CASE NO. 22-6868

IN THE UNITED STATES SUPREME COURT

October 2022, Term

BILLY LEON KEARSE,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review of the habeas corpus claim of ineffective assistance of penalty phase counsel challenging counsel's investigation, preparation, and presentation of a mitigation case should be denied where the circuit court determined that the state court's resolution of postconviction relief was not contrary to or an unreasonable application of *Strickland* as counsel's decision was not unreasonable under the circumstances? (restated)

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The decision of which Petitioner seeks discretionary review is unreported, however may be found at *Kearse v. Secretary, Florida Department of Corrections*, case no. 15-15228, 2022 WL 3661526 (11th Cir. Aug. 25, 2022). This capital case is before this Court upon the decision of the United States Circuit Court of Appeals for the Eleventh Circuit wherein it denied Kearse relief under the AEDPA standard contained in 28 U.S.C. § 2254 *Kearse v. Secretary, Florida Department of Corrections*, case no. 15-15228, 2022 WL 3661526 (11th Cir. Aug. 25, 2022).

JURISDICTION

Petitioner, Billy Leon Kearse ("Kearse"), is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE[1]

Kearse is in custody under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a November 8, 1991, judgment of guilt *Kearse v. State*, 662 So. 2d 677, 680 (Fla. 1995), and March 24, 1997 death sentence entered by the Circuit Court of the Nineteenth Judicial Circuit, Florida. *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), *cert. denied, Kearse v. Florida*, 532 U.S. 945 (2001). On February 5, 1991, Kearse was indicted for the January 18, 1991, first-degree murder of police officer Danny Parrish ("Parrish") and possession of a firearm by a convicted felon. The indictment was amended on May 8, 1991, to include a robbery with a firearm count. Trial commenced October 14, 1991, and a week later the jury convicted him of armed robbery and first-degree murder. *Kearse v. State*, 662 So. 2d 677, 680 (Fla. 1995). Upon the jury's recommendation, the trial court imposed a death sentence. While affirming the conviction, the Florida Supreme Court remanded for resentencing. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995). Following the new penalty phase and the jury's unanimous death recommendation, on March 25, 1997, Kearse was re-sentenced to death. The Florida

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[1] References to the records will be: "1ROA" for the 1991 Direct Appeal; "2ROA-R" and "2ROA-T for the 1996 Resentencing Record and Transcript; "1PCR" for the Initial Postconviction record; "2PCR" for the Successive Postconviction Record; "3PCR" for the Second Successive Postconviction Record; "4PCR" for the 2017 (SC17-346) *Hurst* postconviction appeal; and "5PCR" for the second *Hurst* postconviction record (SC18-458) at issue here. Supplemental materials will be designated by the symbol "S" and where appropriate, the volume and page number(s) will be included.

Supreme Court affirmed.[2] This Court denied certiorari and on March 26, 2000, the case became final. *Kearse v. Florida*, 121 S. Ct. 1411 (Mar. 26, 2000).

On October 3, 2001, Kearse initiated his collateral challenge to his conviction and sentence. Following an evidentiary hearing, relief was denied, and that denial was affirmed. *Kearse v. State*, 969 So. 2d 976 (Fla. 2007). On December 26, 2007, Kearse filed a successive postconviction motion challenging Florida's lethal injection protocols, and the summary denial was affirmed. *Kearse v. State*, 11 So. 3d 355 (Fla. 2009). A second successive postconviction motion was filed claiming newly discovered evidence about trial counsel and seeking reconsideration of the ineffectiveness claims. The Florida Supreme Court affirmed that summary denial of relief of that motion. *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011). Kearse also filed a successive habeas petition challenging Dr. Martell, the State's mental health

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[2] The Florida Supreme Court stated:

> The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse v. State, 770 So. 2d 1119, 1122-23 (Fla. 2000).

expert, based on events that took place after Kearse's re-sentencing in a separated federal prosecution. The petition was denied. *Kearse v. Sec'y, Fla. Dept. of Corr.*, 100 So. 3d 1148 (Fla. 2012). The final state postconviction challenge raised a claim under *Hurst v. Flor*ida, 577 U.S. 92 (2016). The summary denial was affirmed. *Kearse v. State*, 252 So. 3d 693 (Fla. 2018).

