would be rendered meaningless.

Given the confusing fashion in which this claim has been presented, it is understandable that the determination by the Florida Supreme Court does not align precisely with the claim. The record before the Court and the instant Petition (DE 1) show that the issue Petitioner was arguing on appeal was (1) that he should have been allowed to withdraw his prior waiver of his right to be tried in the county where the crime was committed and (2) that, upon remand, venue should have been in St. Lucie County. The Florida Supreme Court, however, analyzed Petitioner's claims as a claim of trial error for denying a motion for change of venue, not a question of whether he should have been allowed to withdraw the waiver on remand. See Kearse II, 770 So.2d at 1124. The Florida Supreme Court concluded that the trial court exercised its considerable discretion in denying Petitioner's request to change venue from Indian River County to St. Lucie County. Petitioner has failed to show how the Florida Supreme Court made an unreasonable application of clearly established federal law. "If pretrial publicity is so prejudicial and inflammatory as to preclude the selection of an impartial jury, due process requires a change of venue or a continuance." Rideau v. Louisiana, 373 U.S. 723 (1963). Here, it was Petitioner who asserted that the pretrial publicity was so prejudicial that his case should not be heard in any county

in the Nineteenth Judicial Circuit, in particular St. Lucie County. Based on Petitioner's sworn statement to the court, his due process rights were not violated by his case being heard in Indian River County. Accordingly, habeas relief on this basis will be denied.

G. Trial Court Error of Denial of Motion to Disqualify Prosecutor

Petitioner's seventh claim for federal habeas relief is that the trial court erred when it denied Petitioner's motion to disqualify the Assistant State Attorney David Morgan. After Petitioner's trial in 1991, but shortly before his resentencing in 1997, Mr. Morgan was elected county court judge in Indian River County. However, as of the Petitioner's resentencing, Mr. Morgan had not taken the oath of office. DE 10, Ex. B, 2R-11 at 143. Petitioner filed a motion to disqualify Mr. Morgan because he believed that he would be deprived of a fair resentencing, as the jury could be composed of citizens who voted for Mr. Morgan for county court judge. At the time Trial Counsel filed this motion, he conceded that there was no case law in support of the motion. See id. at 143. The trial court denied the motion, and the Florida Supreme Court affirmed on direct appeal.

> Kearse also contends that the court erred in denying his motion to disqualify the prosecutor (claim 7). Kearse moved to disqualify Prosecutor David Morgan because Morgan had been elected county court judge in Indian River County where the resentencing proceeding was to be held. Although Morgan had not yet taken office, Kearse argued that the State would have "an unfair advantage in its attempt to convince the jury that they should impose the death penalty" by being represented by the prosecutor. The court denied the motion, stating that a

> disqualification on this basis would prohibit all nominated or elected judges who had not taken office yet from practicing law and would also affect retired judges who wanted to practice law. The court also stated that there could not be a blanket assumption that such a person would have an advantage in court and [that] the motion could be reconsidered if any prejudice was revealed during voir dire.
>
> Disqualification of a state attorney is proper only when specific prejudice [is] demonstrated. See Farina v. State, 679 So.2d 1151, 1157 (Fla. 1996), receded from on other grounds by Franqui v. State, 699 So.2d 1312, 1320 (Fla. 1997); State v. Clausell, 474 So.2d 1189, 1190 (Fla. 1985). Furthermore, "[a]ctual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Under this standard, we conclude that the trial court properly denied Kearse's motion to disqualify the prosecutor.

Kearse II, 770 So.2d at 1129.

Petitioner fails to show how this determination was an unreasonable application of clearly established federal law.[9] See DE 1-1 at 40-44. Indeed, the only clearly established federal law cited by Petitioner is Williams v. Taylor, 120 S.Ct. 1495 (2000) (holding that the defendant was deprived of his constitutional right to effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the jury). However, the Court notes that Williams does not support Petitioner's instant argument. Thus, the Court will deny Petitioner's Petition (DE 1) to the extent it seeks habeas

[9] Petitioner also cites, in addition to Florida law, In re Piper, 271 Or. 726, 534 P.2d 159 (1975). DE 1-1 at 43. Even assuming, arguendo, that Piper is analogous to the above-styled cause, it is well-established that Oregon Supreme Court precedent is neither binding on the Florida Supreme Court nor this Court.

relief based on the trial court's denial of Petitioner's motion to disqualify the Prosecutor during the resentencing phase.

H. Trial Court Error in Denying Motion for Mistrial Based on Inflammatory and Improper Comments to the Jury

Petitioner's next claim for federal habeas relief is that the trial court erred in denying a motion for mistrial following certain remarks made by the Prosecutor during open statements at the resentencing. DE 1-1 at 45. Specifically, Petitioner objected to the Prosecutor's request of the jury that they "show this defendant the same mercy he showed Officer Parrish, except in this courtroom it will be in accordance with the law." Id.; DE 10, Ex. B, 2R-19 at 1149. In fact, the record reflects that the Prosecutor made this argument twice——after the trial court denied Petitioner's motion for a mistrial, the Prosecutor repeated his argument to the jury. Id. at 1151.

Petitioner raised this claim on direct appeal. The Florida Supreme Court denied the claim.

> Claim 8 involves comments made by the prosecutor. During opening argument, the prosecutor stated that Kearse "wants to live, even though he denied that right to Officer Parrish" and urged the jury to show "this Defendant the same mercy he showed Officer Parrish." In response, defense counsel moved for a mistrial, which the court denied. The State contends that this issue has not been properly preserved for appeal because counsel simply moved for a mistrial and did not object or ask for a curative instruction. However, as this Court explained in Spencer v. State, 645 So.2d 377, 383 (Fla. 1994), defense counsel may conclude that a curative instruction will not cure the error and choose not to request one. Thus, a defendant need not request a curative instruction in order to preserve an improper comment issue for

> appeal. Id. Moreover, even though Kearse's counsel did not specifically object to the prosecutor's comment, counsel's contemporaneous motion for mistrial at the time that the prosecutor made these comments was sufficient to preserve the issue for appellate review. See James v. State, 695 So.2d 1229, 1234 (Fla. 1997), cert. denied, 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).
>
> This Court has found similar prosecutorial comments to be error. See Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992) (finding that prosecutor committed error in asking the jury to show defendant as much pity as he showed his victim); Rhodes v. State, 547 So.2d 1201, 1206 (Fla.1989) (finding that the prosecutor's argument that jury show defendant same mercy shown to the victim on the day of her death was "an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation"). However, "prosecutorial error alone does not automatically warrant a mistrial." Rhodes, 547 So.2d at 1206. We must examine the entire record and the nature of the improper comments made. See, e.g., Richardson, 604 So.2d at 1109 (concluding that, in light of the entire record, one comment by the prosecutor was harmless beyond a reasonable doubt); Rhodes, 547 So.2d at 1206 (stating that even though the cumulative effect of the prosecutor's five egregious comments required reversal, "none of these comments standing alone may have been so egregious as to warrant a mistrial"). In light of the record in this case, this single erroneous comment was not so egregious as to require reversal of the entire resentencing proceeding.

Kearse II, 770 So.2d at 1129-30. Petitioner asserts that the Florida Supreme Court's decision is an unreasonable application of clearly established federal law, in particular, Donnelly v. DeCristoforo, 416 U.S. 637 (1974). DE 1-1 at 46. Petitioner acknowledges that he must show that the Prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." DE 1-1 at 46; Donnelly, 416 U.S. at 643. However, he fails to argue how the Prosecutor's

comments denied him of such a right. Moreover, the Court notes that the Florida Supreme Court identified the correct legal standard and, based on the record, determined that an "erroneous comment was not so egregious as to require reversal. . . ." Kearse II, 770 So.2d at 1130. This application of the law to the facts is certainly reasonable considering the trial's fairness as a whole. As Donnelly found "[t]he result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller and Brady, supra, to amount to a denial of constitutional due process." Donnelly, 416 U.S. at 637 (emphasis added). The Court finds the Florida Supreme Court's determination that the Prosecutor's comments did not amount to egregious misconduct was reasonable. Accordingly, the habeas relief sought by the Petition (DE 1) on this basis will be denied.

I. Trial Court Error in Granting Cause Challenge

Petitioner's ninth claim for federal habeas relief is that the trial court erred in granting the State's cause challenge as to Juror Jeremy. DE 1-1 at 47. During the voir dire, Juror Jeremy made statements that prompted the State to raise a cause challenge, to which Petitioner objected. Specifically, when asked questions regarding her thoughts on the death penalty and her ability to be impartial, she stated that she thought she would feel uncomfortable serving on the jury. She also stated that while she would follow

the law that she thought she would "possibly be impaired." Id. at 387. She later clarified this statement, stating, "I do believe it would be impaired, yes, sir." Id. at 388. The trial court granted the State's cause challenge, and the Florida Supreme Court affirmed the trial court:

> The trial court's finding that Juror Jeremy's views would have substantially impaired her performance as a juror is adequately supported by the record. Throughout questioning by the State and defense counsel Jeremy stated that her feelings about the death penalty would impair her ability to follow the law and that she just could not see herself voting for death when she knew that a true life sentence was an alternative. Thus, there was no error in dismissing Jeremy for cause.

Kearse II, 770 So.2d at 1128.

Assuming, arguendo, that the instant claim is cognizable on federal habeas review, Juror Jeremy clearly stated that she believed her ability to follow the law would be impaired. Based on the record, the Court finds that the Florida Supreme Court made a a reasonable determination of the facts regarding the State's cause challenge and will, therefore, deny habeas relief on this ground.

J. Trial Court Error in Denying Petitioner's Cause Challenges

Petitioner's tenth claim for federal habeas relief is that the trial court erred when it denied Petitioner's cause challenges as to Jurors Barker and Foxwell. DE 1-1 at 48. In support of his argument, Petitioner quotes portions of the voir dire record, which allegedly demonstrate that these two jurors had bias that "was as entrenched as it was odd." Id. at 51. The Court notes that

neither Juror Barker nor Juror Foxwell actually served on the jury. DE 10, Ex. B, 2R-18 at 1112. Petitioner argues, essentially, that because the trial court improperly denied his cause challenges as to these two jurors, Petitioner was forced to use two of his peremptory challenges, which he could have used, instead, on other objectionable jurors.

Petitioner raised this claim on direct appeal. The Florida Supreme Court found "no merit to this claim." Kearse II, 770 So.2d at 1129.

> In claim 13, Kearse contends that Jurors Barker and Foxwell should have been excused for cause. In order to preserve such an issue for appeal, Florida law requires a defendant to object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible. See Dillbeck, 643 So.2d at 1028; Trotter v. State, 576 So.2d 691, 693 (Fla. 1990). In the instant case, Kearse has properly preserved this issue. Although neither Foxwell nor Barker served on the jury because Kearse struck them peremptorily, Kearse sought additional peremptory challenges after exhausting his allotted number and named two jurors that he would strike with the extra challenges.
>
> However, even though the issue was preserved for appellate review, the record shows that the trial court did not abuse its discretion in refusing to excuse Barker and Foxwell for cause. The voir dire transcript indicates that each met the test of juror competency in that each could "lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). Originally, Foxwell expressed his belief in the death penalty and his frustrations with the criminal justice system. However, when the capital sentencing process was explained to him, he unequivocally stated that he would follow the law. Defense counsel

> challenged Barker because her husband was a retired police officer and because she originally wanted assurances that a life sentence would be a true life sentence and that conjugal visits not be permitted. However, Barker repeatedly stated that her husband's status as a police officer would not influence her in any way. After defense counsel explained that she would not receive any assurances about the nature of a life sentence, she unequivocally stated that she could be fair and impartial and follow the law. Barker was questioned at length by both sides. A review of this questioning supports the court's denial of the cause challenge. The trial court did not abuse its discretion in declining to excuse these challenged venire members. Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law in light of the evidence presented. Thus, we find no merit to this claim.

Kearse, 770 So.2d at 1128-29.

Without deciding whether or not this claim is even cognizable in a federal habeas proceeding, the Court agrees with the Florida Supreme Court that it is without merit. The record reflects that Juror Baker responded to Trial Counsel's questions about her objectivity by affirming that she would listen to the testimony, be fair to Petitioner, and be objective on no less than ten occasions. DE 10, Ex. B, 2R-17 at 880-92. Likewise, Juror Foxwell also responded affirmatively to questions about whether or not he understood how mitigation of a death sentence works. Id. at 713. Juror Foxwell testified that he believed that he could follow the judge's instructions and that he did not have a problem with the burden of proof required to establish aggravating and mitigating factors. Id. at 715. Although both jurors did exhibit certain bias, each repeatedly assured Trial Counsel and the court that they

could and would follow the law. Thus, based on the record before the Court, the Florida Supreme Court's determination was reasonable, and the Court will deny habeas relief on this basis.

K. Denial of Evidentiary Hearing and Overwhelming Presence of Uniformed Police in the Courtroom

Petitioner's eleventh claim for federal habeas relief is that he was denied a fair trial and deprived of his constitutional rights when the trial court allowed "an overwhelming presence of uniformed police officers in the courtroom during the trial." DE 1-1 at 52. Petitioner asserted that he is entitled to an evidentiary hearing to prove that a hostile courtroom did indeed exist. The state courts disagreed.

> During the 1996 resentencing proceeding, Kearse's defense counsel told the court that at the 1991 trial the courtroom was full of uniformed law enforcement officers. Based solely on this statement, Kearse argued in his postconviction motion that he was deprived of a fair trial in 1991. The circuit court summarily denied relief, finding the claim legally insufficient because the mere presence of the officers was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice. We agree. Kearse does not allege any other facts that in the "totality of the circumstances" would entitle him to relief. See Woods v. Dugger, 923 F.2d 1454, 1455 (11th Cir. 1991) (applying a totality of the circumstances test to a similar claim).

Kearse III, 969 So.2d at 989.

As this claim was adjudicated on the merits, the Court may not grant federal habeas relief unless the state court's determination was unreasonable. Here, Petitioner has not shown, or even alleged, that the Florida Supreme Court's opinion was an unreasonable

application of clearly established law. Petitioner's argument is based solely on Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). This is, however, not clearly established federal law. The phrase "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362 (2000). For this reason alone, the Court should deny the claim.

Moreover, the claim is insufficiently pled. Petitioner's entire claim is based on a single statement from Trial Counsel during the resentencing which indicated that during Petitioner's initial trial "it was a packed courthouse with nothing but law enforcement officers." DE 1-1 at 52. However, it is not enough to simply show that there were uniformed police officers present during the trial, Petitioner must also show actual or inherent prejudice. Williams, 923 F.2d at 1457. The only attempt made by Petitioner to do so was to summarily assert that "Petitioner has shown both." DE 1-1 at 52. This single statement serves as the sole basis for his prejudice argument. This does not provide a basis for the Court to hold an evidentiary hearing. If a prisoner "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." Holmes v. United States, 876 F.2d 1545, 1552 (11th Cir. 1989)(internal quotations omitted). Here, Petitioner

has not made any allegations which would entitle him to relief. Accordingly, the Court will deny Petitioner's request for an evidentiary hearing to the extent raised in his Petition (DE 1), as well as habeas relief based on this claim.

L. Violation of Due Process

Petitioner's twelfth claim for federal habeas relief is that the trial court erred when it denied his public records request for a letter drafted by Assistant State Attorney Mirman and sent to Petitioner's trial counsel, Mr. Udell, prior to the postconviction evidentiary hearing on Petitioner's claim of ineffective assistance of trial counsel. The letter purportedly contained suggested responses to areas of questioning that Mr. Mirman planned to ask Mr. Udell at the evidentiary hearing.

At said hearing, Petitioner inquired about the letter and requested that the court conduct an in camera inspection. After doing so, the court found that the letter was properly withheld and did not need to be produced to the defense. Petitioner argues that even if this letter was work product, the privilege was waived when the Assistant State Attorney Mirman disseminated it to defense counsel. Petitioner raised this claim on appeal of the denial of his postconviction motion. The Florida Supreme Court affirmed, finding that "[t]he assistant state attorney's letter containing his mental impressions about the case clearly fits within the exemption of attorney work product prepared with regard to the

ongoing postconviction proceedings." Kearse v. State, 969 So.2d 976, 989 (Fla. 2007).

At its core, this claim challenges the state court's interpretation of state law. Therefore, this claim is not cognizable in Petitioner's federal habeas petition. "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992). The reasoning behind this well-established principle is straightforward: a challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment, i.e., the conviction itself, and habeas relief is, therefore, not an appropriate remedy. See Quince v. Crosby, 360 F.3d 1259, 1261-62 (11th Cir. 2004); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 2011).

Accordingly, if the letter did create a question of constitutional nature, it would not undermine the legality of the detention or imprisonment. It allegedly assisted Trial Counsel with his testimony during the postconviction proceeding, not with his representation of Petitioner during trial.[10] Because due process violations during state post-conviction proceedings do not

[10] This does not imply that the Court thinks the document in question was attorney work product. The Court has not reviewed the document, and, thus, makes no determination as to the applicability of that privilege.

form the basis of habeas relief, the Court must deny the instant Petition (DE 1) as to this claim. See Carroll v. Sec'y, Dep't of Corr., 574 F.3d 1354, 1365 (11th Cir.2009); Quince v. Crosby, 360 F.3d 1259, 1262 (11th Cir. 2004).

M. Trial Court Error in Consideration of Aggravating Factors

In Petitioner's thirteenth claim, he argues that the trial court erred in considering an aggravating circumstance, specifically the commission of another aggravating circumstance. DE 1-1 at 61-62. Petitioner asserts that "[w]here the commission of one aggravating circumstance is for the sole purpose of committing another aggravating circumstance, it is reversible error to consider both aggravating circumstances separately." Id. at 62. Petitioner contends that he took the officer's gun solely for the purpose of avoiding arrest and hindering the enforcement of laws. Id.

