Case No.: 22-6868

October 2022, Term

IN THE SUPREME COURT OF THE UNITED STATES

BILLY LEON KEARSE,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION

CAPITAL CASE

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

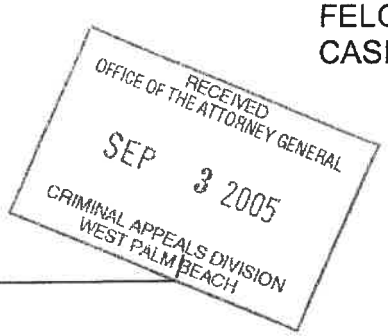
STATE OF FLORIDA

vs.

BILLY LEON KEARSE,

Defendant.

FELONY DIVISION
CASE NO. 561991CF000136A



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ORDER DENYING AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE came before the Court on the Defendant's Motion to Vacate Judgments of Conviction and Sentence initially filed on October 3, 2001, and Amended Motion to Vacate Judgments of Conviction and Sentence filed on March 1, 2004, pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851. The Court finds and determines as follows:

PROCEDURAL HISTORY

Billy Leon Kearse was convicted of robbery with a firearm and first degree murder for shooting Fort Pierce police officer, Danny Parrish. Following the jury's recommendation, the trial court sentenced Kearse to death for the first degree murder. On appeal, the Supreme Court of Florida affirmed the convictions but vacated the death sentence and remanded for resentencing because of errors that occurred during the penalty phase of the trial. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995).

On remand in 1996, a second penalty phase was conducted in Indian River County because of a venue change during the original trial. The jury unanimously recommended

that Kearse be sentenced to death. The trial court found two aggravating circumstances, one statutory mitigating circumstance, and some non-statutory mitigating factors.[1] The court sentenced Kearse to death after determining that the mitigating circumstances were "neither individually nor collectively, [] substantial or sufficient to outweigh the aggravating circumstances." The sentence of death was affirmed on appeal. *Kearse v. State*, 770 So. 2d 1119, 1123 (Fla. 2000). Kearse petitioned the United States Supreme Court for certiorari. The petition was denied on March 26, 2001.

On October 3, 2001, Kearse filed an unverified, unsworn postconviction motion that was dismissed without prejudice on November 26, 2001. Kearse filed a motion seeking reinstatement of his postconviction motion. The trial court dismissed the request but granted Kearse 60 days to comply with the oath requirement. Instead of complying with the oath requirement, Kearse filed an appeal. During the pendency of the appeal Kearse filed another Rule 3.850 motion that was dismissed without prejudice pending resolution of the appeal. The appeal was voluntarily dismissed on June 13, 2002.

Kearse refiled his postconviction motion on June 21, 2002, collaterally attacking the 1991 guilt phase and the 1996 penalty phase. Nine public records hearings were conducted through December 2003.[2] Kearse filed his amended postconviction motion on

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[1]Aggravating circumstances - (1) the murder was committed during a robbery (Officer Parrish's firearm); and (2) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer engaged in the performance of official duties (merged into one factor). Statutory mitigating circumstance - Kearse's age. Non-statutory mitigating factors - Kearse exhibited acceptable behavior at trial, Kearse had a difficult childhood and this resulted in psychological and emotional problems, and Kearse entered the adult penal system at a very early age. *Kearse*, 770 So. 2d at 1123.

[2] Public records hearings were conducted on January 30, 2002; April 1, 2002; January 3, 2003; February 18, 2003; June 9, 2003; July 18, 2003; September 13, 2003; November 12, 2003; and December 12, 2003.

March 1, 2004. Several status hearings were conducted in 2004, followed by a case management conference on August 18, 2004. An evidentiary hearing was granted on: Claim II(A) (1) ¶¶ 4-6; Claim II(A) (3) ¶ 8; Claim II(A) (7) ¶¶ 12-13; Claim II(A) (8) ¶ 14; Claim II(A) (9) ¶ 15; Claim II(A) (11) ¶¶ 17-22; Claim II(A) (12) ¶¶ 23-24, Claim II(A) (13) ¶ 25; Claim II(C) (2) ¶ *31*; Claim II(D); Claim III; and Claim IV. [3]

On December 14, 2004, prior to scheduling the evidentiary hearing, the case was reassigned to Judge Dan L. Vaughn due to the retirement of Judge Marc A. Cianca. On March 1, 2005, the case was reassigned back to Judge Marc A. Cianca when he qualified to serve as a senior judge.

The evidentiary hearing was conducted over five days on April 18, 19, 20, & 21, 2005; and on May 25, 2005, to accommodate an expert witness.

At the evidentiary hearing, both parties presented witnesses. Kearse called defense counsel, Robert Udell; neuropsychologist, Dr. Barry Crown; psychologist, Dr. Alan Friedman; neuropharmacologist, Dr. Jonathan Lipman; attorney, Robert Norgard; psychiatrist, Richard Dudley; CCRC investigators, Stacy Brown and Nicholas Atkinson; uncle, John Kearse; childhood friend, Demetrious Soloman; cousin, Fabian Butler; citizen complaint witnesses, Tracey Davis, Charles Pullen, and Eric Jones; defense investigator, Anne Evans; and neurologist, Dr. Thomas Hyde. The State called forensic neuropsychologist, Dr. Daniel Martell. On August 8, 2005, the parties submitted written post-hearing memoranda.

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[3] The Defendant did not number the sub-claims in his motion. The Court adopted sub-claim and issue numbers for reference purposes at the conclusion of the case management conference. The ¶ numbers refer to paragraphs in the Defendant's Amended Motion.