Kearse also challenged his capital case in federal court by filing a petition for writ of habeas corpus under 28 U.S.C. §2254 and reviewed under Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") standard. The petition was reviewed by the circuit court twice before the district court reached the merits of the petition. See, *Kearse v. Sec'y, Fla. Dept. of Corr.*, 669 F.3d 1197 (11th Cir. 2011); *Kearse v. Sec'y, Fla. Dept. of Corr.*, 736 F.3d 1359 (11th Cir. 2013) and denied relief. The circuit court determined that Kearse was not entitled to federal habeas relief *Kearse v. Secretary, Florida Department of Corrections*, case no. 15-15228, 2022 WL 3661526 (11th Cir. Aug. 25, 2022) based on the determination that under the "doubly" deferential standard of review of a *Strickland v. Washington*, 466 U.S. 668 (1984) claim, the Florida Supreme Court did not unreasonably conclude that defense counsel's performance was reasonable under the circumstances. *Kearse*, WL 3661526 *23. It is this decision under review.

STATEMENT OF THE FACTS

On direct appeal from the conviction, the Florida Supreme Court found:

> 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.
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> . . . 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, 662 So. 2d at 680-81. [3]

During the original trial, Kearse's passenger, Rhonda Pendleton[4] ("Pendleton"), testified that when she first saw Kearse at her brother's house before going for pizza, he had scratches on his neck and arms from a fight with his

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[3] In his Introduction (P. at 4), Kearse leaves the impression that he gave Officer Parrish his real name and then Officer Parrish attempted to effectuate an arrest. While that was Kearse's testimony offered at the resentencing, that is not what the Florida Supreme Court found and it is in conflict with what his passenger, Rhonda Pendleton, testified to in the original trial and acknowledged in the re-sentencing. During the re-sentencing, Pendleton was located by the defense and testified that on the third request, Kearse gave Parrish his true name before an arrest was attempted. However, such testimony was given after she witnessed Kearse's re-sentencing testimony. Further, on cross-examination, she admitted her recollection was better during her 1990 deposition and 1991 trial testimony. (2ROA-T 1943, 1957-63) which did not contain reference to Kearse giving his true name to the officer.

[4] In the re-sentencing, Pendleton's prior testimony was read. Later, the defense was able to locate her, and she testified before the re-sentencing jury as well.

stepfather. (1ROA.7 1457-58; 2ROA-T 1633-35). Upon their return from picking up pizza, the car Kearse was driving started to smoke and Kearse turned the wrong way down a one-way street and soon realized a police officer with blue lights flashing was behind them and they stopped. (1ROA.7 1461-62; 2ROA-T 1638-39, 1654). Upon approaching the car, Officer Parrish ("Parrish") asked for Kearse's license and registration, and Kearse advised that his license was at home and that his name was "Dwayne D. Fuller." (2ROA-T 1639-40). After returning from his cruiser, Parrish again asked Kearse for his name noting there was nothing under the first name offered and Kearse gave "Dwayne Dixon Fuller" (1ROA.7 1463; 2ROA-T 1642-44) Upon returning to the car for a third time having found no match to a record on "Fuller," Parrish asked Kearse to step out of the vehicle and put his hands on the car. Kearse complied, but once Parrish touched him, a fight ensued and Kearse took Parrish's gun, shooting him multiple times. (1ROA.7 1465-66; 2ROA-T 1644-47). On the way back to Pendleton's house and in response to her inquiry, Kearse admitted to shooting the officer because his probation was "suspended" and the police were looking for him. (1ROA.7 1470; 2ROA-T 1649-51).