Petitioner raised this claim on direct appeal. The Florida Supreme Court rejected this argument.

> Claims 19 and 20 both relate to the trial court's consideration of the "commission during a robbery" aggravating circumstance. Kearse contends that either the trial court should have merged this factor with the avoid arrest/hinder law enforcement aggravator or should not have found this aggravator established at all. Kearse argues that his case is similar to Jones v. State, 580 So.2d 143, 146 (Fla. 1991), in which this Court concluded that the "committed during a robbery" aggravator could not apply even though the taking of the victim officer's gun may have technically constituted a robbery. We conclude, however, that the instant case is distinguishable from Jones. In Jones, while the taking of the officer's service revolver was "technically an

> armed robbery, [it] was only incidental to the killing, not the reason for it." 580 So.2d at 146. As noted in our opinion, Jones took the gun and fled after the officer had been fatally wounded in the chest. Id. at 144-45. In the instant case, the evidence shows that Kearse forcibly took the officer's service pistol, turned the weapon on the officer, and then killed him. As noted in the court's sentencing order, "[e]ven though [Kearse] may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense." However, the trial court gave this aggravator somewhat diminished weight because this was not a planned activity like a holdup. As explained in the sentencing order, Kearse "took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented." In light of these circumstances, we conclude that the trial court properly found this aggravator and it does not constitute improper doubling.

Kearse v. State, 770 So.2d at 1133-34. Petitioner's argument is that the trial court erred when it failed to merge his avoidance of arrest and hindrance of law enforcement aggravator with the robbery of the officer's gun aggravator. However, what Petitioner has not argued is why the decision of the Florida Supreme Court was contrary to or an unreasonable application of clearly established federal law. Indeed, he does not cite to any Supreme Court precedent that would support his position. This is fatal to his claim. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, see 28 U.S.C. § 2254 Rule 4." McFarland v. Scott, 512 U.S. 849 (1994); see also Spillers v. Lockhart, 802 F.2d 1007, 1010 (8th Cir. 1986) (holding that it is proper to dismiss a petitioner's claims that do not provide "any specifics to identify precisely how his counsel failed to fulfill those obligations").

Moreover, Petitioner cannot raise, on federal habeas review, what is simply an argument that the trial court violated state laws.

> We have stated many times that "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990); see also Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 874-75, 79 L.Ed.2d 29 (1984). Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S. 19, 21, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975) (per curiam).

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). This claim is based on the trial court's analysis of the Florida sentencing statute and the definition of robbery in Florida while applying the facts of Petitioner's case. This is an issue of state law. See Wilson v. Corcoran, 131 S.Ct. 13 (2010)("But it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."). Because this claim is not cognizable on federal habeas review, the Court will deny the instant Petition (DE 1) as to this basis.

N. Trial Court Error in Doubling Aggravators

Petitioner's fourteenth claim for federal habeas relief is similar to his thirteenth claim. The prior claim asserted that it was error not to merge the factual allegations supporting robbery into the avoid arrest and hinder law enforcement aggravator.

Petitioner asserts in the instant claim, on the other hand, that it was error to have found that the facts established that a robbery was committed as a threshold matter. Whether a robbery, as defined in Florida, was committed is a question of state law. As was the case with his thirteenth claim, this is not a claim which is cognizable for federal habeas relief. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Wilson v. Corcoran, 131 S.Ct 13,16 (2010)(quoting Estelle v. McQuire, 502 U.S. 62, 67 (1991). Accordingly, the Court will deny habeas relief on the basis of this claim.

O. Florida's Capital Sentencing Scheme is Unconstitutional

Petitioner's fifteenth and final claim for federal habeas relief is that the Florida capital sentencing scheme is unconstitutional. The primary focus of his argument is that the enumerated aggravating factors in Florida operate as the functional equivalent of an element of a greater offense, thus, requiring the jury to be the fact-finder in accordance with Ring v. Arizona, 536 U.S. 584 (2002). Petitioner also asserts that he is entitled to habeas corpus relief because "the elements of the offense necessary to establish capital murder were not charged in the indictment." DE 1-1 at 66.

The Court notes that Petitioner first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme

Court denied the claim, reasoning as follows:

> Kearse also argues that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because instructions diminish the role of the jury, all elements are not charged in the indictment, a unanimous jury is not required, and the jury does not decide all the elements. First, Ring is not retroactive to Kearse's case. See Johnson v. State, 904 So.2d 400, 402 (Fla. 2005) ("We hold that . . . the United States Supreme Court's decision in Ring v. Arizona . . . does not apply retroactively in Florida."). We also note that Kearse's resentencing jury returned a unanimous recommendation of death. Further, this Court has rejected all of these claims previously. See Parker v. State, 904 So.2d 370, 383 (Fla. 2005) (listing claims and citing cases in which the Court denied these and other claims).

Kearse III, 969 So.2d at 992.

The Court will similarly deny this claim. First, Petitioner's argument lacks any basis in clearly established federal law. First, Petitioner's reliance on Ring is misplaced. Because Petitioner has a concurrent conviction for robbery with a firearm, Ring is inapplicable to Petitioner. Ring, 536 U.S. at 597 n.4 (noting no aggravating circumstance related to the defendant's past convictions); Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence). Second, the Eleventh Circuit Court of Appeals has determined that Florida's capital sentencing statute does not violate a petitioner's Sixth Amendment rights as interpreted in Ring. Evans v. Sec'y, Dep't. of Corr., 699 F.3d 1249 (11th Cir. 2012), cert denied, Evans v. Crews, 133 S.Ct. 2393 (2013). The Court will deny

habeas relief on this fifteenth and final ground raised in the instant Petition (DE 1).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Petitioner Billy Leon Kearse's Petition for Writ of Habeas Corpus (DE 1) be and the same is hereby **DENIED**;

2. The Clerk of the Court be and the same is hereby **DIRECTED** to change the designation of Respondent, the Secretary of the Florida Department of Corrections, from Julie L. Jones to Michael D. Crews;

3. To the extent not otherwise disposed of herein, all other pending Motions are denied as moot; and

4. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 1st day of September, 2015.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record

APPENDIX D

969 So.2d 976
Supreme Court of Florida.

Billy Leon KEARSE, Appellant,
v.
STATE of Florida, Appellee.
Billy Leon Kearse, Petitioner,
v.
James R. McDonough,
etc., Respondent.

Nos. SC05–1876, SC06–942.
|
Aug. 30, 2007.
|
Rehearing Denied Nov. 30, 2007.

Synopsis

Background: Following affirmance of his convictions for robbery with a firearm and first-degree murder of a police officer, 662 So.2d 677, and his death sentence, 770 So.2d 1119, defendant filed motion for postconviction relief. The Circuit Court, St Lucie County, Marc A. Cianca, Senior Judge, denied the motion. Defendant appealed, and he filed a petition for a writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] defendant was not denied effective assistance of trial counsel;

[2] evidence regarding conduct of State's mental health expert, which allegedly demonstrated that the expert gave biased testimony, did not constitute newly discovered evidence;

[3] trial court acted within its discretion in denying defendant's public record requests;

[4] letter the assistant state attorney sent to defendant's trial counsel was privileged work product;

[5] juror's vague memories about media report regarding the crime, and her attenuated relationship to a testifying detective, did not require that she be removed on defendant's cause challenge; and

[6] defendant did not qualify for exemption from execution based on his age or mental impairment.

Affirmed; petition denied.

Attorneys and Law Firms

***980** Neal A. Dupree, Capital Collateral Regional Counsel, Paul Kalil and Christina L. Spudeas, Assistant CCRC–South, Fort Lauderdale, FL, for Appellant/Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Billy Leon Kearse appeals an order of the circuit court denying his motion to vacate his

first-degree murder conviction and sentence of death, and also petitions this Court for a writ of habeas corpus. ***981** We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. As we explain below, we affirm the circuit court's order and deny Kearse's petition.

I. FACTS AND PROCEDURAL BACKGROUND

Kearse was convicted of robbery with a firearm and the first-degree murder of Fort Pierce police officer, Danny Parrish. On direct appeal, we summarized the facts of the crime as follows:

> After 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 v. State, 662 So.2d 677, 680 (Fla.1995) (*Kearse I*). We affirmed as to Kearse's guilt phase claims, but remanded for a new penalty phase based on errors "relate[d] to the penalty phase instructions and the improper doubling of aggravating circumstances." *Id.* at 685. [1]

After the new penalty phase, the unanimous jury recommended death, and the trial court again sentenced Kearse to death. *Kearse v. State,* 770 So.2d 1119 (Fla.2000) (*Kearse II*), *cert. denied,* 532 U.S. 945, 121 S.Ct. 1411, 149 L.Ed.2d 352 (2001). The trial court found in aggravation that the crime was committed in the course of a robbery, which it afforded "diminished" weight, and found three other aggravating factors that it merged into one—that the murder was committed to avoid arrest and to hinder law enforcement, and that the victim was a law enforcement officer engaged in official duties. The court found one statutory mitigating factor—the age of the defendant—and listed almost forty nonstatutory mitigators to which the court assigned some weight. On appeal, Kearse raised twenty-two issues. *Id.* at 1123. [2] We affirmed the death sentence. *Id.* at 1135.

***982** Kearse subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, in which he raised several claims and subclaims.[3] The trial court held an evidentiary hearing on some of them, and subsequently denied relief on all claims.

II. THE ISSUES ON APPEAL

Kearse raises the following four issues on appeal: (A) that trial counsel provided constitutionally ineffective assistance, (B) that the circuit court erred in denying Kearse's claim of newly discovered evidence warranting a new penalty phase, (C) that the trial court erred in denying Kearse's public records requests, and (D) that the trial court erred in summarily denying several of his postconviction claims. We address each in turn below.

A. Ineffective Assistance of Counsel

[1] [2] [3] Kearse first argues that he received ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court established a two-pronged standard for determining whether counsel provided constitutionally ineffective assistance. ***983** First, a defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. Second, the defendant must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Claims of ineffective assistance present mixed questions of law and fact subject to plenary review. *Occhicone v. State*, 768 So.2d 1037, 1045 (Fla.2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

Kearse argues that his trial counsel was constitutionally ineffective for (1) failing vigorously to advocate for him, (2) failing adequately to prepare the defense experts, (3) failing to investigate and prepare for the State's mental health expert, (4) failing to present victim misconduct evidence, and (5) failing to prepare lay witnesses to testify.

1. Vigorous Advocacy

[4] Kearse's claim that counsel did not sufficiently advocate for him is based largely on various statements made by his counsel during the guilt phase and resentencing, most of which the jury did not hear. Kearse has lifted many of the statements from their context and ascribed to them both importance and meaning not present when they are viewed in context. We agree with the trial court that, when viewed in context, the statements and arguments constitute defense counsel's candid representations to the court. Accordingly, Kearse has demonstrated neither deficiency nor prejudice.

[5] Kearse's allegation that defense counsel did not understand the mental health issues at resentencing is similarly based on statements taken out of context. Defense counsel was an experienced death penalty attorney. He represented Kearse at the guilt phase and original sentencing and again at resentencing. At both sentencing proceedings, he presented the expert testimony of the same neuropsychologist, a number of professionals who had worked with Kearse when he was in a school for emotionally disturbed children, and family members. At the postconviction hearing, defense counsel testified that he understood the issues and was prepared at trial. We conclude that Kearse has failed to demonstrate either deficiency or prejudice.

2. Preparation of Experts

[6] Kearse first argues that defense counsel failed adequately to prepare Dr. Lipman, a neuropharmacologist, to testify by failing to provide him with necessary information and did not provide Dr. Lipman with the defense neuropsychologist's assistance in preparing part of an analysis in support of Dr. Lipman's testimony. Competent, substantial evidence supports the circuit court's finding that defense counsel provided Dr. Lipman with necessary materials. Further, Dr. Lipman testified at resentencing that counsel inundated him with information, and at the postconviction hearing testified that he would not change his testimony now that he had seen further information. Finally, Dr. Lipman testified that when he needed expert assistance, he simply consulted another neuropsychologist. Accordingly, Kearse failed to establish either deficiency or prejudice.

[7] Kearse raises another ineffective assistance claim regarding Dr. Lipman's testimony. At the resentencing, Lipman ***984** testified that Kearse suffered from fetal alcohol effect, explained Kearse's resulting neurodevelopmental problems, and related these factors to Kearse's actions on the day of the murder. Kearse alleges that Dr. Lipman was not qualified to testify regarding his consultations with other experts about Kearse's psychological testing. The resentencing record demonstrates, however, that as a neuropharmacologist, in making his diagnoses Dr. Lipman always relies on medical doctors and psychologists. We agree with the circuit court that Dr. Lipman was not barred from testifying about his reliance on other experts. Thus, Kearse fails to meet either requirement of *Strickland.*

3. Preparation for Expert Testimony

Kearse argues that defense counsel was ineffective for failing to depose and investigate Dr. Martell, the State's mental health expert, and was thus unprepared to cross-examine him. He also claims that counsel failed to present a number of mental health experts in mitigation. To address this claim, we first place it in context by summarizing the mitigation testimony presented at resentencing.

Dr. Fred Petrilla, a neuropsychologist, evaluated Kearse in 1991 and again in 1996 for the resentencing. Petrilla testified for the defense that although Kearse had an

IQ of 79 and was not mentally retarded, he had moderate brain dysfunction. Kearse had auditory, concentration, and behavioral problems, and severe learning problems. Kearse also tended to be hyperactive and react impulsively when confronted, and he was culturally deprived. The expert concluded Kearse was not malingering on testing and that two statutory mitigators were supported: extreme emotional disturbance and because of emotional disturbance, Kearse was incapable of conforming his conduct to the requirements of the law.

Dr. Lipman testified that Kearse had neurodevelopmental problems from an early age due to his mother's alcohol abuse during pregnancy. This alcohol abuse caused Kearse to suffer from fetal alcohol effect (FAE), one of the effects of which is brain dysfunction. The expert testified that his finding of FAE is consistent with Kearse's hyperactivity, impulsivity, and slow physical and subnormal educational development and is consistent with the findings of other experts who tested Kearse, such as Dr. Petrilla. Further, Dr. Lipman testified that Kearse confabulated (i.e., rationalized what happened) in retelling the crime and thus was not "lying" about it. Dr. Lipman opined that at the time of the murder Kearse "exploded" without thought and did not kill the officer to avoid arrest. He also concluded that Kearse had a verbal memory disorder and was not malingering on the Minnesota Multiphasic Personality Inventory (MMPI).

Various teachers and school officials taught Kearse at a school for severely emotionally disturbed children, where Kearse was placed based on psychological evaluations. These education professionals testified that Kearse suffered from severe emotional dysfunction and functioned below grade level. Kearse had learning disabilities and was unable to master the skills of a normal student. He previously had failed in school, repeating the first and second grades twice and being socially promoted through several grades based solely on his age. At age fifteen, Kearse was in the seventh grade when he scored in the .8 percentile (i.e., the bottom one percent of all students) on the Wide Range Achievement Test. Functioning at a third-grade level, Kearse then dropped out at the end of that school year. The educators testified that Kearse had a genuine desire to learn, but was unsuccessful because of his ***985** limitations, and over time Kearse became increasingly disruptive in school. Further, his mother's neglect was apparent. Kearse came to school dirty, hungry, unkempt, and malnourished. His mother failed to respond to school requests for information or consultation.

Kearse's relatives—two aunts, an uncle, and Kearse's mother—testified that Kearse's mother was fifteen when he was born, and that his mother drank excessively during and following the pregnancy. Kearse's father left when he was two, and his mother failed to show him affection and neglected him. She also physically abused him, and as he grew older, was unable to control him. Kearse was slow to develop both physically and emotionally. As a child, he had slurred speech and difficulty pronouncing words. He also was delayed in learning skills, such as tying his shoes. Kearse had difficulty understanding and following through on directions and had

significant difficulties with school work. He frequently ran away for days at a time and lived on the street.

Pamela Baker, a licensed mental health counselor and at one time Kearse's teacher, first encountered Kearse in 1981 when at age eight he was referred to the Suspect Child Abuse and Neglect program. She testified regarding his documented school and psychological history and Kearse's home life. According to Baker, Kearse's mother neglected and frequently "whipped" him. At one time Kearse was reluctant to leave the youth home in which he was placed because he was fed better there. She said that Kearse was classified as severely emotionally disturbed and was placed in special classes. At age twelve, his approximate IQ was 69. He failed grade levels and was usually promoted socially based on age. Neurological testing in 1981 revealed that Kearse had problems related to brain damage, including poor memory, motor skills, and planning skills, an inability to do abstract thinking, and poor comprehension. His mental age was lower than his chronological age. She noted that Kearse became involved in smoking and drinking at an early age and committed petty thefts and burglaries, but there was little aggressive behavior involved in these crimes. Baker visited Kearse in prison and found that he had learned how to read and write while there. She further stated that Kearse exhibited symptoms of panic attacks and conduct disorder. Finally, she testified that although Kearse was sometimes a bully at school, he was not violent, and she never thought he would kill anyone.

The State presented Dr. Martell, who testified that neither statutory mental health mitigator applied, that FAE is not a mental disorder, and that Kearse had no brain damage. He opined that Kearse was depressed, which could account for Kearse's low verbal IQ, and that Kearse had a conduct disorder and chose not to apply himself in school. He opined that Kearse had an antisocial personality disorder and scored within the range for psychopathy. Further, Martell said that Kearse's MMPI results evidenced malingering. Martell concluded that Kearse is a pathological liar, who consciously shot the officer, took the gun with him because of the fingerprints, extinguished his headlights to escape, and then lied to evade responsibility.