FACTS OF THE CASE

The Florida Supreme Court found the following facts:

> After [police officer Danny] Parrish observed Kearse driving in the wrong direction on a one-way street, he called in the vehicle license number and stopped the vehicle. Kearse was unable to produce a driver's license, and instead gave Parrish several alias names that did not match any driver's license history. Parrish then ordered Kearse to exit the car and put his hands on top of the car. While Parrish was attempting to handcuff Kearse, a scuffle ensued, Kearse grabbed Parrish's weapon and fired fourteen shots. Thirteen of the shots struck Parrish, nine in his body and four in his bullet-proof vest. A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female drive away from the scene, and called for assistance on the police officer's radio. Emergency personnel transported Parrish to the hospital where he died from the gunshot injuries.
>
> The police issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo. By checking the license plate that Officer Parrish had called in, the police determined that the car was registered to an address in Fort Pierce. Kearse was arrested at that address. After being informed of his rights and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop.
>
> *Kearse v. State*, 662 So.2d 677, 680 (Fla. 1995).

POSTCONVICTION MOTION

In his motion, the Defendant raises nine claims for relief, five claims involve ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel must satisfy the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must demonstrate that his attorney's performance was so deficient that his attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment of the United States Constitution. *Id.*, at 687. Second, the defendant must establish that there is a reasonable probability but for counsel's deficient performance the outcome of the proceedings would have been different. A "reasonable probability" has been defined as a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*,

at 694. In the context of ineffectiveness during the penalty phase of a trial, the defendant must establish that there is a reasonable probability that but for counsel's errors the defendant would have probably received a life sentence. *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995).

Findings of Fact - Counsel and Mental Health Experts

Robert G. Udell, Esq., represented Kearse during the guilt phase and first penalty phase in 1991, and during the second penalty phase in 1996. At the time of the guilt phase, Udell had been doing capital postconviction and defense work in Florida for about ten years. Prior to 1991, Udell had represented four or five defendants facing the death penalty. Udell has attended the Life Over Death seminar annually since the seminar has been required for appointment to capital cases. Udell is the most experienced capital defense lawyer in the 19th Judicial Circuit. In addition, Udell has represented more than 80 homicide defendants.

The trial court denied Udell's motion for co-counsel during the guilt phase and initial penalty phase. Udell did not have co-counsel during the second penalty phase. Udell used two investigators for trial preparation and support, Jeff Chandler and Anne Evans.

Udell retained psychologist, Dr. Fred Petrilla, to prepare mental health mitigation in both penalty phases. In addition, neuropharmocologist, Dr. Jonathan Lipman, was hired to assist defense counsel in the second penalty phase. During his evaluation, Dr. Lipman consulted with clinical psychologist, Dr. Alan Friedman; neuropsychologist, Dr. Lawrence Levine; and neurosurgeon, Dr. Bennett Blumenkoff .

CLAIM I

THE DEFENDANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BECAUSE PUBLIC RECORDS HAVE BEEN WITHHELD BY AN AGENCY IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES.

Kearse claims that the Fort Pierce Police Department failed to turn over public records related to witness information for Jesse Morales, and a crime scene videotape recorded from the perspective of two witnesses' apartments. The Court finds this claim legally insufficient. Examination of the record reveals that these records were listed in paragraphs 9 and 11 of Kearse's Notice of Outstanding Public Records filed on June 17, 2003. Subsequent to the notice, the Court conducted four additional public records hearings. Public records held by the Fort Pierce Police Department were the subject of the last two hearings. In the November 13, 2003, hearing, the police department represented that the videotape was not missing, but that the tape had not been listed on the evidence sheet or entered into evidence, thus there was no videotape to produce. (See November 13, 2003, public records hearing transcript, starting on page 8.) Collateral counsel did not inquire into, or object to this testimony. In addition, during both the November 13, and December 12, 2003, hearings collateral counsel advised the Court that all of the public records requested, with the exception of one personnel file, had been accounted for or received. An order was entered on December 12, 2003, reflecting collateral counsel's representation of the status of the public records requested. Collateral counsel did not file another notice of outstanding public records and did not move to compel the production of any public records. Thus, Kearse fails to demonstrate that the Fort Pierce Police Department withheld public records in violation of Chapter 119, Florida Statutes.

CLAIM II

NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND IMPROPER RULINGS OF THE TRIAL COURT.

The Defendant's second claim involves four sub-claims. The first sub-claim raises thirteen issues of ineffective assistance of counsel.

Claim II (A): Ineffective Assistance of Counsel:

Finding of Fact - Theory of the case

The theory of the defense's case was that Kearse killed Officer Parrish during 15 seconds of rage and that the murder was not premeditated. Kearse confessed that he shot Parrish during a struggle that ensued after a traffic stop. There was no true claim of self-defense where Kearse's confessions and Rhonda Pendleton's eye witness testimony provided no evidence that Parrish was the aggressor and no evidence that Parrish abused Kearse during the traffic stop.

Claim II (A) (1) ¶¶ 4-6 - Counsel failed to vigorously advocate his client's position.

Kearse claims that counsel was ineffective for failing to vigorously advocate his client's position. Kearse contends that Udell's comments to the press before the 1991 trial and subsequent apology, Udell's statement at deposition, and Udell's repeated qualification of motions demonstrated that Udell "had given up all hope for his client."

In 1991, Udell commented to the press that he fully anticipated Kearse to be found guilty of first degree murder. (1ROA 207).[4] Udell's remarks were printed in the Stuart

[4]Citations to the record will be referenced as follows: 1991 record on appeal 1ROA, 1996 record on appeal 2ROA, supplements to the record 1S or 2S, and postconviction record PCR.