The ordered re-sentencing commenced on December 9, 1996, and the State again offered testimony to support the first-degree murder and robbery of Parrish for which Kearse was convicted which established four aggravating factors merged into two: "felony murder" (robbery); "avoid arrest;" "hindering law enforcement;" and "victim was law enforcement officer engaged in his official duties." These were based upon evidence that Kearse wanted to avoid returning to prison and killed

Parrish while being detained following a traffic infraction.[5]

The defense mitigation case consisted of Kearse testifying along with school officials, family members, a friend, and mental health professionals.[6] These witnesses discussed Bertha Kearse's drinking while pregnant with Kearse, Kearse's difficult family life, the school designation that Kearse was learning disabled and emotionally dysfunctional. The jury heard that Kearse confabulated when discussing the crime, suffered from Fetal Alcohol Effect, had brain dysfunction, concentration, and behavioral problems, and was indecisive, insecure, and defensive, with a tendency to be hyperactive and react without thinking. Dr. Petrilla offered two statutory mental mitigators applied: (1) extreme emotional disturbance at the time of the crime and (2) substantially incapable of conforming his conduct to the requirements of the law. Pendleton, whom the defense was able to locate even though the State had failed, testified Kearse did not kill Parrish to

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[5] See 2ROA-T 1156-57, 1167, 1337-42, 1421-22, 1436, 1439, 1467-93, 1521-22, 1524-26, 1529-30, 1532-36, 1558-65, 1669-73, 1638-41, 1644-45, 1650, 1677, 1682-90, 1708, 1711-12.

[6] Kearse points to Dr. Lipman and the State's objection to his testimony regarding psychological testing and how that exceeded his licensing. (P. at 8). The record shows that Dr. Lipman was not privy to any discussion of his licensing restrictions as he does not appear to have entered the courtroom at the time the objection was raised (2ROA 2277). Further, the trial court characterized the State's objection to Dr. Lipman as a bench objection, where presumably Dr. Lipman, even if he were in court, should not have been able to hear the conversation at the bench. (1PCR 5734). What is clear is the jury was not in the courtroom when the trial court made its ruling and verbally mused about possible charges. (2ROA 2286-87).

avoid arrest.[7] The jury rendered a unanimous death recommendation (2ROA-R 575), and the death penalty imposed was affirmed. *Kearse*, 770 So. 2d at 1123.[8]

At the original trial and in the re-sentencing, Kearse was represented by Robert Udell ("Udell").[9] In his state postconviction litigation, Kearse raised multiple challenges to Udell's representation. Of import in this petition is the claim of ineffective assistance of counsel during the re-sentencing for failure to investigate

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[7] See 2ROA-T 1757-72, 1777-78, 1782-83, 1793, 1797, 1811-12, 1816-28, 1833, 1851-55, 1859-71, 1933-34, 1939, 1942-45, 1948-49, 1951-59, 1968-69, 1971-74, 1979-85, 1990, 1997-2003, 2014-20, 2023-28, 2031-33, 2037-40, 2047, 2052-56, 2061-63, 2075-79, 2086-87, 2095, 2113-14, 2121-24, 2134-38, 2144-51, 2153-59, 2170-99, 2200-03, 2227-33, 2239, 2247-51, 2254-71, 2287-95.

[8] The Florida Supreme Court stated:

> The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse, 770 So. 2d at 1122-23.

[9] By the time of Kearse's resentencing, counsel was well seasoned. Counsel had been practicing criminal law for approximately 16 years, and capital litigation for about 11 years. He had done more than 80 homicide trials, which was most of the capital cases prosecuted in the Nineteenth Judicial Circuit, and attended the "Life Over Death" and Death is Different" seminars as well as watching other capital cases tried in the circuit to stay abreast of issues. (1PCR 495-99, 603-09).

and prepare for the testimony of state expert, Dr. Martell. In rejecting the *Strickland* claim, the trial court noted that penalty phase counsel prepared and presented "extensive mental health mitigation" and "adopt[ed] and incorporate[d]s relevant portions of the State's summary of testimony presented at the penalty phase and Udell's comments concerning the second penalty phase developed at the evidentiary hearing." (1PCR 5726-36)[10]

The trial court found:

> . . Udell knew or anticipated the substance of Dr. Martell's testimony despite not having deposed Dr. Martell. Udell cannot be held responsible for the ruling just weeks before commencement of the second penalty phase compelling the State's mental health examination of Kearse. The ruling resulted in the late disclosure of the State's mental health expert, Dr. Martell. The record reflects that Udell requested but was denied a continuance to depose Dr. Martell.