[8] Having summarized the evidence at the resentencing, we now address Kearse's claim that defense counsel was deficient for failing to depose Dr. Martell, the State's mental health expert. The record shows that Dr. Martell examined Kearse on the Thursday before the resentencing proceedings began the following Monday, and that defense counsel's motion for a continuance was denied. Upon receipt of ***986** Dr. Martell's raw data and report, defense counsel forwarded these to his experts and consulted with them about the information. He also consulted the state attorney regarding Martell's upcoming testimony. At the postconviction hearing, defense counsel testified that despite not having deposed Martell, he knew what Dr. Martell's testimony would be regarding statutory mitigators, what his test results supposedly revealed, and where Martell's testimony would differ from his own experts' testimony. As evidenced from the foregoing summary, the

evidence shows that Udell correctly anticipated Martell's testimony. Kearse thus has not demonstrated anything material that defense counsel did not anticipate or could have done differently had he deposed Dr. Martell.

[9] Kearse also claims that defense counsel should have presented more mitigation or chosen different experts. This claim simply ignores the extensive mental health mitigation outlined above that was presented at resentencing through a psychologist, a neuropharmacologist, a licensed mental health counselor, several educators, and family members. Further, as the trial court pointed out, and Kearse does not dispute, Kearse's experts at the postconviction hearing largely testified in conformity with the testimony defense counsel presented at the resentencing. We can think of no other case—and Kearse has not cited one—in which defense counsel has presented so much expert testimony and other mitigation, but has been found ineffective for failure to present mitigation.[4] Accordingly, we hold that Kearse's claim fails to meet *Strickland's* requirements.

4. Failure to Investigate and Present Victim Misconduct Evidence

[10] Kearse next claims that defense counsel was ineffective for insufficiently investigating and by failing to use a mitigation strategy to vilify the victim. Kearse argues that evidence of Officer Parrish's prior misconduct suggested that he provoked the incident resulting in his death and that presentation of this mitigation would have resulted in a life sentence. Defense counsel considered this strategy and investigated citizen complaints against Officer Parrish. Counsel testified that after considering several factors—including the refusal of some witnesses to testify, the lack of substance of some testimony, and determinations by the Fort Pierce police that formal complaints against the officer were unfounded—he ultimately decided not to use this strategy. In addition, he considered the potential that the strategy would backfire, especially in light of the facts, such as Kearse's firing thirteen bullets into the officer as the officer pled for his life and Kearse's passenger's testimony that at all times Officer Parrish was friendly and polite. Defense counsel admitted that he did not request the officer's personnel file. However, the evidence at the postconviction hearing showed that any evidence in the file supporting the vilification mitigation could have been countered at trial by other evidence in it of Officer Parrish's good reports and commendations. We find that counsel's decision not to present this mitigation strategy was reasonable. Further, Kearse has not demonstrated prejudice from counsel's failure to obtain the personnel record. Accordingly, ***987** we affirm denial of relief on this claim.

5. Failing to Prepare Lay Witnesses

[11] [12] Kearse alleges that defense counsel failed to prepare him, Pamela Baker, and his aunt and uncle to testify. Kearse's claim that counsel failed to prepare him is based on an exchange at resentencing in which defense counsel asked Kearse where he had been incarcerated *before* his arrest for the murder. Kearse answered that he had been on death row at Raiford, which is where he was incarcerated

after the trial. This answer was unresponsive to the question. Accordingly, Kearse fails to demonstrate that counsel was deficient. Kearse's claim regarding his relatives was not raised in his postconviction motion and thus it is unpreserved for appeal. Further, in his brief the claim is conclusory, meeting neither prong of *Strickland.* Kearse's claim that counsel was ineffective for allowing Ms. Baker to testify regarding his juvenile record is also conclusory and meritless. He claims without explanation that the evidence was not admissible. As the testimony at the postconviction hearing made clear, the evidence was admissible and defense counsel chose to admit it through Ms. Baker who could present it in context with Kearse's mental health and social services history. Accordingly, the trial court was correct to deny relief on all of these claims. [5]

B. Newly Discovered Evidence

[13] Kearse argues that the circuit court erred in concluding that information he alleges could have been used at resentencing to impeach the state's mental health expert does not constitute newly discovered evidence. We disagree.

[14] Kearse claims that evidence about Dr. Martell's conduct as an expert witness for the federal government in a criminal case in New Mexico demonstrates that he gave biased testimony in favor of the State at resentencing. In *Jones v. State,* 709 So.2d 512 (Fla.1998), this Court articulated a two-part test for establishing newly discovered evidence: (1) The evidence must have existed but have been unknown by the trial court, the party, or counsel at the time of trial, and must not have been discoverable through the use of due diligence, and (2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones,* 709 So.2d at 521. The evidence shows that Kearse's penalty phase commenced on December 9, 1996, and sentence was imposed on March 25, 1997. Both Dr. Martell's actions in the federal criminal case and allegations regarding his conduct postdated Kearse's sentencing. Thus, the evidence did not exist at the time of the resentencing, and Kearse fails to meet the first prong of the test. The evidence also fails to meet the second prong.

C. The Public Record Requests

Kearse next argues that he was denied due process because certain public records pertaining to his case were not provided to ***988** him, in violation of Chapter 119, Florida Statutes (2005), and Florida Rule of Criminal Procedure 3.852. Each of his claims is addressed below.

[15] Kearse requested production of pictures and videotape that Fort Pierce police took from the perspective of the apartments of two witnesses on the crime scene. The police produced more than two hundred pictures. At a hearing on Kearse's public records request, however, the police explained they did not have the videotape and that no records showed a videotape ever was placed in the evidence locker. The police suggested the possibility it did not exist due to malfunction. On appeal, Kearse argues that the postconviction court erred in denying an evidentiary hearing on his claim regarding the failure to produce the videotape. We conclude that the trial court

did not abuse its discretion. The undisputed evidence demonstrates that the police did not have a videotape and at the hearing on the request, postconviction counsel apparently accepted the explanation given by the police and never again requested the tape or listed it as an outstanding request.

[16] Kearse next contends the circuit court abused its discretion by denying his request for the personnel files of a state investigator and two assistant state attorneys. He claims that under Florida Rule of Criminal Procedure 3.852, he must be given the records because the circuit court did not timely deny the request. Rule 3.852(g)(3) provides that the trial court "shall hold a hearing and issue a ruling within 30 days" ordering production *if* the "additional public records sought are relevant to the subject matter ... or appear reasonably calculated to lead to the discovery of admissible evidence." The rule also provides the trial court with discretion to conduct in-camera inspections and extend the time specifications in the rule. *See* Fla. R.Crim. P. 3.852(k). The record shows that after an in-camera inspection, the court denied the request for the personnel files, finding they were not relevant and could not reasonably be calculated to lead to evidence helpful to Kearse's postconviction motions. Accordingly, the court issued a ruling making the requisite finding and had discretion with regard to the date of issuing its order. Kearse has not demonstrated an abuse of that discretion.

[17] Finally, Kearse argues that a letter the assistant state attorney sent to Kearse's trial counsel regarding the ineffective assistance claims against him in the postconviction proceedings is not privileged work product. The State responds that under section 119.071, Florida Statutes (2005), the letter is exempt from disclosure as work product prepared in anticipation of litigation. We review the claim under the abuse of discretion standard. *See State v. Coney,* 845 So.2d 120, 137 (Fla.2003) ("A circuit court's ruling on a public records request filed pursuant to a rule 3.850 motion will be sustained on review absent an abuse of discretion.").

At the evidentiary hearing, Kearse's trial counsel stated that the assistant state attorney sent him a letter regarding the issues at the hearing. Kearse's postconviction counsel asked to see the letter. Upon the State's objection, the circuit court sealed the letter and examined it in camera. After hearing argument, the trial court ruled that given the nature of the witness —Kearse's trial counsel—in a postconviction proceeding and that trial counsel was listed as a witness for the State as well as the defense, the letter was work product not subject to disclosure.

Section 119.071(1)(d), Florida Statutes (2005), provides as follows in pertinent part:

> ***989** (d)1. A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental

> impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.071(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

The assistant state attorney's letter containing his mental impressions about the case clearly fits within the exemption of attorney work product prepared with regard to the ongoing postconviction proceedings. *See* § 119.071(1)(d), Fla. Stat. (2005); *see also* Fla. R.Crim. P. 3.220(g)(1) ("Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs."); *State v. Kokal*, 562 So.2d 324, 327 (Fla.1990) ("Of course, the state attorney was not required to disclose his current file relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents."). Accordingly, we hold that the circuit court did not abuse its discretion by denying Kearse's request for the letter.

D. Miscellaneous Claims

Kearse argues that the circuit court erred in summarily denying a number of his claims. We disagree, and affirm the trial court's order.

[18] During the 1996 resentencing proceeding, Kearse's defense counsel told the court that at the 1991 trial the courtroom was full of uniformed law enforcement officers. Based solely on this statement, Kearse argued in his postconviction motion that he was deprived of a fair trial in 1991. The circuit court summarily denied relief, finding the claim legally insufficient because the mere presence of the officers was insufficient to demonstrate a hostile courtroom and Kearse failed to demonstrate prejudice. We agree. Kearse does not allege any other facts that in the "totality of the circumstances" would entitle him to relief. *See Woods v. Dugger*, 923 F.2d 1454, 1455 (11th Cir.1991) (applying a totality of the circumstances test to a similar claim).

[19] Finally, in conclusory fashion and without any argument, Kearse alleges the following: (1) that counsel was ineffective for failing to cross-examine or impeach witnesses,

failing to consult crime scene and firearms experts, failing to prepare defense witnesses, failing to argue age as a statutory mitigator, and for conceding aggravating factors without Kearse's consent; (2) that the trial court erred in denying cause challenges and rejecting mental health mitigation; (3) that *Brady*[6] violations ***990** occurred; (4) that nonstatutory aggravators were presented; and (5) that pretrial publicity, the venue, and events in the courtroom denied him a fair trial. We hold these claims are waived and affirm the denial of relief. *See* *Cooper v. State,* 856 So.2d 969, 977 n. 7 (Fla.2003) ("Cooper has chosen to contest the trial court's summary denial of various claims, by contending, without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."); *see also* *Duest v. Dugger,* 555 So.2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

III. THE HABEAS PETITION

In his petition for a writ of habeas corpus, Kearse contends (A) that appellate counsel was ineffective for failing to raise two meritorious claims, and (B) that both his death sentence and lethal injection are unconstitutional. We address these claims below and deny the petition.

A. Ineffective Assistance of Appellate Counsel

[20] **[21]** **[22]** The requirements for establishing a claim based on ineffective assistance of appellate counsel parallel the standards announced in *Strickland.* "[The] [p]etitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." *Wilson v. Wainwright,* 474 So.2d 1162, 1163 (Fla.1985). Counsel ordinarily is not deemed ineffective under this standard for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings. *See* *Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). Moreover, appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. *See id.*

1. Denial of a Cause Challenge

[23] Kearse alleges first that appellate counsel was ineffective for failing to raise the trial court's denial of Kearse's cause challenge to juror Matthews. Kearse's resentencing, like the 1991 trial, was held in Indian River County instead of St. Lucie County. During jury selection, defense counsel moved to strike Matthews for cause based on her knowledge of facts of the case and her relationship to a

testifying detective.[7] After the court denied the strike, defense counsel took the necessary steps to preserve the issue by requesting additional peremptories and renewing the motion before the jury was sworn. *See* *Trotter v. State*, 576 So.2d 691 (Fla.1990) (explaining the requirements for preserving a cause challenge). On direct appeal, appellate counsel raised the denials of other cause challenges, but did not raise the preserved claim regarding Matthews, who actually served on the jury. *See* *Kearse II*, 770 So.2d at 1128–29. Accordingly, contrary to the State's argument, this ***991** claim of ineffective assistance of appellate counsel is properly raised by habeas petition in this Court. Nevertheless, we deny the claim.

During individual questioning by the attorneys, Matthews indicated that she remembered a media report from several years before in which a Fort Pierce officer was "shot about 14 times" and "[t]here was like a trail where he tried to get away." She repeated that she was uncertain these facts concerned this case and had made the tentative connection based on the questioning during jury selection. Matthews also volunteered that, the night before, she learned from her husband's parents that her father-in-law's half brother, a retired Fort Pierce police officer, was coming to Florida for Christmas and to testify at a trial involving the murder of an officer. Matthews stated that she had not seen Detective Raulerson in three years and did not know him well. She assured the court that this would have no effect on her impartiality in the resentencing proceeding. At the resentencing, Raulerson, who was lead crime scene detective in the investigation of Officer Parrish's murder, testified regarding the gathering of physical evidence in the case.

We find that neither Matthews's vague memories about the crime, nor her attenuated relationship to a testifying detective, either separately or cumulatively, raises a reasonable doubt about her ability to be fair and impartial in light of her unwavering statements during voir dire of the need for a fair sentencing proceeding and her ability to be impartial. *See* *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.1984) ("The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court."); *Singer v. State*, 109 So.2d 7, 24 (Fla.1959) (announcing test for juror competency). Accordingly, the trial court did not err in denying the cause challenge, and appellate counsel was not ineffective for failing to raise the preserved claim.

2. The Motion for Appointment of Co–Counsel

[24] Kearse next argues that appellate counsel was ineffective for failing to raise on appeal the trial court's denial of defense counsel's motion for appointment of co-counsel at the 1991 trial. Shortly after his appointment, defense counsel moved for appointment of co-counsel on numerous grounds. After a hearing, the trial court denied the motion and denied the renewed motion before the first penalty phase.

In *Armstrong v. State*, 642 So.2d 730, 737 (Fla.1994), we stated that the question of appointment of additional counsel rests within the discretion of the trial court "and is based on a determination of the complexity of a given

case and the attorney's effectiveness therein." The record shows that trial counsel agreed with the trial court that the case was not complex, and Kearse does not claim here that it was. Accordingly, Kearse has not established that the motion for co-counsel would have been found meritorious on direct appeal and thus has failed to establish ineffective assistance of appellate counsel.

B. Constitutional Claims

[25] Kearse claims that his death sentence is unconstitutional on various grounds. First, he argues that because of his age, low level of intellectual functioning, and mental and emotional impairments he cannot be executed under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which prohibited execution of people with mental retardation. However, Kearse's own expert at the resentencing testified that he was not mentally retarded, and he presented no evidence at his postconviction hearing that ***992** he was. Thus, his sentence is not unconstitutional under *Atkins*. *See Hill v. State,* 921 So.2d 579, 584 (Fla.), *cert. denied,* 546 U.S. 1219, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006).

[26] Next, he argues that because he was only eighteen years and three months old at the time of the crime and had low level intellectual functioning and mental and emotional impairments, he cannot be executed under *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). *Roper* prohibited execution of any defendant who was under age eighteen at the time of the crime. Accordingly, Kearse does not qualify for exemption from execution under *Roper*. *See Hill,* 921 So.2d at 584.

[27] Kearse also argues that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because instructions diminish the role of the jury, all elements are not charged in the indictment, a unanimous jury is not required, and the jury does not decide all the elements. First, *Ring* is not retroactive to Kearse's case. *See Johnson v. State,* 904 So.2d 400, 402 (Fla.2005) ("We hold that ... the United States Supreme Court's decision in *Ring v. Arizona* ... does not apply retroactively in Florida."). We also note that Kearse's resentencing jury returned a unanimous recommendation of death. Further, this Court has rejected all of these claims previously. *See Parker v. State,* 904 So.2d 370, 383 (Fla.2005) (listing claims and citing cases in which the Court denied these and other claims).

Finally, Kearse argues that Florida's lethal injection statute and procedure are unconstitutional. This Court has previously upheld the statute against this challenge in other cases. *See Sims v. State,* 754 So.2d 657 (Fla.2000); *accord Thompson v. State,* 796 So.2d 511, 515 (Fla.2001); *Bryan v. State,* 753 So.2d 1244, 1254 (Fla.2000). We have also previously rejected the claims Kearse raises here regarding the lethal injection procedure. *See Diaz v. State,* 945 So.2d 1136, 1144 (Fla.) (citing cases), *cert. denied,* 549 U.S. 1103, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006). Accordingly, we deny relief on these claims. [8]

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

969 So.2d 976, 32 Fla. L. Weekly S525

Footnotes

1 Most of the twenty-five issues Kearse raised on appeal concerned the penalty phase. *Kearse I*, 662 So.2d at 680–81. The guilt phase issues alleged error as follows: (1) the giving of the State's special instruction on premeditated murder over objection; (2) the instruction to the jury on escape as the underlying felony of felony murder; (3) the denial of Kearse's cause challenges to prospective jurors; (4) the admission of testimony regarding the purpose of a two-handed gun grip; (5) the denial of motions to suppress; (6) the instruction on reasonable doubt denied Kearse due process and a fair trial; and (7) the admission of hearsay evidence during the guilt phase.

2 Kearse raised the following claims: (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 compel 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; (6) the trial court's failure to find the statutory 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 mistrial based on the prosecutor's comments; (9) the trial court informed the jury that Kearse had been found guilty in a previous proceeding, but that the case was remanded for resentencing; (10) the denial of Kearse's motion to interview jurors to determine juror misconduct; (11) pretrial conferences were conducted during Kearse's involuntary absence; (12) the granting of the State's cause challenge to a juror; (13) the denial of Kearse's cause challenges to two jurors; Kearse's compelled mental health examination (14) constituted an unconstitutional rule of discovery, (15) violated the ex post facto clauses of the United States and Florida Constitutions, and (16) Kearse's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (17) the victim impact jury instruction was vague and gave evidence undue importance; (18) the trial court gave little weight to age as a mitigating circumstance; the "committed during a robbery" aggravating circumstance (19) should have been merged with the other aggravators or (20) should not have been considered; (21) the admission of photographs of the victim; and (22) electrocution is cruel and unusual punishment. *Kearse II*, 770 So.2d at 1123.