News in the Martin and St. Lucie county editions. The case was being tried in Indian River County and it was determined that the comments were not carried in the Indian River paper. (1ROA 208-16). Udell recognized that the comments could be seen as "throw[ing] in the towel" and apologized to the Court, the State, Kearse, and Kearse's mother. Further, Udell discussed the matter fully with Kearse and inquired, along with this Court, as to whether Kearse wished Udell to continue representing him. Kearse asserted he had confidence in Udell and wanted him to remain as counsel. Udell advised the Court of his level of preparation in support of his advocacy of Kearse. Udell subsequently represented Kearse at the 1991 guilt and penalty phases, and at the second penalty phase in 1996. (1ROA 207-16; PCR 289-90; State's PCR Ex. 5)

At the evidentiary hearing Udell acknowledged that the comments to the press were not the "smartest thing" he had ever done. Nonetheless, the record shows that Udell fought for Kearse throughout all phases of this case. (PCR 289-90). The record establishes Udell had mental health experts and investigators appointed. He sought suppression of physical evidence, Kearse's statements, and prior convictions. Further, he moved to have the death penalty statute declared unconstitutional and to preclude use of certain aggravation. (1ROA 68-177, 2207-14, 2216-24, 2225-47, 2451-52, 2455, 2457-58, 2462-63, 2474, 2497-98, 2523-25, 2538-41, 2542-45, 2546-49, 2555-57, 2560-61, 2565-66, 2573-81, 2611-35, 2616, 2623, 2631, 2633-35, 2637). The suppression and death penalty motions were resolved against Kearse. Udell cross-examined witnesses, argued against the felony murder theory, as well as premeditation, and asserted there had been no robbery. (1ROA 1648-50, 1708-09, 1777-83, 1785-1812, 1829-39).

Thus, the Court finds no prejudice to the outcome of the proceeding due to Udell's

comments to the press in light of Udell's advocacy and the evidence developed at trial that Kearse killed an officer, who was performing his lawful duties at a traffic stop, during the course of which Kearse grabbed the officer's gun and shot him 14 times. This was confirmed by physical evidence, eye-witness testimony, and Kearse's confession. See *Kearse v. State*, 662 So.2d 677, 680 (Fla. 1995). (1ROA 1028-29, 1093 1128, 1135, 1138, 1140, 1153-54, 1186-87, 1190-91, 1196-97, 1204-05, 1219-21, 1224-31, 1248, 1251-59, 1285-87, 1294-1304, 1310-17, 1387-95, 1400-02, 1426-36, 1452-53, , 1457-70, 1485-99, 1537-60, 1600-04, 1617, 1627-29; S1ROA for confessions).

In Dwayne Rahming's pre-trial deposition, Udell was overheard commenting that Kearse's case was "just a bad case" and "you can't change bad cases." At the evidentiary hearing, Udell explained that this was a "bad case" because you had a black defendant, recently released from prison, charged with killing a police officer after taking the victim's gun and emptying 14 bullets into him. Coupled with Kearse's confessions and Rhonda Pendleton's eye-witness corroboration, these facts made a "bad case" for the defense. (PCR 291-92). The Court finds Udell's explanation credible and in light of Udell's representation of Kearse throughout all phases of this case and the evidence presented at trial, *supra*, the Court finds no prejudice to the outcome of the proceeding due to Udell's comments during the deposition.

In addition, Kearse claims that Udell repeatedly qualified his motions indicating that the arguments were not the most compelling. Kearse claims the Motion in Limine, Motion for Continuance, Motion for Mistrial, and Motion for Judgment of Acquittal were not vigorously argued. (1 ROA 1119-20, 1350-58, 1650, 1743; 2 ROA 137, 141). The Court has reviewed the context of Udell's arguments on the motions and finds Udell's arguments

to be candid representations to the trial court made outside of the presence of the jury, not fatalistic comments concerning the outcome of the case. Thus, the Court finds no deficient performance of counsel in Udell's representation on the motions and no prejudice to the outcome of the proceeding in light of the overwhelming evidence presented at trial, *supra*.

Claim II (A) (2) ¶ 7 - Counsel failed to cross-examine Rhonda Pendleton and John Boler during the second penalty phase on guilt phase testimony that was inconsistent with prior sworn statements and depositions.

Kearse claims that counsel was ineffective for failing to cross-examine eye witnesses during the second penalty phase on guilt phase testimony that was inconsistent with prior sworn statements and depositions. Kearse contends that because the testimony of Rhonda Pendleton and John Boler was read into the record, Udell could not challenge these witnesses on their testimony concerning how Kearse was holding the gun and Kearse's position relative to Parrish at the time of the shooting. Kearse avers that the jury was misled by the reading of the testimony. However, Kearse does not explain what the inconsistencies in the testimony are, how the inconsistencies in the testimony are material to the outcome of the proceedings, or how the jury was misled by the reading of the testimony. And, Kearse does not claim that the testimony was inadmissible.

Further, the record is clear that Udell challenged the unavailability of these witnesses, moved for a continuance to obtain Pendleton's appearance, and objected to the reading of the testimony. All of Udell's challenges were denied. (2ROA 1352-61, 1624-26). Later, Udell found Pendleton and questioned her at length. (2ROA 1930-71). Thus, the Court finds this claim legally insufficient where there is no showing that counsel was deficient or that the proceedings were prejudiced.

Claim II (A) (3) ¶ 8 - Counsel failed to cross-examine Derrick Dickerson and Rhonda Pendleton at the motion to suppress hearing.

Kearse claims that counsel was ineffective for failing to cross-examine Derrick Dickerson and Rhonda Pendleton at the motion to suppress hearing. Kearse contends that he lived with Derrick Dickerson, had a relationship with Rhonda Pendleton, and that the police coerced Dickerson and Pendleton to consent to a search of the residence where Kearse was arrested. Kearse avers that he had a reasonable expectation of privacy at the Dickerson home and therefore the evidence should have been suppressed.

The record is clear that police arrested Kearse at the Dickerson residence without a warrant. However, the trial court found probable cause for the arrest due to exigent circumstances. Therefore the physical evidence and Kearse's confession remain admissible. *Kearse*, 662 So. 2d at 684. Further, the record shows that Kearse admitted that he did not live at the Dickerson residence (1718 Avenue K) at the time of the arrest, Kearse was living at his mother's home (1611 North 19th Street), and Kearse did not have a romantic relationship with Pendleton. (1 ROA - T 104, 1484; 2ROA - T 1833-34; PCR 295-96). Thus, Kearse fails to demonstrate deficient performance and prejudice.