(1PCR 5733). The trial court also credited Udell's testimony that he knew what Dr. Martell was going to say either from discussions with Dr. Martell or the prosecutor "and through Udell's familiarity with the work of Dr. Martell's partner, Dr. Dietz." (1PCR 5733). Continuing, the trial court found it evident from the record that "Udell anticipated Kearse's personality profile would be an issue" with respect to malingering and that he was aware Kearse's "childhood diagnosis of conduct disorder would be problematic," necessitating presentation of teachers and counselors to offer alternate explanations. (1PCR 5733). The trial court also rejected the challenge to Udell's use of Dr. Lipman to present other experts'

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[10] Trial court's order attached as Appendix A.

opinions finding: "the record is replete with expert opinion contradicting Dr. Martell's testimony. Consequently, the Court construes this claim as more of an expression of Kearse's dissatisfaction with the trial performance of Dr. Lipman under pressure of effective cross-examination. " (1PCR 5734-35)

With respect to the complaint that Udell was inadequately prepared to present mental mitigation and undercut Dr. Martell's evaluation procedures and opinion, the trial court determined:

> . . . there is no prejudice where it is clear from the evidentiary hearing testimony that mental health experts do not agree on a standard method of interviewing, where mental health experts disagree on interpreting testing profiles indicating the possibility of malingering, and where Kearse did not show how a qualitative analysis of Kearse's test results would have been dispositive to the resolution of the disagreements among mental health experts. Therefore, the Court finds no evidence that a different approach to cross-examination would mitigate to a life sentence.

(1PCR 5735).

On appeal, the Florida Supreme Court set forth the standard of review under *Strickland* and the mitigation testimony presented from defense experts and lay witnesses to place the claim in context. *Kearse*, 969 So. 2d at 984-85. It then found that Udell obtained Dr. Martell's raw data and report which were forwarded to the defense experts and Udell consulted with his experts. *Kearse*, 969 So. 2d at 985-86. Udell also consulted with the state attorney regarding Dr. Martell's upcoming testimony. Based on Udell's postconviction testimony, the Florida Supreme Court concluded that Udell knew what Dr. Martell would opine about mitigation in the case, Kearse's test results, and where Dr. Martell differed from the defense experts.

Kearse, 969 So. 2d at 986. The court concluded Udell had "correctly anticipated Martell's testimony" and that Kearse had not "demonstrated anything material that defense counsel did not anticipate or could have done differently had he deposed Dr. Martell." *Kearse*, 969 So. 2d at 986.

The Eleventh Circuit Court of Appeals considered this claim under the doubly differential tandem standards of *Strickland* and AEDPA. The review of the record established that: (1) Udell was given a limited time to prepare for Dr. Martell; (2) but even so, Udell knew what the state's expert would say; (3) Udell sent Dr. Martell's test results to the defense experts for consideration; (4) on cross-examination Udell obtained Dr. Martell's admissions consistent with the defense case; and (5) Udell prepared the defense experts to rebut Dr. Martell's testimony including the personality profile, malingering, and mitigation testimony. *Kearse*, 2022 WL 3661526 at 19-22. The circuit court also noted that that there was no categorical rule that counsel must depose every witness and whether to depose an expert was a strategic decision. *Id.* at 21. The court credited Udell's testimony that "he was a 'firm believer of doing very little discovery on the record in the presence of the [s]tate [a]torney' because 'every time you take a deposition, they learn one thing about your case that but for your deposition they wouldn't have known.' " *Id.* at 22. The court agreed that this was not an unreasonable position. *Id.* at 22.

The circuit court also pointed to Kearse's postconviction *Strickland* expert's testimony that the decision to attend an evaluation of the defendant by the state's expert was a tactical/strategic one. *Id.* at 22. It also noted that Udell did attend Dr.