3 Kearse claimed the following: (1) that public records were withheld; (2) that defense counsel failed vigorously to advance Kearse's position, to cross-examine witnesses at trial and at the motion to suppress hearing, to consult with crime scene, firearm, and medical experts, to request co-counsel at the second penalty phase, to prepare witnesses to testify at the resentencing, to object to the admission of evidence, to argue the age mitigating factor, to present evidence regarding the victim's prior misconduct, to obtain Kearse's consent to concede aggravating factors, and cumulative error; (3) that the trial court erred in denying a cause challenge, in denying trial counsel's motion for co-counsel, and in rejecting two statutory mental health mitigating factors; (4) that the State knowingly withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (5) that newly discovered evidence demonstrates the State's expert was biased for the prosecution; (6) that Kearse's rights under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), were denied through the ineffective assistance of counsel and inadequate assistance of mental health experts; (7) that Kearse's death sentence is fundamentally unfair; (8) that Kearse was denied the right to a fair trial because of pretrial publicity, the lack of adequate venue, and events in the courtroom at trial; (9) that Florida's death penalty scheme violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (10) that his death sentence is unconstitutionally based on an automatic aggravator; and (11) that Kearse is insane to be executed.

4 In fact, when we affirmed the death sentence in this case, three members of this Court found the mitigation so compelling that they dissented, opining that "[t]he bottom line is that this is clearly not a death case. It is not one of the most aggravated and least mitigated or among the worst of the worst for which we have reserved death as the only appropriate response." *Kearse II*, 770 So.2d at 1138 (Anstead, J., dissenting).

5 Kearse also argues that defense counsel was ineffective for failing to cross-examine two witnesses at the motion to suppress hearing. He claims that on the day of the murder the eyewitness passenger (Rhonda Pendleton) was his

girlfriend who was staying at her brother's home. Kearse argues that the police search of that house was invalid because he was an overnight guest there. This is not the argument Kearse made in his postconviction motion, and it is thus not preserved. Second, we held in *Kearse I* that exigent circumstances provided probable cause for the warrantless arrest and that physical evidence seized at the scene was not subject to suppression. *Kearse I*, 662 So.2d at 684.

6 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring State disclosure of material information favorable to the defense).

7 Kearse's contention on appeal that the juror was not qualified because she was the prosecutor's insurance agent was not preserved for review.

8 As a result of the execution of Angel Diaz, litigation concerning the constitutionality of Florida's lethal injection procedures is ongoing in *Lightbourne v. McCollum*, No. SC06–2391 (Fla. petition filed Dec. 14, 2006). We do not consider those issues here and express no opinion regarding the merits of any subsequent challenge Kearse may bring related to lethal injection.

APPENDIX E

770 So.2d 1119
Supreme Court of Florida.

Billy Leon KEARSE, Appellant,
v.
STATE of Florida, Appellee.

No. SC90310. | June 29, 2000. | Rehearing Denied Aug. 24, 2000.

Defendant was convicted in the Circuit Court, St. Lucie County, Marc A. Cianca, J., of robbery with firearm and first-degree murder in connection with shooting death of police officer, and was sentenced to death. He appealed. The Supreme Court, 662 So.2d 677, affirmed conviction but remanded for resentencing. The Circuit Court, C. Pfeiffer Trowbridge, J., sentenced defendant to death. He appealed. The Supreme Court held that: (1) defendant was not entitled to jury interviews to investigate alleged misconduct; (2) challenges for cause were properly denied; (3) disqualification of prosecutor was not warranted; (4) photographs of victim's body were admissible; and (5) sentence of death was not disproportionate.

Affirmed.

Anstead, J., filed dissenting opinion in which Shaw and Pariente, JJ., concurred.

Attorneys and Law Firms

***1122** Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Sara D. Baggett, Assistant Attorney General, West Palm Beach, Florida, for Appellee.

Opinion

PER CURIAM.

Billy Leon Kearse appeals the imposition of the death penalty upon resentencing. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the death sentence.

Kearse was convicted of robbery with a firearm and first-degree murder for the shooting of Fort Pierce police officer Danny Parrish. The facts surrounding this crime are discussed in *Kearse v. State,* 662 So.2d 677, 680 (Fla.1995). Following the jury's recommendation, the judge sentenced Kearse to death for the first-degree murder. On appeal, this Court affirmed the convictions but vacated the death sentence and remanded for resentencing because a number of errors occurred during the penalty phase of the trial. *See id.* at 685-86. This Court concluded that the trial court improperly doubled the "avoid arrest/hinder enforcement of laws" and ***1123** "murder of a law enforcement officer" aggravating circumstances, erred in denying Kearse's request for an expanded instruction on the cold, calculated, and premeditated aggravating circumstance, and erroneously applied the heinous, atrocious, or cruel aggravating circumstance. *See id.* Consequently, this Court vacated Kearse's death sentence and remanded to the trial court for a new penalty phase proceeding before a jury. *See id.* at 686.

The case was remanded to St. Lucie County, where the offense occurred, and pretrial hearings were conducted there. However, because venue had been changed to Indian River County in the original trial, the penalty proceeding was conducted there. The jury unanimously recommended that Kearse be sentenced to death; the trial court followed that recommendation and imposed the death sentence. 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."

On appeal to this Court, Kearse raises twenty-two issues as error: (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.

[1] In his first issue, Kearse contends that the trial court erred by not permitting him to withdraw his waiver of venue. The shooting of Officer Parrish occurred in St. Lucie County. Kearse moved for a change of venue before his original trial on the basis of pretrial publicity and possible difficulty ***1124** in seating an impartial jury. The motion was granted and the first trial was held in Indian River County, which is in the same judicial circuit as St. Lucie County. The judge transferred the case back to St. Lucie County for the sentencing hearing and final sentencing. Thus, Kearse's appeal came to this Court as a conviction from the circuit court in St. Lucie County. Venue was never raised as an issue in Kearse's first appeal and this Court simply remanded to "the trial court with directions to empanel a new jury, to hold a new sentencing proceeding, and to resentence Kearse." *Kearse,* 662 So.2d at 686. Thus, there was initially some confusion as to which county would be the location for the resentencing. A pretrial conference was conducted by Judge Thomas J. Walsh in St. Lucie County on January 30, 1996. During this hearing, defense counsel moved to change venue back to St. Lucie County, in effect withdrawing Kearse's previous waiver of venue. Initially, the State indicated no opposition to such a change, but the judge deferred consideration of venue until Kearse could be present for the discussion. At a subsequent hearing on February 6, 1996, the State indicated that the proper venue was Indian River County and should not be changed back to St. Lucie County. Kearse personally agreed to the resentencing proceeding being conducted in Indian River County. After Kearse successfully moved to recuse Judge Walsh, however, defense counsel renewed the motion for resentencing to be held in St. Lucie County. Newly appointed Judge C. Pheiffer Trowbridge also deferred consideration of the motion until Kearse could be heard personally. After hearing from all parties and Kearse, the judge denied the motion. The judge noted that all of the reasons for granting the original change of venue (pretrial publicity and possible difficulty in seating an impartial jury) were still factors in the case and that this guided his decision to keep venue in Indian River County.

[2] A motion for a change of venue is addressed to the trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion. *Cole v. State,* 701 So.2d 845, 854 (Fla.1997), *cert. denied,* 523 U.S. 1051, 118 S.Ct. 1370, 140 L.Ed.2d 519 (1998). Given the trial court's articulated reasons for denying a change of venue back to St. Lucie County and Kearse's original request for the change to Indian River County, the denial here cannot be deemed an abuse of discretion and thus we find no merit to this issue.

[3] Kearse also claims that he was involuntarily absent at two pretrial conferences where the venue issue was discussed and that he did not properly waive his presence at pretrial proceedings (claim 11). Florida Rule of Criminal Procedure 3.180(a) states that "the defendant shall be present ... at any pretrial conference, unless waived by the defendant in writing." Because Kearse had not waived his presence at the time of the January 30, 1996, hearing, we find that error occurred. *See Pomeranz v. State,* 703 So.2d 465, 471 (Fla.1997) (conducting pretrial conferences in defendant's absence without defendant's express waiver was error although defense counsel purported to waive defendant's

presence); *Coney v. State,* 653 So.2d 1009, 1012 (Fla.1995) (same), *receded from on other grounds by Boyett v. State,* 688 So.2d 308, 310 (Fla.1996).

[4] **[5]** However, such violations are subject to harmless error analysis and the proceeding will only be reversed on this basis if "fundamental fairness has been thwarted." *Pomeranz,* 703 So.2d at 471. Here the record reflects that Judge Walsh took the venue issue under advisement and delayed hearing arguments on any motions until Kearse could be present. On February 6, 1996, Kearse filed a written waiver of his presence at all pretrial conferences. At a hearing that same day, Judge Walsh acknowledged the written waiver and informed Kearse that the venue issue would be discussed in his presence. Kearse then personally represented to the court that he ***1125** wanted resentencing in Indian River County. Thus, Kearse's absence during the January 30 conference was harmless beyond a reasonable doubt. *See id.*

[6] On June 21, 1996, after Kearse successfully moved to recuse Judge Walsh from the case, defense counsel renewed the motion for resentencing to be held in St. Lucie County and raised the issue in Kearse's absence. Although defense counsel acknowledged on the record that Kearse had previously filed a waiver of his right to appear at the hearing, Judge Trowbridge took the matter under advisement until Kearse could be heard personally. Because Kearse had waived his presence at pretrial conferences, we conclude that the court did not err in conducting this hearing in Kearse's absence. Furthermore, Kearse was present at the subsequent August 26, 1996, hearing when the parties reargued their positions and the court denied the motion and determined that the resentencing proceeding would remain in Indian River County.

[7] Kearse further contends that he did not validly waive his presence at any pretrial conferences because the court did not conduct a colloquy with him after he filed his written waiver. However, rule 3.180(a)(3) provides that a defendant may waive his or her presence at pretrial conferences by written waiver and does not require the court to conduct a waiver hearing. Thus, Kearse validly waived his presence at pretrial conferences by virtue of his February 6 written waiver.

Issues 2, 14, 15, and 16 all relate to Florida Rule of Criminal Procedure 3.202, which requires the court, in cases where the state seeks the death penalty and where the defendant intends to establish mental mitigation, to order that the defendant be examined by a mental health expert chosen by the state. Rule 3.202 became effective January 1, 1996, but the notice deadlines were revised upon rehearing and the amended rule became effective on May 2, 1996. *See Amendments to Fla. Rule of Crim. Pro. 3.220-Discovery,* 674 So.2d 83 (Fla.1995).

Kearse claims that the trial court erred in granting the State's motion to compel a mental health examination because the State's notice of intent to seek the death penalty was not timely under rule 3.202 and that the rule is inapplicable to his case, which was remanded for a new sentencing proceeding (issue 2). He further claims that the compelled mental health

examination constitutes unconstitutional one-sided discovery (issue 14); that the application of rule 3.202 in his case violates the ex post facto clauses of both the United States and Florida Constitutions (issue 15); and that the introduction of the expert's testimony based upon a defendant's compelled statements violates the defendant's Fifth Amendment privilege against self-incrimination and limits the defendant's ability to present mitigating evidence during the penalty phase (issue 16).

Initially, Kearse contends that the State's notice of intent to seek the death penalty was not timely under the requirements of rule 3.202 and thus the court erred in granting the State's motion to compel a mental health examination. While rule 3.202 became effective January 1, 1996, the rule was amended on rehearing to alter the deadlines for the state's written notice of its intent to seek the death penalty [1] and the defendant's notice of intent to present expert testimony of mental mitigation. [2] As explained in this ***1126** Court's opinion on rehearing, "[t]he amendments shall become effective upon the release of this opinion," which was May 2, 1996. *Amendments to Fla. Rule of Crim. Pro. 3.220-Discovery,* 674 So.2d 83, 85 (Fla.1995). Thus, we agree with the trial court's determination that the parties complied with the applicable time limits and find no merit to issue 2.

1 Rule 3.202(a) was amended on rehearing to provide that the state must give written notice of its intent to seek the death penalty within forty-five days from the date of arraignment. *See Amendments to Fla. Rule of Crim. Pro. 3.220-Discovery,* 674 So.2d 83, 85 (Fla.1995). Prior to the amendment, the state had ten days from arraignment to give such notice. *See id.* at 84.

2 Rule 3.202(c) was amended on rehearing to provide that the defendant must give notice of intent to present expert testimony of mental mitigation "not less than 20 days before trial." *Amendments to Fla. Rule of Crim. Pro. 3.220-Discovery,* 674 So.2d 83, 85 (Fla.1995). Prior to the amendment, the defendant was required to give notice of such intent "within 45 days from the date of service of the state's notice of intent to seek the death penalty." *Id.* at 84.

Kearse also argues that rule 3.202 is inapplicable to his case (issue 2), violates the ex post facto clauses (issue 15), violates the Fifth Amendment privilege against self-incrimination, and limits the defendant's ability to present mitigating evidence during the penalty phase (issue 16). In *Dillbeck v. State,* 643 So.2d 1027, 1030 (Fla.1994), this Court authorized a similar procedure to "level the playing field" between the defense and the state. The Court explained that this procedure was necessary in light of its earlier ruling in *Nibert v. State,* 574 So.2d 1059, 1062 (Fla.1990), that a trial court must find that a mitigating circumstance has been proved whenever the defense presents a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance. *See Dillbeck,* 643 So.2d at 1030. By allowing the state's expert to examine the defendant, the state would have an opportunity to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation. *See id.* (quoting *State v. Hickson,* 630 So.2d 172, 176 (Fla.1993)).

In *Elledge v. State,* 706 So.2d 1340 (Fla.1997), *cert. denied,* 525 U.S. 944, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998), the defendant argued that the trial court erred in compelling a similar mental health examination when there was no authority to compel the exam. In that case, rule 3.202 did not become effective until

three years *after* the defendant's resentencing. *See id.* at 1345. This Court concluded that there was no error because the procedures ordered by the court were "consistent with the requirements set forth in rule 3.220[3] and in *Dillbeck.*" *Id.* We have also concluded that the compelled mental health examination required by rule 3.202 does not violate the Fifth Amendment's proscription against compelled self-incrimination. *See Davis v. State,* 698 So.2d 1182, 1191 (Fla.1997), *cert. denied,* 522 U.S. 1127, 118 S.Ct. 1076, 140 L.Ed.2d 134 (1998); *Dillbeck,* 643 So.2d at 1030-31. Accordingly, we agree with the trial court's determination that rule 3.202 is applicable to the instant case and find no merit to the remainder of issue 2 and issues 15 and 16.

3 Florida Rule of Criminal Procedure 3.220 governs discovery in all criminal proceedings.

[8] In issue 14, Kearse argues that rule 3.202 requires the kind of one-sided discovery that the United States Supreme Court deemed unconstitutional in *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). We conclude that *Wardius* is inapposite to the instant case. *Wardius* involved an Oregon statute that precluded the defendant from introducing alibi evidence where the defense did not provide notice of an alibi defense prior to trial. The United States Supreme Court held that the Oregon statute violated due process because the statute did not specifically grant criminal defendants reciprocal discovery rights. *See id.* at 472, 93 S.Ct. 2208. The Supreme Court explained that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* at 475, 93 S.Ct. 2208. The Supreme Court concluded that "in the absence of fair notice that [Wardius] would have an opportunity to discover the State's rebuttal witnesses, [he could not] be compelled to reveal his alibi defense." *Id.* at 479, 93 S.Ct. 2208.

Kearse argues that rule 3.202 is similarly flawed in that it requires a defendant to ***1127** give written notice of intent to present expert testimony of mental mitigation, to give a statement of particulars listing the mitigating circumstances the defendant expects to establish through the expert testimony, and to list the names and addresses of the experts who will establish the mitigation, while imposing no corresponding duties on the state. *See* Fla. R.Crim. P. 3.202(b), (c). While rule 3.202 does not *by its terms* require reciprocal discovery by the State, rule 3.220 spells out very specific discovery obligations by both sides when the defendant elects to participate in discovery. By rule, Florida provides for two-way discovery and imposes obligations on both parties, including a list of expert witnesses. *See* Fla. R.Crim. P. 3.220(b)(1)(A)(i). This is unlike the situation in *Wardius* where Oregon granted no discovery rights to criminal defendants. *See* 412 U.S. at 475, 93 S.Ct. 2208. Thus, we conclude that rule 3.202 does not violate a defendant's due process rights.

Issue 3 involves the trial court's denial of Kearse's motion for a continuance in order to depose the State's mental health expert witness and research the expert's background in preparation for rebuttal. The trial court conducted two hearings on Kearse's motion for a continuance. The first hearing was held several days before the resentencing proceeding commenced and was conducted by a substitute judge in the trial judge's absence.

Before jury selection began Kearse again moved for a continuance and the trial judge heard argument from both sides. The trial court denied the continuance on the expert testimony issue, concluding that rule 3.202 contemplated timely action by the parties without long delays. The court found "no grounds for continuance on the expert testimony issue" and ordered the parties to depose the experts during evenings and weekends to avoid delaying the resentencing proceeding.

[9] [10] [11] The granting of a continuance is within a trial court's discretion, and the court's ruling will only be reversed when an abuse of discretion is shown. *See Gorby v. State,* 630 So.2d 544, 546 (Fla.1993). An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to defendant. *See Fennie v. State,* 648 So.2d 95, 97 (Fla.1994). This general rule is true even in death penalty cases. "While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." *Cooper v. State,* 336 So.2d 1133, 1138 (Fla.1976); *see also Hunter v. State,* 660 So.2d 244, 249 (Fla.1995). In the instant case, there is no indication that Kearse was prejudiced by the denial of the continuance. *See Hunter.* Under these circumstances, the court's denial was not an abuse of discretion.