Claim II (A) (4) ¶ 9 - Counsel failed to cross-examine Rhonda Pendleton concerning her relationship with Kearse.

Kearse claims that counsel was ineffective for failing to cross-examine Rhonda Pendleton concerning her relationship with Kearse. Kearse contends that Pendleton testified that she was not Kearse's girlfriend. Kearse avers that this testimony was of questionable veracity but fails to allege any facts in support of this claim and fails to demonstrate how this testimony could have been used for impeachment purposes.

Further, this claim is in contradiction of Kearse's statement to Udell that Kearse and Pendleton were not dating. (2ROA - T 1484, PCR 295-96.) Thus, the Court finds this claim merely conclusory and legally insufficient. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

Claim II (A) (5) ¶ 10- Counsel failed to challenge the veracity of State witness, Bruce Heinnsen.

Kearse claims that counsel was ineffective for failing to challenge the veracity of State witness, Bruce Heinnsen. Kearse contends that in his deposition Heinnsen indicated that he had criminal convictions for theft and possession of firearms, yet Heinnsen had also served on a jury. Kearse does not allege any facts to show that Heinnsen was untruthful at deposition or to demonstrate how challenging Heinnsen's testimony at deposition would have changed the outcome of the proceeding. Thus, the Court finds this claim merely conclusory and legally insufficient. *Kennedy*, 547 So. 2d at 913.

Claim II (A) (6) ¶ 11 - Counsel failed to consult with experts to rebut the testimony of State experts in the areas of crime scene investigation, firearms, and medical examination.

Kearse claims that counsel was ineffective for failing to consult with experts to rebut the testimony of State experts in the areas of crime scene investigation, firearms, and medical examination. However, Kearse fails to allege any facts to show what the defense experts would have found or to demonstrate how the outcome of the proceedings was prejudiced by failure to consult with the experts. Thus, the Court finds this claim merely conclusory and legally insufficient. *Kennedy,* 547 So. 2d at 913.

Claim II (A) (7) ¶¶ 12-13 - Counsel failed to request co-counsel prior to the second penalty phase resulting in inadequate preparation of witnesses.

Kearse claims that Udell failed to request co-counsel prior to the second penalty phase resulting in inadequate preparation of witnesses. The Court relies on its analysis in Claims II (A)(8), III, and IV, *infra*, and finds no prejudice to the outcome of the proceeding.

Claim II (A) (8) ¶ 14 - Counsel failed to adequately prepare Kearse and Pamela Baker to testify at the second penalty phase resulting in otherwise inadmissible testimony concerning Kearse'sincarceration on death row and Kearse's juvenile infractions.

Kearse claims that counsel was ineffective for failing to adequately prepare Kearse and Pamela Baker to testify at the second penalty phase. As a result of counsel's deficiencies, Kearse contends that he improperly disclosed that he already lived on death row and that Baker testified at length concerning Kearse's juvenile infractions, facts that were otherwise inadmissible.

As to Kearse's disclosure that he already lived on death row, the record is clear that Kearse's answer was unresponsive to Udell's question about where Kearse had been incarcerated prior to his 1991 arrest for killing Officer Parrish. (2ROA-T 1833-34.) Thus, Udell was not expecting Kearse to answer as he did. (PCR 296-97). Therefore, Kearse has failed to demonstrate that Udell was deficient in preparing Kearse to testify.

With respect to Baker's testimony about Kearse's juvenile infractions, at the evidentiary hearing Udell explained that the evidence would come in eventually as a result of the State's right to cross-examine on mental mitigation testimony. So, finding Baker to be a good witness in the past and Kearse's biggest advocate, Udell prepared her with her

prior testimony, and permitted Baker to testify in narrative form to underlying facts including the juvenile infractions. [5] Udell determined that it would be better to bring the evidence in on direct examination through a witness favorable to Kearse who could support the testimony of other mental health experts. (PCR 296-99). Thus, the Court finds that Udell considered alternatives and made a reasonable strategic decision in the presentation of Baker's testimony.

Claim II (A) (9) ¶ 15 - Counsel failed to object to the prosecutor improperly and incorrectly introducing evidence that the Defendant's MRI was normal.

Kearse claims that counsel was ineffective for failing to object to the prosecutor improperly and incorrectly introducing evidence that Kearse's MRI was normal. Kearse contends that Udell did not clarify the meaning of the MRI results. The Court finds no deficient performance or prejudice where penalty phase expert, Dr. Lipman, and postconviction expert, Dr. Dudley, both characterized the MRI results as "normal" with qualifications. And where Dr. Petrilla and Dr. Lipman testified to the meaning of the "normal" MRI results during the second penalty phase. (2ROA 22, 25, 2237-38, 2254-57, PCR 281-82, 574-77). Further, the Court relies on its analysis in Claims III and IV, *infra*, in finding no ineffective assistance of counsel and no ineffective assistance of mental health experts.

Claim II (A) (10) ¶ 16 - Counsel failed to adequately address and argue the statutory mitigating factor of Kearse's age at the time of the offense.

Kearse claims that counsel was ineffective for failing to adequately address and argue the statutory mitigating factor of Kearse's age at the time of the offense. Kearse

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[5] Baker's testimony is summarized in Claims III and IV, *infra*.

admits that his biological age was 18 years and 3 months at the time of the murder but contends that Kearse was functioning at a substantially lower age due to his cognitive and emotional impairments. [6] Kearse avers that although the issue of age was raised and decided on direct appeal to the Supreme Court of Florida, Kearse seeks to preserve the issue because the constitutionality of executing juvenile offenders was under review by the United States Supreme Court in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), at the time that Kearse's amended motion was filed.

Kearse's claim must be denied for two reasons. First, Kearse has merely recast the issue of age mitigation which was raised and decided on direct appeal as a claim of ineffective assistance of counsel in order to relitigate the claim. This is impermissible in a collateral proceeding. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). In addition, Kearse has failed to show prejudice where he was not under 18 years of age at the time of the offense. *Roper v. Simmons*, 125 S. Ct. 1183 (2005). Therefore, Kearse's claim is both procedurally barred and legally insufficient.