Martell's evaluation of Kearse until he honored the doctor's request that the evaluation be done in private. However, Udell stayed during the initial questioning of his client about the circumstances of the murder so that he might preserve his objections to the evaluation. *Id.* at 22. Based on the circuit court's doubly differential review, and reaching only the performance prong of *Strickland*, it rejected habeas relief finding the Florida Supreme Court did not unreasonably apply *Strickland*. *Id.* at 22. It is this decision that this Court has been asked to review.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW OF THE DENIAL OF HABEAS CORPUS RELIEF ON A CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY COUNSEL SHOULD BE DENIED AS THE ANALYSIS CONDUCTED BY THE CIRCUIT COURT UNDER THE DOUBLY DEFFERENTIAL STANDARD OF *STRICKLAND* AND THE AEDPA IS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED MATTER OF CONSTITUTIONAL LAW

Certiorari review should be denied where the Eleventh Circuit Court of Appeals' decision reviewing a state court's denial of an ineffective assistance of counsel claim does not conflict with a decision of any other state court of last resort or any decision of any federal court of appeals. Federal habeas relief may not be granted unless this Court finds that the Florida Supreme Court's assessment of the *Strickland* deficiency prong is contrary to and an unreasonable application of this Court's precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). Kearse has not demonstrated that the Florida Supreme Court's merits determination based on credibility and factual findings supported by the record requires review by this Court. Under the doubly deferential ADEPA standard for both defense counsel's performance and the state court's rejection of the *Strickland* claim, certiorari should be denied.

"A state court's determination that the claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the

state court's decision." *Harrington v. Richter*, 562 U.S. 86 (2011) (internal quotation marks omitted). If there is any basis for any reasonable jurist to agree with the state court, habeas relief must be denied. "In order to be granted relief, the inmate must show that the state court's merits ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement. *Id.* Here, Kearse cannot show that the state court's opinion addressed to *Strickland* deficiency which rested on factual and credibility determinations supported by the record decided an important question of federal law in a manner that conflicts with a decision of this Court. *See* Supreme Court Rule 10. Further, determination of whether the rejection of Kearse's ineffective assistance of penalty phase counsel's claim under *Strickland*, is dependent wholly on the facts of the case and of significance to no one other than the parties to this litigation. This Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). As no compelling reason for review has been offered, certiorari should be denied.

Review of the denial of habeas corpus relief is circumscribed by 28 U.S.C. Section 2254(d)(1)[11] which focuses solely on the propriety of the state court's

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[11] As this Court explained in *Brown v. Payton*, 544 U.S. 133, 141 (2005):

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim

decision on the merits of the claim of ineffective assistance of penalty phase counsel. Federal habeas relief is not available unless the state decision is "contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or the state court's determination of facts was unreasonable in light of the evidence." *Williams*, 529 U.S. at 412-13. *See, Woodford v. Visciotti*, 537 U.S. 19 (2002) (explaining when habeas applicant alleges Sixth Amendment violation, he must show that state court applied *Strickland* in an objectively unreasonable manner); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (noting that the focus is on the state court's application of governing federal law). AEDPA, "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (*per curiam*).

Kearse suggests that the circuit court truncated its review of his *Strickland* claim by finding counsel's performance constitutional based on a "mere incantation

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> "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). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra*, at 405, 120 S. Ct. 1495; *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam). A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra*, at 405, 120 S. Ct. 1495; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

of strategy" and that this conflicts with *Strickland* and its progeny. He further suggests that counsel's failure to conduct discovery in this case was deficient and that prejudice resulted. A review of the state and federal courts' analysis of the claim establish that counsel conducted the most effective discovery he could under the time constraints imposed, anticipated correctly what the state's expert would say, and prepared the defense experts to counter that evidence. As the reviewing courts have concluded, Kearse has not set forth any evidence that should have been discovered and presented that establishes *Strickland* prejudice sufficient to undermine confidence in the sentencing. The situation in this case is unique and of interest to these parties alone. The courts resolved credibility issues against Kearse and the facts show that counsel's alleged omissions did not prejudice his client. This Court should deny certiorari.