[12] Claims 10, 12, and 13 involve juror issues. Kearse contends that the court erred in denying his motion to interview the jurors in order to determine whether juror misconduct had occurred (claim 10). Six weeks after the jury had rendered its recommendation that a death sentence be imposed, Kearse filed a motion to interview the jurors. Attached was an affidavit from an assistant public defender who overheard a lunch conversation by several unnamed jurors during the course of the trial. According to the affidavit, one juror stated, "I can't believe that [the defense counsel] said that." Another juror replied, "I watched his face-that was a bad thing." Defense counsel filed the motion more than a month after being informed by the public defender about this overheard conversation. The State filed a response, arguing that the equivocal nature of the comments did not warrant a juror interview. At hearing on this motion, both sides relied upon their written arguments and made no further argument. The court denied the motion.

As explained by this Court in *Baptist Hospital v. Maler,* 579 So.2d 97, 100 (Fla.1991), juror interviews are not permissible ***1128** unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding. This standard was formulated "in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it." *Id.* Kearse's allegations did not meet this standard and thus the court did not err in denying the motion.

[13] [14] [15] [16] [17] Kearse also raises two juror challenge issues: that the court erroneously granted the State's cause challenge of Juror Jeremy (issue 12) and erroneously denied his cause challenges of

Jurors Barker and Foxwell (issue 13). The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *See Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State,* 656 So.2d 426, 428 (Fla.1995). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. *See Pentecost v. State,* 545 So.2d 861 (Fla.1989). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. *See Gore v. State,* 706 So.2d 1328, 1332 (Fla.1997), *cert. denied,* 525 U.S. 892, 119 S.Ct. 212, 142 L.Ed.2d 174 (1998). "In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." *Smith v. State,* 699 So.2d 629, 635-36 (Fla.1997), *cert. denied,* 523 U.S. 1008, 118 S.Ct. 1194, 140 L.Ed.2d 323 *and cert. denied,* 523 U.S. 1020, 118 S.Ct. 1300, 140 L.Ed.2d 466 (1998); *see also Taylor v. State,* 638 So.2d 30, 32 (Fla.1994). It is the trial court's duty to determine whether a challenge for cause is proper. *See Smith,* 699 So.2d at 636.

[18] The trial court's finding that Juror Jeremy's views would have substantially impaired her performance as a juror is adequately supported by the record. Throughout questioning by the State and defense counsel Jeremy stated that her feelings about the death penalty would impair her ability to follow the law and that she just could not see herself voting for death when she knew that a true life sentence was an alternative. Thus, there was no error in dismissing Jeremy for cause.

[19] In claim 13, Kearse contends that Jurors Barker and Foxwell should have been excused for cause. In order to preserve such an issue for appeal, Florida law requires a defendant to object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible. *See Dillbeck,* 643 So.2d at 1028; *Trotter v. State,* 576 So.2d 691, 693 (Fla.1990). In the instant case, Kearse has properly preserved this issue. Although neither Foxwell nor Barker served on the jury because Kearse struck them peremptorily, Kearse sought additional peremptory challenges after exhausting his allotted number and named two jurors that he would strike with the extra challenges.

[20] However, even though the issue was preserved for appellate review, the record shows that the trial court did not abuse its discretion in refusing to excuse Barker and Foxwell for cause. The voir dire transcript indicates that each met the test of juror competency in that each could "lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." ***1129** *Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984). Originally, Foxwell expressed his belief in the death penalty and his

frustrations with the criminal justice system. However, when the capital sentencing process was explained to him, he unequivocally stated that he would follow the law. Defense counsel challenged Barker because her husband was a retired police officer and because she originally wanted assurances that a life sentence would be a true life sentence and that conjugal visits not be permitted. However, Barker repeatedly stated that her husband's status as a police officer would not influence her in any way. After defense counsel explained that she would not receive any assurances about the nature of a life sentence, she unequivocally stated that she could be fair and impartial and follow the law. Barker was questioned at length by both sides. A review of this questioning supports the court's denial of the cause challenge. The trial court did not abuse its discretion in declining to excuse these challenged venire members. Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law in light of the evidence presented. Thus, we find no merit to this claim.

[21] Kearse also contends that the court erred in denying his motion to disqualify the prosecutor (claim 7). Kearse moved to disqualify Prosecutor David Morgan because Morgan had been elected county court judge in Indian River County where the resentencing proceeding was to be held. Although Morgan had not yet taken office, Kearse argued that the State would have "an unfair advantage in its attempt to convince the jury that they should impose the death penalty" by being represented by the prosecutor. The court denied the motion, stating that a disqualification on this basis would prohibit all nominated or elected judges who had not taken office yet from practicing law and would also affect retired judges who wanted to practice law. The court also stated that there could not be a blanket assumption that such a person would have an advantage in court and the motion could be reconsidered if any prejudice was revealed during voir dire.

[22] Disqualification of a state attorney is proper only when specific prejudice demonstrated. *See Farina v. State,* 679 So.2d 1151, 1157 (Fla.1996), *receded from on other grounds by Franqui v. State,* 699 So.2d 1312, 1320 (Fla.1997); *State v. Clausell,* 474 So.2d 1189, 1190 (Fla.1985). Furthermore, "[a]ctual prejudice is something more than the mere appearance of impropriety." *Meggs v. McClure,* 538 So.2d 518, 519 (Fla. 1st DCA 1989). Under this standard, we conclude that the trial court properly denied Kearse's motion to disqualify the prosecutor.

[23] **[24]** **[25]** Claim 8 involves comments made by the prosecutor. During opening argument, the prosecutor stated that Kearse "wants to live, even though he denied that right to Officer Parrish" and urged the jury to show "this Defendant the same mercy he showed Officer Parrish." In response, defense counsel moved for a mistrial, which the court denied. The State contends that this issue has not been properly preserved for appeal because counsel simply moved for a mistrial and did not object or ask for a curative instruction. However, as this Court explained in *Spencer v. State,* 645 So.2d 377, 383 (Fla.1994), defense counsel may conclude that a curative instruction will not cure the error and choose not to request one. Thus, a defendant need not request a curative instruction in order to preserve an improper

comment issue for appeal. *Id.* Moreover, even though Kearse's counsel did not specifically object to the prosecutor's comment, counsel's contemporaneous motion for mistrial at the time that the prosecutor made these comments was sufficient to preserve the issue for appellate review. *See James v. State,* 695 So.2d 1229, 1234 (Fla.), *cert. denied,* 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).

***1130 [26]** This Court has found similar prosecutorial comments to be error. *See Richardson v. State,* 604 So.2d 1107, 1109 (Fla.1992) (finding that prosecutor committed error in asking the jury to show defendant as much pity as he showed his victim); *Rhodes v. State,* 547 So.2d 1201, 1206 (Fla.1989) (finding that the prosecutor's argument that jury show defendant same mercy shown to the victim on the day of her death was "an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation") However, "prosecutorial error alone does not automatically warrant a mistrial." *Rhodes,* 547 So.2d at 1206. We must examine the entire record and the nature of the improper comments made. *See, e.g., Richardson,* 604 So.2d at 1109 (concluding that, in light of the entire record, one comment by the prosecutor was harmless beyond a reasonable doubt); *Rhodes,* 547 So.2d at 1206 (stating that even though the cumulative effect of the prosecutor's five egregious comments required reversal, "none of these comments standing alone may have been so egregious as to warrant a mistrial"). In light of the record in this case, this single erroneous comment was not so egregious as to require reversal of the entire resentencing proceeding.

Claim 9 and part of claim 8 involve comments and instructions to the jury regarding the nature and reason for the resentencing proceeding. In response to inquiries by the venire members, the trial court explained that Kearse had been found guilty by another jury and that an appellate court had remanded the case for resentencing. The court gave a similar instruction to the jury during the preliminary instructions. Kearse claims that the court erred by informing the jury of his previous conviction (claim 9). He also raises as error the prosecutor's comment that this Court had directed a new proceeding to recommend death (claim 8).

[27] [28] When resentencing a defendant who has previously been sentenced to death, caution should be used in mentioning the defendant's prior sentence. *See Hitchcock v. State,* 673 So.2d 859, 863 (Fla.1996). Making the present jury aware that a prior jury recommended death and reemphasizing this fact could have the effect of preconditioning the present jury to a death recommendation. *See id.* To avoid this potential problem on remand in such cases, this Court approved the following instruction to explain to the jury why it is considering the sentence:

> Ladies and gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree. [An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a

> new trial to decide what sentence should be imposed.] Consequently, you will not concern yourselves with the question of [his][her] guilt.

Standard Jury Instructions in Criminal Cases No. 96-1, 690 So.2d 1263, 1264 (Fla.1997). No other instruction is to be given by the court as to a prior jury's penalty-phase verdict or why the case is before the jury for resentencing at this time. *See Hitchcock,* 673 So.2d at 863. The trial court's instructions in the instant case were consistent with this standard instruction. Thus, we find no instructional error by the court. We further note that defense counsel specifically approved the instruction when initially given to the venire and did not object when it was read a second time when new prospective jurors were included in the venire. Defense counsel again voiced his approval of the instruction which was included in the standard preliminary instructions given to the jury. Thus, even if the instruction had been erroneous, the issue was not properly preserved.

[29] The only real issue here is the prosecutor's comment during jury selection that this Court had affirmed Kearse's conviction, but "said that there should be a proceeding to recommend death." While ***1131** this was clearly an erroneous statement by the prosecutor, defense counsel neither objected to the comment nor asked for a curative instruction. Kearse argues that the prosecutor's comment constituted fundamental error which can be reviewed without objection and that no instruction could cure this error. The State contends that the error was cured by the totality of the comments and the court's instructions and that the error did not vitiate the entire resentencing. The record shows that this was an isolated misstatement by the prosecutor and, as explained above, the trial court correctly instructed the jury as to the nature of the resentencing proceeding. Thus, no relief is warranted on this basis.

Kearse claims that the court erred in admitting photographs depicting the victim's wounds and a surgical scar from resuscitation efforts at the hospital and also erred in admitting the medical examiner's testimony detailing the victim's injuries (claim 21). Before the medical examiner testified, defense counsel objected to the medical examiner's testimony, arguing that the victim's injuries were not relevant to any aggravating circumstance that the jury would be instructed on[4] and thus should not be admitted. The State responded that the victim's injuries were relevant to show the resentencing jury the entire context of the homicide so that they would not be making a sentencing recommendation in a vacuum and that the injuries were also relevant to show that a robbery occurred by showing that force was used. The trial court overruled the defense objection to the testimony, but ruled that specific photographs must be proffered for the court's approval. The State limited the photographs to five, half of the number of photographs introduced during Kearse's first trial. Each of the photographs depicted different injuries to the victim.[5] The prosecutor stated that this was the "[f]ewest number of photographs" that the State could find. The medical examiner used these photos to explain the nature of the victim's wounds and the cause of death. The medical examiner testified that nine of the gunshot wounds penetrated the victim's body and four more

struck his body but did not penetrate it. He further stated that the victim would have been unable to use his left arm, unable to stand on his left leg, would have been paralyzed by the injuries to his spine, would possibly have been conscious and capable of speech, and that he died from massive internal hemorrhage.

4 The State did not seek to establish either the cold, calculated, and premeditated or the heinous, atrocious, or cruel aggravating factors.

5 The photographs included: the victim's left arm depicting a bullet entry which shattered the bone; the victim's left leg where bullets shattered the two leg bones; the victim's back depicting impact injuries from bullets that stuck the victim's bulletproof vest and other wounds where bullets either entered and exited the body or were lodged under the skin; the victim's front depicting eight bullet impacts, one exit wound, and a surgical scar on the front of the abdomen from resuscitation efforts by medical personnel; and an x-ray depicting bullets inside the victim's body and injury to his spine.

[30] **[31]** **[32]** The test for the admission of evidence is relevancy as to the "nature of the crime" and not just as to whether the evidence was admissible to prove any aggravating or mitigating circumstances. *See Wike v. State,* 698 So.2d 817, 821 (Fla.1997), *cert. denied,* 522 U.S. 1058, 118 S.Ct. 714, 139 L.Ed.2d 655 (1998); *see also* § 921.141(1), Fla. Stat. (1995) (stating that in a capital sentencing proceeding "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant"). Because this was a resentencing proceeding, the jury initially knew nothing about the facts of the case. *See Wike,* 698 So.2d at 821. The basic premise of the sentencing procedure is that the sentencer is to consider *all* relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. *See id.* Had this been the same jury that ***1132** originally determined Kearse's guilt, the jury would have been allowed to hear and see this evidence and more. *See id.* Kearse's resentencing jury could not be forced to make its sentencing recommendation in a vacuum, and both the photographic evidence and the medical examiner's testimony were relevant to the nature of the crime. *See Preston v. State,* 607 So.2d 404, 410 (Fla.1992). Moreover, the trial court has discretion to admit relevant photographic evidence, and the fact that photographs are gruesome does not render the admission an abuse of discretion. *See id.* Accordingly, we find no error in the admission of the photographs or the medical examiner's testimony.

[33] In claim 17, Kearse argues that the trial court erred in giving the jury an instruction on victim impact evidence. According to Kearse, the instruction was vague and thus did not give the jury adequate guidance in how to consider the evidence and also gave undue influence to the victim impact evidence by calling it to the jury's attention. We find no merit to this claim. Defense counsel acknowledged that victim impact evidence was admissible, but argued that the law did not permit any instruction as to the evidence. The State responded that the instruction was necessary to inform the jury that victim impact was not an aggravating circumstance, to guide the jury in its consideration of this evidence, and to prevent the defense from arguing that it was evidence that the State brought in impermissibly. The trial court overruled the defense objection and gave the following instruction:

> Now you have heard evidence that concerns the

> uniqueness of Danny Parrish as an individual human being and the resultant loss to the community's members by the victim's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

[34] **[35]** Defense counsel did not object to the instruction as a misstatement of the law and offered no alternative to the State's requested instruction. Instead, defense counsel simply argued that no instruction was required. As this Court has repeatedly explained, our approval of standard jury instructions does not relieve a trial judge of his or her responsibility under the law to charge the jury properly and correctly in each case. *See, e.g., Standard Jury Instructions in Criminal Cases (95-1),* 657 So.2d 1152, 1153 (Fla.1995); *In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases,* 431 So.2d 594, 598 (Fla.1981). Moreover, this Court's approval of standard instructions does not foreclose parties from "requesting additional or alternative instructions." *Standard Jury Instructions In Criminal Cases (97-2),* 723 So.2d 123, 123 (Fla.1998). The language of the instruction given here mirrors this Court's explanation of the boundaries of victim impact evidence[6] and the language in the victim impact evidence statute.[7] Moreover, the instruction given ***1133** helped to guide the jury's consideration of the victim impact evidence, including that the evidence could not be viewed as an aggravating circumstance. Thus, the court did not err in giving this special instruction.

6 *See, e.g., Bonifay v. State,* 680 So.2d 413, 419-20 (Fla.1996) ("Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.").

7 Section 921.141(7), Florida Statutes (1997), provides:

> VICTIM IMPACT EVIDENCE.-Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Claims 5, 6, and 18 involve the trial court's consideration of various mitigating circumstances. Kearse claims that the trial court failed to evaluate the nonstatutory mitigating circumstance of emotional or mental disturbance (claim 6), erred in giving little weight to his age as a mitigating circumstance (claim 18), and did not conduct a proper analysis as to the mitigating circumstances in the sentencing order (claim 5). For the reasons explained below, we find no error in

the trial court's consideration of the mitigating circumstances.

[36] *Campbell v. State,* 571 So.2d 415, 420 (Fla.1990), requires the sentencing court to expressly evaluate in its written order each mitigating circumstance proposed by the defendant. Kearse contends that the sentencing order here only contained a summary analysis of the mitigation and that this lack of detail does not permit this Court to perform a meaningful review of the order (claim 5). In a sentencing memo to the trial court, Kearse's defense counsel listed forty nonstatutory mitigating factors. Kearse claims that the trial court failed to properly analyze items 6 through 39 because each factor was not specifically listed. Instead, the court categorized these factors as relating to Kearse's "difficult childhood and his psychological and emotional condition because of it." Of these factors, the court concluded that all but fetal alcohol effect and organic brain damage were established and entitled to some weight. The court did not abuse its discretion in grouping the nonstatutory mitigating circumstances in this manner. *See Reaves v. State,* 639 So.2d 1, 6 (Fla.1994) (finding that trial judge reasonably grouped several proffered nonstatutory mitigating factors into three factors).

Kearse also asserts that the trial court failed to evaluate the nonstatutory mitigating circumstances of emotional or mental disturbance (claim 6). The sentencing order explains that the trial court rejected the statutory mental mitigating circumstance because the disturbance was not "extreme." The order discusses the evidence presented and notes that the experts who testified disagreed as to the severity of Kearse's disturbance. Additionally, the sentencing order shows that the court did consider Kearse's mental health evidence as nonstatutory mitigation, found such evidence to exist, and gave each of these nonstatutory factors some weight.

[37] **[38]** Finally, Kearse claims that the court erred in its evaluation of his age (18 years and 3 months at the time of the shooting) as a mitigator (claim 18). Where a defendant is not a minor, no per se rule exists which pinpoints a particular age as an automatic factor in mitigation. *See Shellito v. State,* 701 So.2d 837, 843 (Fla.1997), *cert. denied,* 523 U.S. 1084, 118 S.Ct. 1537, 140 L.Ed.2d 686 (1998). Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing. *See id.* Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard. *See Cole v. State,* 701 So.2d 845, 852 (Fla.1997). This Court has held that the trial judge is in the best position to judge a non-minor defendant's emotional and maturity level, and this Court will not second-guess the judge's decision to accept age in mitigation but assign it only slight weight. *See Shellito,* 701 So.2d at 844.