Claim II (A) (11) ¶¶ 17-22 - Counsel failed to present evidence at the guilt phase and second penalty phase of Officer Parrish's prior misconduct and difficulties in dealing with the public.

Kearse claims that counsel was ineffective during the guilt phase and the second penalty phase for failing to present evidence of Officer Parrish's prior misconduct and difficulties in dealing with the public. Kearse contends that Parrish had a history of dealing with the public in a threatening and erratic manner that could have provoked Kearse during

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[6] Significant testimony was presented at the second penalty phase to demonstrate that Kearse was functioning at a level below his chronological age. See summary of testimony in Claims III and IV, *infra*.

the traffic stop. Kearse avers that had counsel adequately investigated all of the complaints against Parrish and obtained the documentation of Parrish's deficient performance, counsel could have undermined the State's theory that Parrish was killed without provocation during the traffic stop. However, Kearse does not allege any actual provocation by Parrish during the traffic stop. And at the evidentiary hearing, Kearse presented no evidence of actual provocation by Parrish during the traffic stop.

It is uncontested that during discovery Udell obtained copies of citizen complaints filed against Parrish and that Udell did not obtain copies of Parrish's personnel file or internal affairs file. (PCR 42-44, 48, 50.) It is clear from the evidence presented at the evidentiary hearing that Udell decided not to pursue the strategy of vilifying the officer/victim after reviewing citizen complaints, information obtained by defense investigators on the citizens complaints, and interviews with some of the citizens that filed the complaints. Udell compared the strength of citizen complaint evidence against Kearse's confessions and Rhonda Pendleton's eye witness testimony describing Parrish's conduct during the traffic stop where Pendleton testified that Parrish was polite and did not abuse Kearse, and where both Kearse and Pendleton reported that Parrish was going to let Kearse leave on his own recognizance if Kearse would give Parrish his correct name. (1ROA 1458-70; 2ROA - T1641, 1660-63, 1847; PCR 42-57.)

As to the citizen complaints, Udell acknowledged that the complaints revealed that Parrish had been aggressive in the past in dealing with citizens with some racial overtones. However, Udell testified that he made a strategic decision not to use the complaints to vilify Parrish because some complainants were unwilling to testify and the circumstances of the complaints were insufficient to overcome juror sympathy for the officer/victim. Udell

reasoned that the jury was likely to look at the complaints as part of an officer doing his job, recognizing that not everyone is going to like a police officer. Udell believed that this type of evidence would backfire especially in Indian River County, a venue based on Udell's experience where the jury would be more sympathetic to the deceased officer. (PCR 52-54, 56-57, 299-305.)

The Court finds Udell's assessment of this complaint evidence credible and reasonable where complaint witnesses, Tracey Davis and Eric Jones, testified at the evidentiary hearing to complaints of Parrish's misconduct during traffic stops, where the complaints were investigated by the Fort Pierce Police Department, where the complaints were determined to be unfounded, and where Davis and Jones ultimately paid traffic citations issued by Parrish without contest. (PCR 375-399, & 880-926.) Further, the Court finds Udell's concern about the lack of credibility of complainant, Benjamin Lewis, supported by the facts that Lewis was detained by Parrish due to suspicious circumstances and by Lewis' confession that he had been arrested for murder, aggravated assault on a police officer, and convicted of carrying a concealed firearm. And, the Court finds Udell's assessment that the Martin's complaint was weak supported by the fact that the wife admitted that her husband may have provoked an incident involving Parrish at the K-Mart, and where Captain Price had investigated and exonerated Parrish. (PCR 313-315.) Therefore, in light of Udell's consideration of alternatives, and absent stronger evidence of Parrish's prior misconduct and absent evidence that Parrish abused Kearse during the traffic stop in this case, the Court finds trial counsel's strategy not to pursue the victim vilification defense reasonable. *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987.)

During the evidentiary hearing, Kearse sought to admit evidence of Parrish's alleged

racial bias in dealing with minority citizens. The Court permitted Kearse to proffer the testimony of CCRC investigators, Stacy Brown and Nicholas Atkinson. The testimony was offered to relate what Pastor Lacy Newton had reported to Atkinson concerning Parrish's alleged racial bias. At the hearing, the Court reserved ruling on admission of the testimony of the CCRC investigators. (PCR 704-05.) The Court now rules that the proffered testimony is inadmissible hearsay in this postconviction proceeding, and thus the Court did not consider the testimony in ruling on Kearse's postconviction claims. *See Randolph v. State*, 853 So.2d 1051, 1062 (Fla. 2003) (recognizing there was no error in ruling affidavits of unavailable witnesses were inadmissible hearsay as the rules of evidence apply in such proceedings). *Cf. Kokal v. State*, 901 So.2d 766, 775 (Fla. 2004) (recognizing that rules of evidence apply in postconviction cases).

Lastly, the Court finds no prejudice where counsel failed to obtain Parrish's personnel and internal affairs files. Parrish's personnel records contained evaluations which noted areas that needed improvement including: (1) dealing with the public, although he got along well with fellow officers; (2) knowing rules and regulations; (3) learning to use discretion; and (4) noting Parrish was excitable, but anticipating experience would change that. The record contained a one-day suspension of Parrish for leaving his service revolver in his cruiser. An evaluation closer to the time of the traffic stop noted satisfactory job performance. Further, the file contained other positive material concerning Parrish's performance that the State could have used to rebut any claims of misconduct. (PCR 42-57.) Thus, the Court finds no prejudice where counsel failed to obtain and consider these records prior to making a strategic decision not to pursue a strategy vilifying Parrish.

Claim II (A) (12) ¶¶ 23-24 - Counsel failed to obtain the Defendant's consent to concede to the aggravating factors of "avoid arrest" and "hindering enforcement of the laws."