The Circuit Court Conducted a Full and Proper AEDPA Analysis of Counsel's Performance Based on Testimony Regarding Strategy and Supporting Record Evidence to Find that the Florida Supreme Court's Opinion Was Not Contrary to or an Unreasonable Application of Federal Law

The pith of Kearse's challenge is that the state and federal courts should not have found Udell had a strategy for not deposing Dr. Martell. That is not a claim meriting certiorari review. Clearly, the courts believed Udell when he testified that he knew what Dr. Martell would say. While "[r]easonable minds reviewing the record might disagree about the [witness]'s credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." See *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). Even so, the courts did not just take Udell's

word for his reason for not deposing Dr. Martell. The courts considered the preparation Udell did for his mental health experts, the fact that Udell correctly anticipated Dr. Martell's testimony, and how he used the defense experts not only to show where Dr. Martell's opinion was subject to attack, but obtained concessions from Dr. Martell that supported the defense. *See Kearse*, 2022 WL 3661526 at *19-22; *Kearse*, 969 So. 2d at 984-86. The review provided by the state court followed the dictates of Strickland and the review by the federal court, under the doubly deferential AEDPA standard, is not contrary to or an unreasonable application of clearly established Supreme Court precedence. *See generally*, *Turner v. Williams*, 35 F.3d 872, 898 (4th Cir. 1994) (concluding counsels' failure to depose the state's witnesses was not ineffective assistance because counsel was aware of witness's testimony based on conversations defense counsel had with prosecutor), *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) (recognizing "[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))); *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 "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)); *Robinson v. Maschner*, 2 Fed. Appx. 683, 684 (8th Cir. 2001) (rejecting *Strickland* claim that counsel failed to depose expert where state postconviction court credited defense counsel's testimony and record showed counsel effectively cross-examined expert). Kearse has not offered a case which has held that the failure to depose an expert under these circumstances is ineffective assistance of counsel.

Moreover, Kearse has admitted that there is no case from this Court or a lower tribunal that has found a defense counsel must depose every state witness or expert especially where a continuance was denied to Udell. See *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) (noting "*Strickland* indicates clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable. This correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources."); *McClesky v. Kemp*, 753 F.2d 877, 900-901 (11th Cir. 1985) (because petitioner did not demonstrate how counsel's failure to interview certain individuals would have revealed information not already known to him or affected his cross-examination, he could not show a "reasonable probability" that such failure affected the verdict).

Kearse's attack on the rejection of his *Strickland* claim is very fact specific given the circumstances of the time constraints imposed and newly applied rule,

Rule 3.202, Fla. R. Crim. P. (1996)[12] permitting the State to have the defendant examined by its expert. Again, the state courts credited Udell's recollections on his preparation for Dr. Martell and reviewed such in light of the preparation/presentation of defense experts, obtaining concessions from Dr. Martell, and the fact Kearse failed to show what more Udell should have done that would have resulted in a reasonable probability of a different outcome. The resolution here is not in conflict with another case from this Court or another circuit court or state supreme court.

Kearse argues that the circuit court's conclusion that Udell knew what Dr. Martell would opine is refuted by the record. (P. at 20). However, Kearse fails to offer specific support for that proposition. As the circuit court determined, the cross-examination of Dr. Martell challenged the doctor's opinion that Kearse did not suffer from fetal alcohol effect by having Dr. Martell agree that drinking alcohol "while pregnant could cause significant detrimental effects" and lead to brain dysfunction, a factor the defense and its experts were positing. *Kearse*, 2022 WL 3661526 at *20. Additionally, Udell was able to show the jury that Dr. Martell

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[12] See *Kearse v. State*, 770 So. 2d 1119, 1126–27 (Fla. 2000) (rejecting the contention that rule 3.202 violates a defendant's due process rights by creating a one-way discovery obligation); see also *Buchanan v. Kentucky*, 483 U.S. 402, 423–24 (1987) (holding that subjecting the defendant to the State's mental health examination for the purpose of rebutting the defendant's alleged emotional disturbance did not violate the Fifth Amendment); *Davis v. State*, 698 So. 2d 1182, 1191 (Fla. 1997) (rejecting the contention that requiring a defendant to submit to an examination by the State's mental health expert before the penalty phase of a capital case violates the defendant's Fifth Amendment right against compelled self-incrimination).