[39] Claims 19 and 20 both relate to the trial court's consideration of the "commission during a robbery" aggravating circumstance. ***1134** Kearse contends that either the trial court should have merged this factor with the avoid arrest/hinder law enforcement aggravator or should not have found this aggravator established at all. Kearse argues that his case is similar to *Jones v. State,* 580 So.2d 143, 146

(Fla.1991), in which this Court concluded that the "committed during a robbery" aggravator could not apply even though the taking of the victim officer's gun may have technically constituted a robbery. We conclude, however, that the instant case is distinguishable from *Jones.* In *Jones,* while the taking of the officer's service revolver was "technically an armed robbery, [it] was only incidental to the killing, not the reason for it." 580 So.2d at 146. As noted in our opinion, Jones took the gun and fled *after* the officer had been fatally wounded in the chest. *Id.* at 144-45. In the instant case, the evidence shows that Kearse forcibly took the officer's service pistol, turned the weapon on the officer, and then killed him. As noted in the court's sentencing order, "[e]ven though [Kearse] may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense." However, the trial court gave this aggravator somewhat diminished weight because this was not a planned activity like a holdup. As explained in the sentencing order, Kearse "took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented." In light of these circumstances, we conclude that the trial court properly found this aggravator and it does not constitute improper doubling.

[40] Kearse also argues that the death sentence is disproportionate in this case because of the quality of the mitigating and aggravating circumstances (claim 4). "Our proportionality review requires us to 'consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.' " *Terry v. State,* 668 So.2d 954, 965 (Fla.1996) (quoting *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990)).

[41] **[42]** In the instant case, Kearse claims that the robbery aggravator is so intertwined with the avoid arrest aggravator that these should be considered one aggravator. He also contends that the trial court did not properly weigh the "lifetime of mitigation leading up to this incident." As discussed above, however, the robbery aggravator was properly found in this case and did not constitute doubling. The trial court also considered the various mitigating circumstances urged by Kearse, considered the suggested factors, and gave some weight to them. The court concluded, however, that "the statutory and nonstatutory mitigating circumstances found proven are not individually or in toto substantial or sufficient to outweigh the aggravating circumstances." It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator, and that ruling will not be disturbed if supported by competent, substantial evidence in the record. *See Spencer v. State,* 691 So.2d 1062, 1064 (Fla.1996); *Johnson v. State,* 660 So.2d 637, 646 (Fla.1995). Nor does this Court conduct a reweighing of the aggravating and mitigating circumstances. Absent demonstrable legal error, we accept those aggravating factors and mitigating circumstances found by the trial court as the basis for our proportionality review. *See State v. Henry,* 456 So.2d 466, 469 (Fla.1984).

[43] Thus, the instant case involves two aggravating factors (committed during a robbery and avoid arrest/hinder law

enforcement/murder of a law enforcement officer) and a number of nonstatutory mitigating circumstances and the statutory mitigating circumstance of age. The trial court afforded the mitigating circumstances only "some" or "little" weight. Kearse cites *Fitzpatrick v. State,* 527 So.2d 809 (Fla.1988), as evidence that the death sentence is disproportionate in his case. ***1135** While both cases involved the murder of a law enforcement officer in order to avoid arrest, *Fitzpatrick* is distinguishable from the instant case. The record in *Fitzpatrick* supported the trial court's finding of the statutory mitigators of extreme emotional or mental disturbance, substantially impaired capacity to conform his conduct to the requirements of the law, and low emotional age. In addition to eyewitness and family testimony about Fitzpatrick's "psychotic" and "goofy" behavior, several experts testified that Fitzpatrick had an emotional age between nine and twelve years old; a neurologist testified that his examination revealed "extensive brain damage with symptoms resembling schizophrenia"; and all of the experts agreed that Fitzpatrick suffered from "extreme emotional and mental disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired." *Id.* at 811-12. In contrast, in the instant case the trial court found no evidence of organic brain damage and concluded that Kearse "exhibited sophistication rather than naivete." Thus, Kearse's reliance on *Fitzpatrick* is misplaced.

To the contrary, we find the instant case is comparable to *Burns v. State,* 699 So.2d 646, 651 (Fla.1997), *cert. denied,* 522 U.S. 1121, 118 S.Ct. 1063, 140 L.Ed.2d 123 (1998), in which we concluded that the circumstances were "sufficient to support the death penalty." *Burns* also involved a defendant who murdered a law enforcement officer in order to avoid arrest. As in the instant case, the trial court merged these factors into one aggravator and afforded it great weight. *Id.* at 650. Also like the instant case, *Burns* was "devoid of the statutory mental mitigators," and the statutory and nonstatutory mitigators that were found were afforded only "minimal weight." *Id.* Accordingly, we reject Kearse's contention that his death sentence is disproportionate.

As his final claim, Kearse argues that his death sentence must be vacated because electrocution is cruel and unusual punishment (claim 22). Any question regarding the constitutionality of electrocution has been resolved since Kearse filed this appeal. *See* ch. 00-2, § 2, Laws of Fla. ("A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.") (signed into law by the Governor on Jan. 14, 2000); *Sims v. State,* 754 So.2d 657, 664-65 (Fla.2000) (holding that the retroactive application of the choice statute did not violate Ex Post Facto clauses of the state and federal constitutions).

For the reasons expressed above, we affirm Kearse's sentence of death.

It is so ordered.

HARDING, C.J., and WELLS, LEWIS and QUINCE, JJ., concur.

ANSTEAD, J., dissents with an opinion, in which SHAW and PARIENTE, JJ., concur.

ANSTEAD, J., dissenting.

I have 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.

PROPORTIONALITY

First, and most importantly, I cannot agree that death is the appropriate penalty in this case under the standards for proportionality we have established. In *State v. Dixon,* 283 So.2d 1, 8 (Fla.1973), we stated that this Court's review process is to ensure that the death penalty is reserved for "the most aggravated, the most indefensible of crimes." We recently reiterated this view in *Cooper v. State,* 739 So.2d 82 (Fla.1999), wherein we stated that " '[o]ur law reserves the death penalty only for the most aggravated and least mitigated murders.' " *Id.* at 85 (quoting *Almeida v. State,* 748 So.2d 922, 933 (Fla.1999) ***1136** (quoting *Kramer v. State,* 619 So.2d 274, 278 (Fla.1993))). Indeed, despite the existence of multiple aggravating factors, we vacated Cooper's sentence of death because upon review of the record, we found that the case was one of the most mitigated killings that we have reviewed. *See id.* at 86.

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. Importantly, there is no evidence that Kearse set out that night intending to commit any crime, let alone murder. In fact, he had just picked up a pizza and was returning home to eat it with friends when this tragic incident took place.

First, it is important to note that there is only one serious aggravator present here. The trial court found two aggravators after concluding that the evidence supported four aggravating circumstances, three of which merged and could only be treated as one: the murder was committed while the defendant was engaged in a robbery; the crime was committed for the purpose of avoiding arrest; the crime was committed to disrupt or hinder the enforcement of the laws; and the victim of the crime was a law enforcement officer engaged in the performance of his official duties. As required by law, the trial court merged the second, third and fourth circumstances into one single aggravator. In addition, the trial court gave the first aggravator diminished weight because although it was technically satisfied, the record showed that unlike a distinct and ordinary robbery, Kearse took the weapon to effect the killing and then kept it to conceal his fingerprints. Thus, we are considering a death sentence based upon only two aggravating factors, one of which the trial court itself gave diminished weight. In fact both of the aggravators are based upon the same single factual predicate, the defendant's impulsive and

irrational reaction to his confrontation with the police officer victim.

As for mitigation, the trial court found the defendant's age a mitigating factor to which it attributed "some" weight. The trial court also gave "some" weight to numerous nonstatutory mitigators, which include the defendant's: (1) acceptable behavior at trial; (2) low IQ, impulsiveness, and inability to reason abstractly; (3) impulsiveness with memory problems and impaired social judgment; (4) difficulty attending to and concentrating on visual and auditory stimuli; (5) difficulty with perceptual organizational ability and poor verbal comprehension; (6) impaired problem-solving flexibility; (7) deficits in visual and motor performance; (8) lower verbal intelligence; (9) poor auditory short-term memory; (10) mild retardation and ability to function at a third grade level; (11) developmental learning disability; (12) slow learning and need for special assistance in school; (13) severe emotional handicap; (14) impaired memory; (15) impoverished academic skills; (16) mental, emotional and learning disabilities; (17) delayed developmental milestones; (18) severe emotional disturbance as a child; (19) difficult childhood due to social and economical disadvantages; (20) impoverished background; (21) improper upbringing; (22) malnourishment; (23) lack of opportunity to bond with natural father; (24) loss of his father when young boy which forced him to grow up without a male role model; (25) upbringing in a broken home and poverty; (26) dysfunctional family; (27) alcoholic mother; (28) neglect by mother; (29) childhood trauma; (30) physical and sexual abuse; and (31) life in the streets after his mother gave up on him at an early age.[8] ***1137** The trial court rejected Kearse's alleged factors that he suffers from fetal alcohol effect and a brain disorder.

8 These factors were not individually listed in the sentencing order. Rather, the trial court grouped them together and treated them categorically. The list of factors is contained in the Defendant's Memorandum Regarding Sentencing.

The majority relies on *Burns v. State,* 699 So.2d 646, 651 (Fla.1997), in finding the sentence of death proportional. Burns was a forty-two-year-old adult who had been stopped by a police officer while trafficking in cocaine. A struggle between Burns and the police officer ensued, during which the officer was killed. The trial court found one aggravating factor, two statutory mitigators and several nonstatutory mitigators. These included: (1) Burns was one of seventeen children raised in a poor rural environment with few advantages, but was intelligent and became continuously employed after high school; (2) Burns contributed to his community, graduated from high school, worked hard to support his family, with whom he had a loving relationship, and was honorably discharged from the military, albeit for excessive demerits after only one month and seventeen days of active duty; and (3) Burns had shown some remorse, had a good prison record, behaved appropriately in court, and demonstrated some spiritual growth. *See id.* at 648-49.

Burns is patently distinguishable from this case. First, unlike Kearse, Burns was in the process of committing a serious felonious criminal offense at the time he was stopped by the officer. Indeed, the Court in *Burns* explicitly relied on this fact to distinguish the

case from another case involving the murder of a law enforcement officer in which we had vacated the sentence of death. Second, the extent and weight of the mitigation in *Burns* pales in comparison to the mitigation presented herein. Critically, unlike Kearse, Burns was an intelligent forty-two year old adult. There was no indication that he suffered from any mental or emotional difficulties.

Instead, this case is more comparable to *Brown v. State,* 526 So.2d 903 (Fla.1988), and *Songer v. State,* 544 So.2d 1010 (Fla.1989), both of which were cited by Kearse in his appellate brief. In *Brown,* the defendant killed a law enforcement officer after being stopped during an investigation into a recent robbery that Brown and his companion had committed. We summarized the mitigating evidence as follows:

> According to expert testimony, appellant had an IQ of 70-75, classified as borderline defective or just above the level for mild mental retardation. At age ten, he had been placed in a school for the emotionally handicapped. Although chronologically eighteen, he had the emotional maturity of a preschool child. The psychologist concluded that both statutory mental mitigating factors applied, i.e., that the murder was an impulsive act committed while appellant was under the influence of serious emotional disturbance and while his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired. Additionally, there was testimony that appellant was not a vicious or predatory-type criminal and rehabilitation thus was likely.

526 So.2d at 908 (footnotes omitted). We held it was error for the trial court to override the jury's recommendation of life because there was sufficient evidence in the record to support the jury's recommendation. *Id.*

In *Songer,* the defendant killed a law enforcement officer who apparently approached Songer while he was sleeping in his car. Songer had walked away from a work release program several days earlier. The trial court found one aggravator (defendant was under sentence of imprisonment) and several statutory mitigators: the crime was committed while Songer was under the influence of extreme mental or emotional disturbance, Songer's ability to appreciate the criminality of his conduct or ***1138** to conform his conduct to the requirements of law was substantially impaired, and his age, twenty-three years old. The trial court also found several nonstatutory mitigators: Songer's sincere and heartfelt remorse; his chemical dependency on drugs, which caused significant mood swings; his history of adapting well to prison life and using the time for self-improvement; his positive change of character attributes, as manifested in a desire to

help others; his emotionally impoverished upbringing; his positive influence on his family despite his incarceration; and his developing strong spiritual and religious standards. *See* 544 So.2d at 1011.

Like Kearse, the defendant in *Songer* was not engaged in a serious felonious offense at the time of the murder. However, unlike *Kearse,* and arguably more aggravating, the police officer in *Songer* was killed by a hail of bullets as he approached Songer's car. Although *Songer* involved only one aggravating factor (which this Court diminished due to the fact that Songer had not been imprisoned), this distinction is minimal compared to the factors presented in this case. Here, the murder during a robbery aggravator was given diminished weight by the trial court and the major factor centered on the fact that Kearse killed a law enforcement officer.

Although *Songer* and *Brown* contained proof of statutory mental mitigators, that too does not constitute a serious distinction because, although the trial court here did not find any statutory mitigators, it found the evidence sufficient to support numerous *nonstatutory* mental mitigators. In other words, the court found and gave weight to Kearse's deprived childhood, his economic and social disadvantages, and his low intelligence and emotional difficulties. As noted above, none of these factors were found by the trial court in *Burns.*

The bottom line is that this is clearly not a death case. It is not one of the most aggravated and least mitigated or among the worst of the worst for which we have reserved death as the only appropriate response. What eighteen-year-old Kearse did was horrible-but his actions in light of the bizarre circumstances in this case do not warrant the ultimate penalty of death.

AGE MITIGATOR

Whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court. *See Campbell v. State,* 571 So.2d 415, 420 (Fla.1990). The trial court's conclusions as to the relative weight will be sustained if "supported by 'sufficient competent evidence in the record.' " *Id.* (quoting *Brown v. Wainwright,* 392 So.2d 1327, 1331 (Fla.1981)). In *Shellito v. State,* 701 So.2d 837 (Fla.1997), we stated that "whenever a murder is committed by a minor, the mitigating factor of age must be found and weighed but that the weight can be diminished by other evidence showing unusual maturity." *Id.* at 843. However, where the defendant is not a minor, as in the case herein, "no per se rule exists which pinpoints a particular age as an automatic factor in mitigation." *Id.* "[I]f a defendant's age is to be accorded any significant weight as a mitigating factor, 'it must be linked with some other characteristic of the defendant or the crime such as immaturity.' " *Mahn v. State,* 714 So.2d 391, 400 (Fla.1998). Thus, the existence and weight to be given to this mitigator depends on the evidence presented at trial and the sentencing hearing. *See Shellito,* 701 So.2d at 843.

Here, the trial court found age as a statutory mitigating factor. However, the court gave this factor only "some" weight because "the

defendant had already been through many stages of the criminal justice system" including prison and had "exhibited sophistication rather than naivete." The court noted that the obvious intent of the statute was to give consideration to a youth who acts from immaturity, but found that that was not the case here. The ***1139** judge's conclusion is not supported by the evidence.

The evidence demonstrates that Kearse was eighteen years old at the time of the offense. As a child, he was placed in schools for the emotionally handicapped. In 1991, after the commission of the crime, Kearse underwent a series of neuropsychological tests to determine his intellectual functioning. These tests revealed a verbal IQ of 75, placing Kearse in the lower fifth percentile of people in his age group. According to one expert, this score places Kearse in the borderline range of intelligence and means that he has difficulty receiving, integrating, and sequencing information. This expert noted that Kearse's score is similar to the score Kearse received when tested in 1981, which means that his intellectual function did not significantly increase with age. Further testing indicated that in 1991 (at age eighteen) Kearse could spell on a third grade level and do arithmetic on a fourth grade level. According to the defense expert, these scores indicate severe learning problems. Although the State's expert disputed several of the conclusions offered by the defense experts, the State's expert did not challenge the defense's evidence as to learning disabilities except to state his belief that Kearse could at least read on a sixth grade level in order to take the tests. The State's expert agreed that the test results suggest that Kearse has intellectual deficits and subnormal IQ.

The sentencing order fails to acknowledge this evidence. Further, contrary to the trial court's conclusion, the record establishes that Kearse operated at an intellectual level much lower than his chronological age. Accordingly, I believe the trial court's conclusion with regard to this mitigator is erroneous. Greater weight should have been given to this factor.

STANDARD OF REVIEW FOR CAUSE CHALLENGES

I am also concerned that the majority opinion is not upholding our prior rulings that any doubts about impartiality should be resolved in favor of granting a for-cause challenge. In this case, Kearse challenged the trial court's for-cause determination as to three jurors: juror Jeremy who was excused for cause based on her anti-death views and jurors Barker and Foxwell who were not excused for cause despite their pro-death views. The majority holds that the trial court did not err in excusing juror Jeremy because she stated that her feelings about the death penalty would impair her ability to impose a death sentence. The majority further holds that the trial court did not err in denying Kearse's for-cause challenge as to the other two jurors because, "[a]lthough they stated certain biases and prejudices, each of them also stated that could set aside their personal views and follow the law in light of the evidence presented." Majority op. at 1129. This analysis is incomplete.

In *Singer v. State,* 109 So.2d 7 (Fla.1959), this Court stated "that if there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion." *Id.* at 23-24. The *Singer* opinion emphasized that "a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so." *Id.* at 24. We stressed that the test should not be "whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice or bias or, whether he is infected by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon the evidence given at the trial." *Id.*

***1140** This Court applied the same rule in *Hill v. State,* 477 So.2d 553 (Fla.1985), in analyzing whether a juror should have been excused for cause in light of that juror's views on the death penalty. During voir dire, the juror expressed a strong bias in favor of the death penalty and, based on media accounts of the events, had formed an opinion as to the guilt or innocence of the participants. However, the juror stated that he believed he could set his opinion aside and listen to the evidence presented in court. During voir dire, the following was also said:

> PROSECUTOR: Have you ever thought about what type of case would deserve a death sentence?
>
> JOHNSON: Yes, sir, premeditated murder, and felony murder.