Kearse claims that counsel was ineffective in failing to obtain Kearse's consent to concede to the aggravating factors of "avoid arrest" and "hindering enforcement of the laws." Kearse contends that these aggravating factors are elements of capital murder pursuant to *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and that the elements could have been undercut by records of Parrish's misconduct. Kearse avers he was prejudiced by counsel's failure to obtain the records and by counsel's failure to inform Kearse of this avenue of inquiry.

This claim must be denied for two reasons. First, Kearse is not entitled to relief under *Ring*, as discussed in Claim VII, *infra*. In addition, the Court relies on its analysis in Claim II (A) (11), *supra*, and finds no prejudice in counsel's failure to obtain Parrish's records or in counsel's failure to inform Kearse of this avenue of inquiry. Thus, Kearse fails to satisfy the second prong of *Strickland*.

Claim II (A) (13) ¶ 25 - Cumulative effect of counsel's deficiencies.

Kearse claims that he is entitled to relief based on the cumulative effect of counsel's deficiencies. However, based on the Court's analysis in Claims II(A) (1) - (12), *supra*, and in Claims III and IV, *infra*, the Court finds insufficient demonstration of counsel's deficiencies to undermine Kearse's convictions and sentence. Therefore, Kearse is not entitled to relief.

The second sub-claim raises three issues of judicial error.

Claim II (B): Judicial Error:

Claim II (B) (1) ¶ 26 - The trial court erred in the second penalty phase by denying a challenge for cause on Juror Claire Matthews.

Kearse claims that the trial court erred in the second penalty phase by denying a challenge for cause on Juror Claire Matthews. Kearse asserts that Juror Matthews was related to witness, Les Raulerson, and that the juror was never asked if she could put the relationship aside and render an unbiased verdict. (2ROA 860-873.) This claim is procedurally barred and without merit. Examination of the record reveals that defense counsel preserved the issue for appeal by objecting to Juror Matthews for cause, exhausting his peremptory challenges, and requesting more peremptory challenges. *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990). (2ROA 1097, 1105-07, & 1111.) However, on appeal, Kearse did not raise the denial of the cause challenge on Juror Matthews, although he did raise the issue as to two other jurors. *Kearse*, 770 So. 2d at 1128-29 [claim 13.] Thus, this issue is procedurally barred because the issue should have been raised on direct appeal. *Spencer v. State*, 842 So. 2d 52, 60-61 (2003); *Smith v. State*, 445 So 2d 323, 325 (Fla. 1983). In addition, on the merits, the record shows that Juror Matthews had never met or spoken to the witness, and the record does not otherwise demonstrate bias warranting the grant of a challenge for cause. (2ROA 860-873.) Further, while being questioned about publicity on the case, Juror Matthews averred that she could set aside preconceived notions and be fair in her deliberation. She agreed to decide the case on the facts and law given in court. *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). (2ROA 1007-1016.) Thus, the claim is without merit.

Claim II (B) (2) ¶ 27 - The trial court erred in denying trial counsel's motion for guilt phase co-counsel.

Kearse claims that the trial court erred in denying trial counsel's motion for guilt phase co-counsel. This issue was preserved for appeal when the trial court denied both of trial counsel's motions for co-counsel. (1ROA 29-41 and 63-67.) Therefore, the issue could have been raised on direct appeal, and is not cognizable through collateral attack. Further, absent a showing that trial counsel was ineffective under *Strickland*, the failure of the trial court to appoint co-counsel does not establish a ground for postconviction relief. *Ferrell v. State*, 653 So. 2d 367, 370 (Fla. 1995).

Claim II (B) (3) ¶ 28 - The trial court erred in rejecting two statutory mental health mitigating circumstances.

Kearse claims that the resentencing court erred in rejecting two statutory mental health mitigating circumstances. Kearse contends that the only evidence contradicting the mitigating circumstances was the "dubious testimony of Dr. Daniel Martell," that Kearse attacks in Claim II (C), *infra*. Kearse's claim must be denied for two reasons. First, this claim of trial court error should have been raised on direct appeal, and thus is not cognizable on collateral review. *Spencer,* 842 So. 2d at 60-61. In addition, the rejection of mitigation is supported by competent, substantial evidence, in the form of Dr. Martell's testimony, and the determination of whether a mitigating circumstance exists and the weight to be given to the mitigator, is a matter of sentencing court discretion. *Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000); *Spencer v. State*, 691 So. 2d 1062, 1064 (Fla. 1996).

Claim II (C): Withholding Exculpatory Evidence: State knowingly withheld records

Claim II (C) (1) ¶ ¶ 29 & 20 - The State knowingly withheld Officer Parrish's misconduct and personnel records in violation of *Brady v. Maryland*.

Kearse claims that the State knowingly withheld Officer Parrish's misconduct and personnel records in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). To successfully maintain a *Brady* claim, the Kearse must establish the following three elements: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the State's failure to disclose the evidence was prejudicial. *Spencer v. State,* 842 So.2d 52, 67 (Fla. 2003). A *Brady* claim cannot stand if "the information is equally accessible to the defense and prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Freeman v. State,* 761 So.2d 1055, 1061-62 (Fla. 2000) (quoting *Provenzano v. State,* 616 So.2d 428, 430 (Fla. 1993)).

Kearse's claim fails on two of the three elements. At the evidentiary hearing no evidence was offered to show that these records were not accessible to Kearse. In fact Udell admitted that he could have obtained the records had he not limited his request to the Fort Pierce Police Department to complaints filed against Kearse. Moreover, this Court found in Claim II (A) (11), *supra*, that the absence of these records did not result in prejudice to Kearse. Therefore Kearse is not entitled to relief on this *Brady* claim.