would not want his wife to drink while she was pregnant and that the doctor was not a neuropharmacologist, as was Dr. Lipman, and had not studied the effects of alcohol on animals. *Id.* at 20.[13] The cross-examination also showed that Udell started to challenge Dr. Martell's opinion on both statutory mental health mitigators. Udell was able to get Dr. Martell to admit that he had not thought about when Kearse may have formed the intent to kill and to highlight facts undercutting Dr. Martell's opinion on the avoid arrest aggravator. *Id.* at 21. As the circuit court noted, even though there were just three days between Dr. Martell's examination and the start of trial, Udell provided Dr. Martell's test results to the defense experts which assisted those experts in their testimony rebutting Dr. Martell's conclusions regarding intellectual functioning and malingering. *Id.* (2ROA 2427-2513, 2521-23).

From the foregoing, the state and federal courts did not merely rely on Udell's announcement that he does not always depose state experts so he may shield from disclosure defense information. Instead, the courts engaged in an analysis of what Udell did and how those decisions met the dictates of Strickland given the other evidence in the case. As such, Udell's billing errors and other alleged omissions in his representation of Kearse did not result in *Strickland* prejudice. Kearse failed to show what more Udell could have done that would have resulted in a different sentence. As such, neither *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) nor *Hooper v. Mullin*, 314 F.3d 1162, 1170-71 (10th Cir.

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[13] See State's Appendix A, trial court's order denying postconviction relief " (1PCR 5734-35) and (2ROA 2427-2513, 2521-23)

2002) establish a conflict necessitating certiorari review. As the record shows and the Florida Supreme Court found, this is not a situation where counsel failed to investigate and present mitigation. What it shows is that under the time constraints imposed by the trial court, Udell supplied his experts with the results of Dr. Martell's testing and was informed sufficiently of Dr. Martell's opinion that an effective defense mitigation case was presented and Dr. Martell was challenged effectively on cross-examination. *Strickland* and its progeny were applied reasonably to the facts and circumstances of this case and certiorari should be denied.

Trial Counsel's Reliance on Dr. Lipman to Challenge the State's Expert Was Reasonable Under *Strickland*

Kearse asserts that the circuit court failed to address his claim that it was ineffective assistance for Udell to present Dr. Lipman, a neuropharmacologist, to rebut Dr. Martell's testimony. A review of the circuit court's opinion refutes this claim. *Kearse*, 2022 WL 3661526 at *22.

The trial court made findings rejecting Kearse's insinuation that Dr. Lipman was ill prepared and was threatened by the trial judge. The record shows that Dr. Lipman was not privy to any discussion of his licensing restrictions as he does not appear to have entered the courtroom at the time the objection was raised (2ROA 2277). Further, the trial court characterized the State's objection to Dr. Lipman as a bench objection, where presumably Dr. Lipman, even if he were in the courtroom, should not have been able to hear the conversation at the bench. (1PCR 5734). What is clear is the jury was not in the courtroom when the trial court made its ruling

and verbally mused about possible charges. (2ROA 2286-87). Moreover, Udell "overwhelmed Dr. Lipman with "paperwork;" background materials on Kearse, and Dr. Martell's test results. (2ROA 2317-20, 2322, 2336-38; PCR 161-62). As the trial court concluded during the state postconviction litigation, Udell's use of Dr. Lipman to present other experts' opinions was not ineffective as "the record is replete with expert opinions contradicting Dr. Martell's testimony. Consequently, the Court construes this claim as more of an expression of Kearse's dissatisfaction with the trial performance of Dr. Lipman under pressure of effective cross-examination." (1PCR 5734-35). Nonetheless, the trial court found "no prejudice where Kearse does not demonstrate how Dr. Lipman's opinion would have changed and how that change in opinion would have mitigated to a life sentence." (1PCR 5735) The trial court determined:

> Further, the Court finds no ineffective assistance of mental health experts. Kearse's postconviction mental health experts, Drs. Crown, Dudley, Friedman, and Hyde, offered opinions consistent with Kearse's penalty phase mental health experts, Drs. Petrilla and Lipman, despite Dr. Dudley's disagreement with the diagnosis of conduct disorder made by Kearse's childhood psychiatrist Dr. Dedai. These expert opinions were based on facts cumulative to evidence presented in the second penalty phase with the exceptions of a reference to an affidavit by a relative that Kearse had an odd shaped head at birth, and self reports by Kearse that he experienced nightmares and had some different sexual experiences as a child. No birth records or additional medical records were produced during the postconviction proceeding to establish Fetal Alcohol Syndrome, organic brain damage, or mental retardation. And even though Kearse challenges the propriety pf Dr. Petrilla's administration of the MMPI personality test, postconviction mental health expert, Dr. Crown developed a personality profile of

> Kearse consistent with Dr. Petrilla's personality profile using a different test instrument. Therefore, the Court finds no basis for a claim of ineffective assistance of mental health experts.

(1PCR 5725-36).

The circuit court reviewed the record and agreed that Dr. Lipman and Dr. Petrilla were prepared in a constitutional manner. *Kearse*, 2022 WL 3661526 at *22. Kearse does not explain how this determination is contrary to or an unreasonable application of *Strickland* or where that ruling conflicts with a case from this Court or anther federal circuit court or state supreme court. Certiorari should be denied.

The Florida Supreme Court's *Strickland* Prejudice Prong Analysis Does Not Conflict with a Case from This Court

In rejecting the ineffective assistance of penalty phase counsel claim, the Florida Supreme Court considered the cross-examination of Dr. Martell by Udell establishing Udell had correctly anticipated the doctor's testimony and found Kearse "***has not demonstrated anything material***" that Udell "did not anticipate or could have done differently had he deposed Dr. Martell." *Kearse*, 770 So. 2d at 986 (emphasis supplied). That court rejected *Strickland* prejudice, finding "... Kearse's experts at the postconviction hearing largely testified in conformity with the testimony [Udell] presented at the re-sentencing." *Id.* When the federal circuit court reviewed this claim under AEDPA, it agreed that Udell's performance was reasonable under the circumstances and that "[b]ecause the Florida Supreme Court "did not unreasonably apply *Strickland*'s performance prong, we need not address

the prejudice prong." *Kearse*, 2022 WL 3661526 *22.

Kearse boldly asserts that Udell's "failure to investigate and challenge Dr. Martell's testimony allowed the State to decimate Kearse's mitigation claims" and but for those failing, the resentencing "would have been different." (P. at 26-27). In support Kearse points to Justice Anstead's dissent wherein it was argued that Kearse's death sentence should be vacated on proportionality grounds. This argument is limited to the instant parties and does not provide Kearse with a basis for certiorari review. First, this Court has determined that comparative proportionality review is not required under the United States Constitution. See *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (announcing "There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."). Second, the Florida Supreme Court has recognized that under Florida's Constitutional requirement to conform its Eighth Amendment decision to this Court's Eighth Amendment analysis, comparative proportionality is no longer applicable in Florida capital sentencing review. See *Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020) (eliminating "comparative proportionality review from the scope of our appellate review set forth in rule 9.142(a)(5)" Florida Rule of Appellate Procedure). Hence, the issue of comparative proportionality discussed by Justice Anstead, does not establish a basis for challenging the ineffective assistance of penalty phase counsel claim either under the Florida Supreme Court's application of *Strickland* or the federal court's "doubly deferential" standard under the AEDPA.

Kearse fails to address the mitigation that was collected and presented by Udell as identified by the reviewing courts. Likewise, Kearse fails to identify what additional mitigation should have been offered by Udell[14] a failure recognized by the Florida Supreme Court. That determination has record support and the denial of federal habeas relief here does not conflict with a case from this Court or that of any other court of appeals. Certiorari should be denied,

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[14] The trial court found the statutory age mitigator and the non-statutory mitigators of : "Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances." *Kearse*, 770 So. 2d at 1123.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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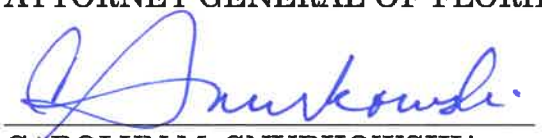
ATTORNEY GENERAL OF FLORIDA



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