When asked by defense counsel how he was going to keep his preconceived opinion from affecting his deliberations, Mr. Johnson answered as follows:

> Well, basically, like I said, I have not associated that opinion with Mr. Hill. It was just a blank feeling that ... someone that shoots someone else should be punished.
>
> ....
>
> I feel anyone that shoots anyone else in the type of incident as much as I know about it now, *the death penalty should be imposed upon them.* That's basically what I felt at the time.

(Emphasis supplied). Later in the inquiry, with regard to the imposition of the death penalty, defense counsel asked:

> Do you feel like from under the facts that you know now, do you feel like this might be an appropriate case?
>
> JOHNSON: I don't feel I have really been given any more facts than I have before coming into the courtroom.
>
> DEFENSE COUNSEL: You formed an opinion before though?
>
> JOHNSON: Yes, sir.

> DEFENSE COUNSEL: Have you discarded that opinion?
>
> JOHNSON: Not necessarily.
>
> DEFENSE COUNSEL: Do you feel that in all cases of premeditated murder that the death penalty should be applied?
>
> JOHNSON: It's a hard question to answer.
>
> DEFENSE COUNSEL: Yes, sir, sure is.
>
> JOHNSON: I'm not saying in all cases, dependent upon the evidence.
>
> DEFENSE COUNSEL: *Are you still inclined towards the death penalty in this case if in fact there is a conviction?*
>
> JOHNSON: *Yes, sir.*
>
> DEFENSE COUNSEL: *That's the presumption that you came into this court with?*
>
> JOHNSON: *Yes, sir.*

Id. at 555. This Court held that juror Johnson should have been excused for cause and explained that

> [i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. *A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.* When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Id. at 556 (emphasis added).

Here, the trial court denied defense challenges to jurors Barker and Foxwell for cause based on their views as to the appropriate punishment, and Kearse was forced to peremptorily strike both jurors. The majority opinion correctly states the test for determining juror competency. ***1141** The majority also correctly states the concept that a juror should be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See* majority op. at 1128. However, contrary to the summary conclusion of the majority opinion, it appears the trial court erred in refusing to excuse jurors Barker and Foxwell for cause, and the majority fails to acknowledge our holdings that any reasonable doubt requires excusal of the juror.

Juror Barker stated that she favored the death penalty. During voir dire, she further stated that in deciding whether to recommend life or death, she would "have to be assured that the perpetrator would not be put into prison where conjugal visits would be allowed or perhaps the fact that he could get out on a technicality." She then claims that she could recommend a

life sentence if she "was assured that there would be no chance of parole at any time." Defense counsel informed juror Barker that there would be no such assurances during trial and asked whether that would be a concern for her. The juror responded that she would have to "weigh the evidence and decide." She later admitted that there were circumstances where life would be the appropriate penalty. Although juror Barker claimed that she would weigh the evidence and decide accordingly, I am concerned with her initial comment that she would require assurances that a life sentence meant a true life sentence. Her statements indicate that the defense would have the burden of assuring her that the defendant would remain in prison for the rest of his life. Despite juror Barker's promise to weigh the evidence, her initial statements created a reasonable doubt as to her ability to consider life as one of the permissible forms of punishment.

Juror Foxwell expressed frustration with the criminal system, stating: "I don't understand Florida law as far as he's already been tried and convicted, I mean, why in the heck do we have to go through all this expense again to sentence him?" After a brief explanation by defense counsel, juror Foxwell asserted that he could listen to the evidence and follow the law. However, he then stated that he was a strong proponent of the death penalty because there is nothing worse than taking a life. Foxwell told the defense counsel that he would "have to do a lot of talking" to change his mind. The following colloquy occurred next:

> Defense counsel: All things being equal, would it be fair to say that just knowing what you know as of now about the evidence you're going to hear, would it be fair to say that you're going to tend to recommend death under these facts based upon your feelings?
>
> Mr. Foxwell: Well you've already told us he's been convicted. Now you got to convince us another way, right?
>
> Defense counsel: That's what I'm saying. If that's the way you feel, correct?
>
> Mr. Foxwell: Yes.

The next day, the State asked juror Foxwell whether he could listen to the evidence and make a determination based on the law as instructed. The juror responded: "I would try my damndest." He further stated that he would consider whatever evidence the defense presented in mitigation.

That juror Foxwell stated that he would listen to the evidence and would follow the law is not dispositive if such assurances are insufficient to overcome his earlier statements concerning his preconceived view about punishment. *See Singer.* Juror Foxwell clearly stated that the defense would have to "change his mind" in order to overcome his belief that death was the appropriate penalty. His statements during voir dire created a reasonable doubt as to his impartiality and the trial court should have ruled in favor of the defense and excused juror Foxwell for cause. [9]

9 Because Kearse was forced to use two of his peremptory strikes in order to remove jurors Barker and Foxwell from the panel, exhausted his peremptory challenges, and was denied additional peremptory strikes, the denial of the for-cause challenges constitutes reversible error. *See Hill,* 477 So.2d at 556 ("[I]t is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or

her peremptory challenges and an additional challenge is sought and denied.").

*1142 WITHDRAWAL OF WAIVER OF VENUE

Article I, section 16 of the Florida Constitution guarantees defendants the right "to have a speedy and public trial by an impartial jury in the county where the crime was committed." This Court has construed this right as an important one which "must not be lightly treated." *O'Berry v. State,* 47 Fla. 75, 86, 36 So. 440, 444 (1904); *see also Rhoden v. State,* 179 So.2d 606, 607 (Fla. 1st DCA 1965) (noting that right to jury trial in county where crime was committed is a right that should be "jealously guarded"). Undoubtedly, Kearse had the constitutional right to be tried in Port St. Lucie County since that is where the crime was committed. He waived that right, however, when he requested a change of venue due to pretrial publicity.

The trial court in this case concluded that a defendant could not withdraw a waiver of venue. Nevertheless, this Court has recognized the proper withdrawal of a waiver of another similar constitutional right-the right to a jury trial. In fact, the same constitutional provision that guarantees defendants the right to be tried in the county where the crime occurred also guarantees defendants the right to be tried by an impartial jury. *See* Art. I, § 16(a), Fla. Const.

In *Floyd v. State,* 90 So.2d 105 (Fla.1956), the defendant waived his right to a jury trial and then later attempted to withdraw that waiver. This Court held that a defendant may withdraw a waiver of jury trial if he or she does so in good faith and the withdrawal will not cause delay or harm to the State:

> It would appear to us that the fundamental and cherished right of trial by jury will best be protected and be caused to "remain inviolate" if the withdrawal of the waiver to such a trial is refused by a court only when it is not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public, i.e., the State, such as unreasonable delay or interruption of the administration of justice, real inconvenience to the court and the State, or that additional expense to the State will be occasioned thereby.

Id. at 106. Because there was nothing to show that the State or the court would have been inconvenienced in any way if the motion was granted and no valid ground for denying the motion had been asserted, this Court held the trial court had abused its discretion in denying Floyd's motion to withdraw the waiver of jury trial. *Id.* at 107. The same principle should apply here.

Because Kearse has a constitutional right to be tried in the county where the crime occurred and specifically requested to be tried in St. Lucie county,[10] Kearse should have been permitted to withdraw his earlier waiver of venue. The motion appears to have been made

in good faith, and there is no evidence in the record that the State or the court would have been inconvenienced.

10 As the majority points out in its opinion, the record reflects that Kearse initially requested that resentencing be held in Indian River County. However, the majority fails to mention that after the recusal of Judge Walsh, the defense renewed its motion to establish venue in St. Lucie County and at a hearing on the matter, Kearse stated that he would prefer to be tried in St. Lucie County.

Importantly, the record reflects that many phases of the proceedings occurred in St. Lucie County and it does not appear the state would have been harmed if this case remained there. During Kearse's initial ***1143** trial, and despite the change of venue to Indian River County, the trial court transferred the case back to St. Lucie County for sentencing, from which the notice of appeal was subsequently filed. On appeal, this Court remanded the case to St. Lucie County for resentencing. The crime occurred in St. Lucie County, the pretrial hearings were being held in St. Lucie County, and the trial court did not anticipate any problems with obtaining an available courtroom in St. Lucie County. Because a jury had to be impaneled in either county, there was no showing that holding the resentencing in St. Lucie County would cause additional delays. Although the court was concerned with pretrial publicity and its effect on the ability to find impartial jurors, there is no evidence that it would be difficult or impossible to obtain an impartial jury in St. Lucie County. The trial was originally held in 1991 and the resentencing took place in 1996, five years later. Thus, at this stage of the proceedings, there was no showing that the parties could not have obtained an impartial jury.

Further, Kearse's motion appears to have been made in good faith. He argued that holding the resentencing in Indian River County could prejudice his case because of a difference in the number of African Americans in Indian River County compared to St. Lucie County. He pointed out that the percentage of African Americans in the population in St. Lucie County was almost twice the percentage of African Americans in Indian River County. In addition to the differences in the racial makeup of the two counties, Kearse noted the fact that the prosecutor had recently been elected a judge in Indian River County. Under these circumstances, the trial court abused its discretion in denying Kearse's request to be resentenced in St. Lucie County.

PROSECUTOR'S "NO MERCY" ARGUMENT

During the State's opening statement to the jury, the prosecutor identified the facts he believed the evidence would show and then concluded with the following remarks:

> Now I don't know what the Defense is going to show you in an attempt to mitigate this horrible crime. We have some idea based on voir dire, but we'll have to wait and see. But whatever that mitigation is, I would ask you now, listen to it, consider it and then ask yourself what does this have to do with the true character of the Defendant on January 18th, 1991 when he took that gun and pulled that trigger 14 times. [11]

11 This remark is also troubling because the prosecutor essentially is telling the jury that whatever the defense

> presents as mitigation about the defendant's background does not matter. Although this too was an improper expression of the prosecutor's personal opinion on evidence that had not yet been submitted, it was not objected to at trial and appellate counsel did not present this issue on appeal. Thus, this issue is not presently before the Court.

> We are here because this Defendant is guilty of murder. We are here because the Defendant wants to live, even though he denied that right to Officer Parrish. The bottom line, Ladies and Gentlemen, is we're here seeking justice on behalf of Officer Danny Parrish. A voice we're going to bring from six years ago demand justice. We are here asking you to show this Defendant the same mercy he showed Officer Parrish, except in this courtroom it will be in accordance with the law.
>
> Defense counsel moved for mistrial on the "no mercy" argument. Following the trial court's denial of the defense motion, the prosecutor reiterated its "no mercy" argument, stating "at the end of this proceeding, we're going to ask you to show this Defendant the same consideration that he showed Officer Parrish almost six years ago [by sentencing him to death]."

The majority opinion agrees that the prosecutor's remarks were improper. ***1144** However, the majority holds that the prosecutor's "no mercy" comment during opening statement to the jury was not prejudicial. The opinion relies on *Rhodes v. State,* 547 So.2d 1201 (Fla.1989), and *Richardson v. State,* 604 So.2d 1107 (Fla.1992), in support of its conclusion that although the "no mercy" comments were improper, they do not require reversal. Both cases can be distinguished by the simple fact that they involved statements made during *closing* argument.

Here, the prosecutor's remarks are especially troubling because the comment was made during *opening* statement. The defense did not present opening remarks at this stage of the proceeding, having reserved the right to make an opening statement at a later time. The purpose of opening statement is to recite the facts the attorney believes will be proven by the evidence at trial. *See Occhicone v. State,* 570 So.2d 902, 903 (Fla.1990). Arguments and personal opinions are inappropriate. *See First v. State,* 696 So.2d 1357, 1358 (Fla. 2d DCA 1997) (reversing for new trial where prosecutor expressed personal belief during opening statement that defendant's alibi witness was a "liar"). The prosecutorial comments here set the course for the entire proceeding because they established that justice could only be served by imposing death (i.e., the same fate met by Officer Parrish). Thus, the jury started listening to the State's evidence immediately after the prosecutor's erroneous remarks. Under these circumstances, it is difficult to say that the prosecutor's final words had no effect on the jurors' minds.

SHAW and PARIENTE, JJ., concur.

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APPENDIX F

662 So.2d 677
Supreme Court of Florida.

Billy Leon KEARSE, Appellant,
v.
STATE of Florida, Appellee.

No. 79037. | June 22, 1995.
| Rehearing Denied Nov. 9, 1995.

Defendant was convicted in the Circuit Court, St. Lucie County, Marc A. Cianca, J., of robbery with firearm and first-degree murder in connection with shooting death of police officer. Defendant appealed. The Supreme Court held that: (1) trial court did not err in giving expanded jury instruction on premeditation which accurately stated law; (2) any error in trial court's referring to homicide as "murder" in expanded premeditation instruction was harmless; (3) jury was properly instructed on escape as underlying felony of felony murder; (4) defendant failed to establish claim that improper denial of challenges for cause of prospective jurors improperly forced him to peremptorily strike objectionable jurors; (5) trial court did not abuse its discretion in granting additional peremptory challenge to state as well as defendant; (6) testimony as to purpose for two-handed gun grip was relevant to issue of premeditation; (7) authorities had probable cause to arrest defendant; (8) erroneous admission of hearsay testimony was harmless; (9) aggravating sentencing factor of "commission during a robbery" was properly found and did not constitute doubling; (10) aggravating factors of "avoid arrest/hinder enforcement of laws" and "murder of a law enforcement officer" were duplicative; (11) denial of requested instruction on cold, calculated, and premeditated aggravating circumstance was error; and (12) murder was not "heinous, atrocious, or cruel."

Convictions affirmed, sentence vacated and remanded.

McDonald, Senior Justice, filed concurring and dissenting opinions.

Attorneys and Law Firms

***680** Richard L. Jorandby, Public Defender and Jeffrey L. Anderson, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Sara D. Baggett, Asst. Atty. Gen., West Palm Beach, for appellee.

Opinion

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Billy Leon Kearse. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution. For the reasons set forth below, we affirm Kearse's convictions, but vacate his death sentence and remand for a new penalty phase proceeding before a jury.

Kearse was charged with robbery with a firearm and first-degree murder in the death of Fort Pierce police officer Danny Parrish on January 18, 1991. After 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.

The jury convicted Kearse of both charged counts and recommended the death penalty by a vote of eleven to one. In sentencing Kearse to death, the judge found four aggravating circumstances: 1) the murder was committed while the defendant was engaged in a robbery; 2) the murder was committed to either avoid arrest or hinder the enforcement of laws; 3) the murder was especially heinous, atrocious, or cruel (HAC); and 4) the victim of the murder was a law enforcement officer engaged in the performance of his official duties. § 921.141(5)(d), (e), (g), (h), (j), Fla.Stat. (1991). The judge found two statutory mitigating circumstances: the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(b), (f), Fla.Stat. (1991). The judge also found three nonstatutory mitigating circumstances: the defendant's impoverished and culturally deprived background; the defendant was severely emotionally disturbed as a child; and the defendant's IQ is just above the retarded line. However, the judge determined that none of the mitigating circumstances "are substantial or sufficient to outweigh any aggravating circumstance."

On appeal, Kearse raises the following issues: 1) the denial of the requested limiting instruction on the consideration of duplicate ***681** aggravating circumstances; 2) the aggravating circumstances of murder of a law enforcement officer and avoid arrest or hinder enforcement of laws constituted improper doubling; 3) the court's failure to find Kearse's age to be a mitigating factor; 4) the consideration of the aggravating circumstance of committed while engaged in the commission of a robbery; 5) finding that the murder was HAC; 6) the denial of the requested instruction on the cold, calculated, and premeditated (CCP) aggravating circumstance; 7) the prosecutor engaged in misconduct during the penalty phase; 8) the aggravating circumstance of committed while engaged in the commission of a robbery was based on the same aspect of the offense as the other aggravating circumstances; 9) the death penalty

is not proportional; 10) the admission of evidence regarding Kearse's emotional state during the penalty phase; 11) the giving of the State's special requested instruction on premeditated murder over defense objection; 12) instructing the jury on escape as the underlying felony of felony murder; 13) the denial of defense challenges for cause of prospective jurors; 14) the admission of testimony regarding the purpose of a two-handed grip on a gun; 15) the denial of defense motions to suppress evidence on the basis that Kearse's warrantless arrest was not based on probable cause; 16) the instruction on reasonable doubt denied Kearse due process and a fair trial; 17) the admission of hearsay evidence during the guilt phase; 18) the introduction of evidence in the penalty phase that Kearse had been previously convicted of robbery; 19) the admission of Kearse's alleged disciplinary record during the penalty phase; 20) the constitutionality of the felony murder aggravating circumstance; 21) the denial of the requested instruction regarding the weight to be afforded the jury's recommended sentence; 22) the denial of the requested instruction regarding mitigating circumstances; 23) the denial of the requested instruction regarding the burden of proof in the penalty phase; 24) the constitutionality of Florida's death penalty statute; and 25) the constitutionality of the aggravating circumstances found in this case.

Guilt Phase

[1] Issues 11–17, which relate to the guilt phase proceedings, are without merit. Kearse claims that the standard instruction on reasonable doubt which was given in this case is constitutionally infirm (issue 16). This issue was not properly preserved as counsel raised no objection below. However, even if preserved, we would find no merit to this claim as this Court has previously considered and rejected similar constitutional challenges directed at the reasonable doubt instruction. *See Esty v. State,* 642 So.2d 1074, 1080 (Fla.1994); *accord Brown v. State,* 565 So.2d 304, 307 (Fla.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), *abrogated on other grounds, Jackson v. State,* 648 So.2d 85 (Fla.1994).

[2] In issue 11, Kearse argues that the trial court erred in reading a special instruction on premeditation. The following language was added to the standard instruction on premeditation:

> Among the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted.

Kearse contends that this instruction improperly highlighted the State's evidence through the court's voice, permitted the jury to infer premeditation based on insufficient evidence, and constituted an improper comment on the evidence because the court called the killing a “murder.” The State argues that these were not the grounds on which Kearse objected to the special instruction below, and thus he is precluded from raising them for the first time on appeal. Our review of the record reveals that defense counsel

objected that the special instruction "doesn't accurately state the law" and "limits the jury to what they may look at in inferring the existence of premeditation." These objections and the discussion that followed can be fairly interpreted to cover the first two legal grounds raised in this appeal. Thus, these contentions have been preserved for our review.

[3] As this Court explained in *State v. Bryan,* 287 So.2d 73, 75 (Fla.1973), *cert. denied,* ***682** 417 U.S. 912, 94 S.Ct. 2611, 41 L.Ed.2d 216 (1974), the standard jury instructions should be used to the extent applicable in the judgment of the trial court. However, the trial judge still has the responsibility to " 'properly and correctly ... charge the jury in each case,' " *id.* (quoting *In re Standard Jury Instructions in Criminal Cases,* 240 So.2d 472, 473 (Fla.1970)), and the judge's decision regarding the charge to the jury "has historically had the presumption of correctness on appeal." *Id.*

[4] In the instant case, the judge instructed the jury that premeditation could be inferred from such evidence as the nature of the weapon used, the manner in which the murder was committed, and the nature and manner of the wounds inflicted. The State sought this more detailed definition of premeditation as this element of the offense was the foremost issue in dispute. Although the added language is not part of the standard jury instruction, it is an accurate statement of the law regarding premeditation. *See Sireci v. State,* 399 So.2d 964, 967 (Fla.1981) ("Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted."), *cert. denied,* 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Thus, the trial court did not err by giving this expanded instruction on premeditation.

[5] **[6]** We do agree with Kearse that the trial court erred by referring to the homicide as a "murder" in the expanded instruction. However, Kearse did not object to the special instruction on this ground and thus did not preserve this issue for appeal. *See Steinhorst v. State,* 412 So.2d 332, 338 (Fla.1982) ("[I]n 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."). Moreover, even if properly preserved, the error would be harmless beyond a reasonable doubt when viewed in the context of the entire instruction given and the evidence of premeditation presented. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

Kearse also contends that the court erred in instructing the jury on escape as the underlying felony of felony murder (issue 12). Kearse objected to the escape instruction on two grounds: that he had insufficient notice that the State would rely upon escape as the underlying felony because it did not allege escape in the indictment; and that the elements of escape were not proven during the trial. We find no error on either point.

[7] The State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and

felony murder when the indictment charges premeditated murder. *O'Callaghan v. State,* 429 So.2d 691, 695 (Fla.1983); *Knight v. State,* 338 So.2d 201, 204 (Fla.1976). In *O'Callaghan,* we concluded that the defendant was not prejudiced by the lack of a felony murder charge in his indictment or by the instructions given to the jury on the crime as charged in the indictment. 429 So.2d at 695. Because the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder. As we explained in *O'Callaghan,* "because of our reciprocal discovery rules, [a defendant has] full knowledge of both the charges and the evidence that the state [will] submit at trial." *Id.* Moreover, the underlying felonies that the State can rely upon to prove felony murder are limited by statute. *See* § 782.04(1)(a) 2, Fla.Stat. (1991). Thus, a defendant also has statutory notice of the possible underlying felonies, including escape. *See* § 782.04(1)(a) 2.g.

Kearse further argues that the instruction should not have been given because the elements of escape were not proven independent of his confession. Specifically, Kearse argues that the element of arrest was not proven. *See Kyser v. State,* 533 So.2d 285, 287 (Fla.1988) ("For there to be an escape, there must first be a valid arrest.").

[8] [9] [10] An arrest is legally made when there is a purpose or intention to effect an arrest, an actual or constructive seizure or detention is made by a person having present power to control the person arrested, and ***683** such purpose or intention is communicated by the arresting officer to, and understood by, the person whose arrest is sought. *State v. Parnell,* 221 So.2d 129, 131 (Fla.1969); *Melton v. State,* 75 So.2d 291, 294 (Fla.1954). Kearse argues that, absent his confession, there was no evidence presented that Officer Parrish communicated that Kearse was under arrest. *See Ruiz v. State,* 388 So.2d 610, 611 (Fla. 3d DCA 1980) ("[W]hen a confession is relied upon to satisfy the state's burden of proof to establish the defendant's guilt, there must be either direct or circumstantial evidence—*apart from the confession*—of the so-called *corpus delicti* of the offense with which he is charged."), *review denied,* 392 So.2d 1380 (Fla.1981). We do not agree with Kearse's argument. Rhonda Pendleton, Kearse's companion in the car at the time of the stop, testified that Officer Parrish told Kearse that he would "haul his ass in" if Kearse did not tell him his correct name or admit that his license had been suspended. When Kearse was not forthcoming, Parrish asked him to get out of the car and to put his hands on top of the car. Parrish's handcuffs were found on the ground at the scene. Pendleton also testified that Kearse explained that he shot Parrish "because his probation was suspended and the police was [sic] looking for him already." These facts constitute competent, substantial evidence of the arrest element of escape independent of Kearse's confession. Thus, the court did not err by giving the escape instruction. Moreover, had the court erred in giving this instruction, the error would be harmless beyond a reasonable doubt in light of the evidence establishing premeditated murder and felony murder based on the underlying felony of robbery. *DiGuilio.*

[11] In issue 13, Kearse contends that the court improperly denied his challenges for cause of five prospective jurors, thereby forcing him to peremptorily strike the objectionable jurors. In order to preserve this issue for appellate review, a defendant must exhaust all peremptory challenges and seek an additional challenge which is denied. *Hill v. State,* 477 So.2d 553, 556 (Fla.1985); *accord Trotter v. State,* 576 So.2d 691, 693 (Fla.1990). As explained in *Trotter,* the defendant "initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." 576 So.2d at 693 (footnotes omitted).

[12] Defense counsel initially removed four of the challenged jurors with peremptory challenges. After exhausting all peremptory challenges, counsel requested an unspecified number of additional challenges to strike jurors "that were challenged for cause which were improperly denied." When asked to identify the objectionable jurors, defense counsel named only prospective juror Shawl. The court subsequently granted each side an additional peremptory challenge, and the defense exercised this challenge to strike Shawl. The defense identified no other jurors that it would have stricken if given the opportunity. Thus, Kearse has failed to establish this claim. *See Trotter,* 576 So.2d at 693.

[13] **[14]** Kearse also argues that the State received an unwarranted advantage when the court granted each side an extra peremptory challenge. He contends that he alone was disadvantaged by the denial of challenges for cause, yet the State received the benefit of an extra challenge. We agree with the State that this issue has not been preserved for review as Kearse raised no such objection below. However, even if properly preserved, we find no merit to this argument. Florida Rule of Criminal Procedure 3.350(e) provides that "[t]he trial judge may exercise discretion to allow additional peremptory challenges when appropriate." We find no abuse of discretion in granting an additional peremptory challenge to the State in this case.

[15] The next issue involves the court's admission of testimony regarding the purpose for a two-handed gun grip (issue 14). During direct examination by the State, a police officer recounted Kearse's account of the shooting, including the fact that Kearse fired the initial shot with one hand but switched to a two-handed grip before firing ***684** the remaining shots. Defense counsel objected when the officer was asked what purpose a two-handed grip served. The court overruled the objection and the witness responded, "Better control, better accuracy." Kearse argues that the court erred in admitting this testimony as it was not probative of Kearse's mindset at the time of the shooting.

[16] A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Blanco v. State,* 452 So.2d 520 (Fla.1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). We do not find that the court abused its discretion in

admitting this testimony which was relevant to the issue of premeditation.

[17] Kearse argues that the trial court erred in denying his motion to suppress certain physical evidence and his post-arrest confession (issue 15). Kearse contends that the evidence was the fruit of an illegal arrest because his warrantless arrest was not based on probable cause. "The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco,* 452 So.2d at 523.

The record reveals the following facts regarding Kearse's arrest. The police had issued a BOLO for a black male driving a dark blue 1979 Monte Carlo. This man was suspected of shooting Parrish and was believed to be in possession of the officer's missing gun. By checking the license plate, the police determined that the car was registered to the address in Fort Pierce where Kearse was arrested. The police also knew that the shooter had told Parrish that his name was Dwight D. Fuller or Phillips.[1] When police officers arrived at the Fort Pierce address, a person leaving the residence told the officers that he just had talked to someone named Derrick or Dwight inside the house. The officers also spotted a Monte Carlo matching the BOLO vehicle in the backyard. Two black men were exiting the front door when the arresting officers approached the house. One of the men returned to the house when he saw the officers. When the officers asked the remaining man where Dwight was, the man replied that he was Derrick and that "the guy you want just went in the house" and offered to get him. The officers remained at the open front door until Kearse appeared. They then arrested him inside the house.

1 At trial, the evidence revealed that the suspect had actually given a first name of "Duane" to Officer Parrish. However, at the time of Kearse's arrest, the officers had been informed that the suspect had given the first name of "Dwight."

Based upon these facts, we agree with the trial court's determination that the authorities had probable cause to arrest Kearse. Therefore, the physical evidence seized after the arrest and Kearse's later confession, made after receiving and waiving his *Miranda*[2] rights, did not require suppression.

2 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

As his final guilt phase issue, Kearse contends that the trial court erred in admitting three hearsay statements into evidence over his objections (issue 17). The evidence at issue includes the testimony of Detective James Tedder that Parrish radioed to dispatch for a driver's license check on several names that Kearse had given to Parrish, the audio tape of the transmissions between Parrish and dispatch, and Tedder's testimony regarding where Parrish was found at the scene.

[18] **[19]** We find no error in the admission of Tedder's testimony regarding the transmissions to dispatch or the tape of those transmissions. The State did not offer this evidence to prove the truth of the matter asserted, but rather to establish the sequence of events and to explain why the police investigation focused on Kearse as the perpetrator. *See Crump v. State,*

622 So.2d 963, 969 (Fla.1993). Moreover, if the court did err in admitting any of this evidence, the error would be harmless beyond a reasonable doubt. *DiGuilio.* The same information regarding Kearse's use of an alias was admitted ***685** without defense objection through the testimony of Pendleton and the State exhibits of Parrish's ticket book and notepad and a printout of the BOLO.

[20] However, we do agree with Kearse that the court erred in overruling his objection to Tedder's testimony regarding Parrish's location at the scene. Because Parrish had been removed by emergency personnel before Tedder arrived at the scene, Tedder had no firsthand knowledge about Parrish's location and was merely recounting what other officers had told him. However, the error in admitting this testimony was harmless beyond a reasonable doubt, *DiGuilio,* as others present at the scene testified about Parrish's location without defense objection.

After reviewing the record, we find that Kearse's conviction is supported by competent, substantial evidence. Therefore, we affirm Kearse's convictions for first-degree murder and robbery with a firearm.

Penalty Phase

While most of Kearse's penalty phase issues are without merit, [3] we find that several constituted error that requires a new sentencing proceeding before a jury. The errors relate to the penalty phase instructions and the improper doubling of aggravating circumstances.

3 We find no merit to issues 3, 10, and 18–25. Issues 7 and 9 are rendered moot by our determination that a new sentencing proceeding is required in this case.

Kearse argues that several of the aggravating circumstances in this case are duplicative and that the trial judge erred in refusing to give the limiting instruction he requested regarding duplicative aggravating circumstances. Specifically, Kearse contends that the aggravating circumstances of "avoid arrest/hinder enforcement of laws" [4] and "murder of law enforcement officer engaged in the performance of official duties" are duplicative because they are based on the same aspect of the crime; namely that the law enforcement officer was killed to avoid arrest and prevent enforcement of the law. Likewise, Kearse argues that the aggravating circumstance of "committed while engaged in the commission of a robbery" was improperly considered as it was based on the same aspect of the offense as the other aggravating circumstances.

4 Although the jury was instructed on each of these aggravating circumstances, the trial court determined that the facts that would apply to the two circumstances were "interlocking, interwoven, with many of the same facts certainly applicable to one or both of these circumstances." Accordingly, the court merged these two aggravating circumstances into one in its sentencing order.

[21] **[22]** The "commission during a robbery" aggravating circumstance was properly found in this case and did not constitute doubling. This was not a situation where the taking of the officer's weapon was only incidental to the killing. *See Jones v. State,* 580 So.2d 143, 146 (Fla.), *cert. denied,* 502 U.S. 878, 112 S.Ct. 221, 116 L.Ed.2d 179 (1991). Kearse forcibly took Officer Parrish's service pistol, then turned that weapon on the

officer and killed him. Even though Kearse may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery because it involved "the taking of ... property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.13(1), Fla.Stat. (1991); *see also Grossman v. State,* 525 So.2d 833 (Fla.1988) (evidence that defendant wrestled officer's weapon away and fired fatal shot into officer's head supported felony murder instruction based on robbery), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Under section 812.13, the force, violence, or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of force, violence, or intimidation and the taking constitute a continuous series of acts or events. *See Jones v. State,* 652 So.2d 346, 349 (Fla.1995).

[23] However, we agree with Kearse that the aggravating factors of "avoid arrest/hinder enforcement of laws" and "murder of a law enforcement officer" are duplicative because both factors are based on a single aspect of the offense, that the victim was a ***686** law enforcement officer. [5] *Armstrong v. State,* 642 So.2d 730, 738 (Fla.1994).

5 Because these aggravating circumstances were duplicative, Kearse also argues that the trial judge erred in refusing to give his requested limiting instruction. While this Court has held that a requested instruction on "doubled" aggravating factors may be given, if applicable, *see Castro v. State,* 597 So.2d 259, 261 (Fla.1992), we need not reach this issue in light of our determination that the doubling constituted error and that a new sentencing proceeding is required in this case.

[24] The denial of Kearse's requested instruction on the CCP aggravating circumstance (issue 6) also constituted error in this case. Claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. *James v. State,* 615 So.2d 668, 669 & n. 3 (Fla.1993). In the instant case, defense counsel objected to the form of the CCP instruction at trial, requested an expanded instruction that essentially mirrored this Court's case law explanations of the terms, and raised the constitutionality of the instruction in this appeal as well. Thus, the issue has been properly preserved for review.

Subsequent to Kearse's trial, this Court determined that the standard CCP instruction, which was given in this case, is unconstitutionally vague. *Jackson v. State,* 648 So.2d 85, 90 (Fla.1994). Just as in *Jackson,* we cannot fault the trial judge for giving the standard CCP instruction in this case.

[25] The State contends that any error in failing to give the requested instruction to the jury would necessarily be harmless because the trial court did not find CCP after its independent examination of the evidence. We do not agree. The fact that the court correctly determined that the murder was not CCP does not change the fact that the jury instruction was unconstitutionally vague. As the United States Supreme Court noted in *Espinosa v. Florida,* 505 U.S. 1079, 1082, 112 S.Ct. 2926, 2929, 120 L.Ed.2d 854 (1992), "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." While a jury is likely to

disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." *Sochor v. Florida,* 504 U.S. 527, 538, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992); *Jackson,* 648 So.2d at 90.

[26] **[27]** We also agree with Kearse that the heinous, atrocious, or cruel aggravating circumstance was improperly applied in this case (issue 5). A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *Cheshire v. State,* 568 So.2d 908, 912 (Fla.1990). However, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." *Lewis v. State,* 398 So.2d 432, 438 (Fla.1981); *see also McKinney v. State,* 579 So.2d 80 (Fla.1991) (HAC not shown where semiconscious victim suffered seven gunshot wounds on right side of body and two acute lacerations on head). While the victim in this case sustained extensive injuries from the numerous gunshot wounds, there is no evidence that Kearse "intended to cause the victim unnecessary and prolonged suffering." *Bonifay v. State,* 626 So.2d 1310, 1313 (Fla.1993). The medical examiner could not offer any information about the sequence of the wounds and stated both that the victim could have remained conscious for a short time or rapidly gone into shock. In fact, the taxi driver who arrived at the scene as the shooter sped away could not get a response from the victim and described him as "dead or dying." Thus, we cannot find beyond a reasonable doubt that this murder was heinous, atrocious, or cruel.

In light of all of the penalty phase errors discussed above, we cannot say beyond a reasonable doubt that the errors were harmless. Accordingly, we vacate Kearse's death sentence and remand to the trial court with directions to empanel a new jury, to hold a new sentencing proceeding, and to resentence Kearse.

It is so ordered.

***687** GRIMES, C.J., and OVERTON, SHAW, KOGAN and HARDING, JJ., concur.

McDONALD, Senior Justice, concurs in part and dissents in part with an opinion.

McDONALD, Senior Justice, concurring in part, dissenting in part.

I concur that the conviction of Billy Leon Kearse was proper and should be affirmed. I would also affirm his sentence of death and disagree that a new sentencing proceeding is necessary. The improper penalty instruction on cold, calculated, and premeditated was harmless error. If there was any doubling of aggravating circumstances, it was clearly harmless. I am firmly convinced that the elimination of the aggravating factors found by the majority to be error would not affect the jury's recommendation of death or the judge's imposition of the death penalty. Killing a police officer in the line of duty in the manner in which Kearse did has caused him to earn a death sentence.

I disagree with the majority that it was improper to find both the avoiding arrest and killing a police officer as separate aggravating factors. One may kill to avoid arrest without the victim being a police officer; one may kill a police officer without doing so to avoid arrest. The legislature added the aggravating factor of killing a police officer after the avoiding arrest factor had already existed which leads me to conclude that this factor was to be treated as an additional aggravating factor. None of this really matters, however. We have found that the decision to impose the death penalty does not depend on counting the number of aggravating and mitigating circumstances. The sentencing judge and the reviewing court look at what transpired, the circumstances surrounding it, and the history and characteristics of the defendant to determine the appropriateness of the ultimate penalty of death. This case justifies that penalty.

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