Claim II (C) (2) ¶ 31- The State knowingly withheld Bruce Heissen's statement to police that the Defendant "looked high on cocaine" in violation of *Brady v. Maryland.*

Kearse claims that the State knowingly withheld Bruce Heissen's statement to police

that Kearse "looked high on cocaine" in violation of *Brady v. Maryland*, 373, U.S. 83 (1963). This claims fails on two of the three elements required for a *Brady* claim. At the evidentiary hearing Udell testified that he did not know if he had seen Heissen's statement, Defense Exhibit "M." However, despite Udell's lack of knowledge, Kearse failed to show how the statement was exculpatory where no evidence has ever been presented that Kearse was under the influence of any substance at the time of the murder. Further, no evidence was presented to show how the outcome of the proceeding was otherwise prejudiced sufficient to undermine Kearse's convictions and death sentence. Therefore Kearse is not entitled to relief on this *Brady* claim.

Claim II (D):Newly Discovered Evidence: Dr. Martell's conduct exhibits bias in favor of the prosecution and his testimony was simply unreliable.

Kearse claims that newly discovered evidence of Dr. Martell's conduct in *United States v. Spivey*, and during the State compelled mental health examination of Kearse exhibits bias in favor of the prosecution and renders Dr. Martell's testimony unreliable. To prevail on a claim of newly discovered evidence Kearse must show that the evidence existed at the time of trial but was unknown by the trial court, the defendant, and counsel, and could not have been discovered through the exercise of due diligence. *Wright v. State*, 847 So. 2d 861, 887 (Fla. 2003). Both of Kearse's claims fail to meet these requirements.

First, at the evidentiary hearing it was established that the *Spivey* allegation post-dated the second penalty phase and the trial court's pronouncement of the death sentence. Further, the evidence showed no resolution of the *Spivey* controversy through judicial or administrative findings of misconduct by Dr. Martell. Thus, Kearse fails to

demonstrate that the *Spivey* allegation existed at the time of the second penalty phase, fails to show that Dr. Martell was untrustworthy as a result of the *Spivey* controversy, and fails to allege how the *Spivey* controversy is otherwise admissible to collaterally attack Kearse's judgment and sentence. (PCR 91, 118-19, 800-08, 836-37, Defense Exhibit "BB.")

As to Kearse's challenge of Dr. Martell's conduct during the State compelled mental health examination, it is clear from the record that a videotape of the examination was available at the time of the penalty phase and that Udell was aware that the examination had been videotaped. Therefore, Dr. Martell's conduct during the examination is not newly discovered evidence because the videotape could have been obtained by counsel at the time of the second penalty phase through the exercise of due diligence. (PCR 80-88, 284-85, 794-97, 825.)

CLAIMS III & IV

THE DEFENDANT WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL IN THE INVESTIGATION AND PRESENTATION OF MENTAL HEALTH MITIGATION, AND DUE TO THE INADEQUATE ASSISTANCE OF MENTAL HEALTH EXPERTS.

Kearse claims that he was denied his rights under *Ake v. Oklahoma,* 470 U.S. 86 (1985), due to ineffective assistance of counsel in the investigation and presentation of mental health mitigation, and due to the ineffective assistance of mental health experts. The crux of Kearse's argument in these two claims is that defense mental health expert, Dr. Jonathan Lipman, was inadequately prepared compared to State mental health expert, Dr. Daniel Martell; and that Udell was ineffective in undercutting the credibility of Dr. Martell's testimony rebutting statutory and non-statutory mental health mitigation. Kearse

avers that Udell was ineffective for failing to depose Dr. Martell, for exposing the weakness of Dr. Lipman reviewing another doctor's work, for failing to provide Dr. Lipman all of the case documentation, and for inadequately cross-examining Dr. Martell. Further, Kearse contends that defense mental health expert, Dr. Fred Petrilla, improperly administered an MMPI personality test to Kearse that resulted in an inappropriate characterization of Kearse as a malingerer.

In bringing these claims, Kearse fails to acknowledge the extensive mental health mitigation prepared and presented on Kearse's behalf. Udell retained psychologist, Dr. Fred Petrilla, to prepare mental health mitigation in both penalty phases. In addition, Udell retained neuropharmocologist, Dr. Jonathan Lipman, to assist defense counsel in the second penalty phase. At Dr. Lipman's direction, Kearse underwent three brains scans - MRI, PET, and SPECT. In making his mental health findings, Dr. Lipman consulted and relied upon clinical psychologist, Dr. Alan Friedman; neuropsychologist, Dr. Lawrence Levin; and neurosurgeon, Dr. Bennet Blumenkoff. In addition, Udell utilized licensed mental health counselor, Pamela Baker, to prepare and present mental health mitigation from Kearse's childhood.

Udell used family and school psychological history to give support to mental health experts' testimony about brain dysfunction, emotional disturbance, Fetal Alcohol Effect, and confabulation. However, the mental health experts did not find Fetal Alcohol Syndrome, organic brain damage, or mental retardation. Further, Udell used the testimony of Kearse's teachers and counselors to neutralize psychiatrist, Dr. Angelina Desai's childhood diagnosis of conduct disorder, and to demonstrate the neglect and difficulties of Kearse's childhood.

In analyzing Claims III and IV, the Court adopts and incorporates relevant portions of the State's summary of testimony presented at the second penalty phase and Udell's comments concerning the second penalty phase developed at the evidentiary hearing to evaluate Kearse's claims of ineffective presentation of mental health mitigation:

> Having fully litigated the first penalty phase, Udell was reappointed for the re-sentencing. In preparation for it, Udell relied upon and updated the investigation from the first penalty phase, rehired Dr. Petrilla, whom he had used in the first trial, and contracted with Dr. Lipman, a neuropharmacologists to add new mental health mitigation. (PCR 134). He also called Kearse, Rhonda Pendleton, Kurt Craft, Sharon Craft, Peggy Jacobs and Ernest Jacobs (Kearse's aunt and uncle), Danny Dye, Bertha Kearse (mother), Betty Butler (Kearse's aunt), and Pam Baker. Udell's 1996 investigation/preparation entailed talking to family members including Kearse's mother, aunts, and uncle. While it is his standard procedure to talk to grandparents and siblings, Udell does not recall if he did, but he believes Kearse's siblings were too young to be of assistance at the time. (PCR 134-35). Udell contacted Dr. Lipman, and at his request, obtained MRI, SPECT, and PET scans of Kearse, however, they turned out not to be helpful to the defense. (PCR 135). Udell used Kearse's family and school/psychological history as mitigation as well as to give support to the mental health experts' testimony about brain dysfunction, emotional disturbance, Fetal Alcohol Effect, and confabulation.
>
> . . .The school officials, Kurt Craft, Sharon Craft, and Danny Dye testified. (2ROA 1753, 1762, 1820). Kurt Craft reported that in 1983-1984, Kearse had learning disabilities, was emotionally dysfunctional, and had been placed in a class for "severely emotionally disturbed" children. (2ROA-T 1757-61).
>
> Sharon Craft reported Kearse had repeated the First and Second grades twice, was severely emotionally handicapped, and was placed in a special program. Ms. Craft had no contact with Kearse's mother, Bertha Kearse ("Bertha") and considered him a neglected child who came to school hungry and dirty. He received poor grades, had difficulty concentrating, and was hyper-kinetic. In the Seventh grade, Kearse functioned at the Third grade level, and dropped out of school the next year. (2ROA-T 1765, 1769-72, 1777-78, 1782-83). Kearse was caught fighting and stealing; his records revealed he was angry and disruptive. One teacher noted Kearse liked to "play dumb" and work as little as possible. He was "street-wise", establishing the leadership role with peers, and inclined to talk back to his teachers. (2ROA-T 1793, 1797). Danny Dye noted Bertha was uninterested in her son and neglected him. He was small and dirty. (2ROA-T 1822-28).
>
> Kearse's family members testified. Peggy Jacobs, Kearse's aunt reported that Bertha drank excessively when pregnant with Kearse and was 15 or 16 years-old when she gave birth. (2ROA-T 1811-12). Ernest Jacobs added that Kearse would sneak out at night, and once was found sleeping under a car. (2ROA-T 1816-19). Another aunt, Betty Butler, confirmed Bertha's drinking and testified that

Bertha beat her son because she had trouble keeping him in line. He developed later than his peers, slurred his speech, and had difficulty learning (2ROA-T 1979, 1981, 1983, 1985). Bertha smoked and drank a lot during her pregnancy and could not afford prenatal care. (2ROA-T 1971, 1974).

. . . In 1981 when Kearse was eight years-old, Pamela Baker ("Baker"), a licensed mental health counselor, had contact with him regarding a complaint that he was ungovernable and beyond his parent's control (2ROA-T 1990, 1997-2001). Kearse was placed in the "Suspected Child Abuse and Neglect" program ("SCAN Program") and his mother enrolled in the in-home parenting program, but her participation was superficial. (2ROA-T 2002-03, 2018). Bertha Kearse "whipped" her son daily; she had "given up" and had little interaction with her children. (2ROA-T 2004, 2014). Baker added that Kearse left his home because of his mother's drinking and fighting with her boyfriend. He wished to remain at the youth home because he was fed better there. The SCAN case closed in a year because no evidence of abuse was found. (2ROA-T 2016-20, 2054-55).

About the same time as the SCAN investigation, Kearse began to commit crimes, petty thefts, and burglaries; however, there was little aggressive behavior in the crimes. When he was in special education classes, between 1982 and 1987, he committed no criminal offenses (2ROA-T 2023-26). The 1982 psychological evaluation noted Kearse "listened to his mind" which indicated there may be auditory hallucinations. (2ROA-T 2027-28). The records showed that when Kearse was in Fourth grade, he operated at a retarded level and was severely emotionally handicapped. He had a 69 IQ at the age of 12, and quit school at 15 years-old. However in jail, he learned how to read and write. (2ROA-T 2031-33, 2037, 2039-40, 2052).

Baker never believed Kearse would kill; he was not mean or violent, but would get into fights. At times, he bullied others, pushing and shoving them; he threatened the school faculty because he wanted out of school (2ROA-T 2047, 2086-87). In 1981, Dr. Kushner did neurological and neuropsychological testing which revealed problems related to brain damage. Kearse had poor short and long-term memory, motor skills, and planning. His verbal comprehension was poor and he was unable to do abstract thinking; his mental age was less than his chronological age, and the Weschler test put Kearse's IQ at 78. (2ROA-[T] 2121-24, 2134).

While in jail, Kearse confided to Baker that as a child, he had been forced to walk the neighborhood naked; and he had been tied to a bed and beaten with extension cords and cloth-wrapped hangers. Bertha physically abused her boyfriend and drank heavily on the weekends. Kearse started drinking at four or five years of age, smoking marijuana at age 12 or 13, and smoking cigarettes at 14, but he did not do other drugs. (2ROA-T 2056, 2061-63, 2113-14). Kearse was beaten by gang members, robbed, hit by a car twice, fell out of a window hitting his head, and nearly drowned three times. (2ROA-T 2075-76). He was sexually molested at the age of 12 by a person four years older; and at 16, he lost his virginity to a 31 year-old woman. (2ROA-T 2078-79). Kearse exhibited symptoms of panic attacks and conduct disorders. (2ROA-T 2077-78, 2095).

Dr. Fred Petrilla, a licensed clinical psychologist, evaluated Kearse in 1991 and again in 1996. (2ROA-T 2236). In 1991, Dr. Petrilla met with Bertha Kearse, spent about 20 hours with Kearse and administered several neuropsychological tests. The 1991 testing indicated Kearse was not mentally retarded, but had brain dysfunction, auditory, concentration, and behavioral problems in addition to cultural deprivation. (2ROA-T 2138, 2144, 2146-47, 2153-59, 2170-74, 2177-87). In 1996, the neuropsychological testing appeared to be normal, however, when reviewed in conjunction with the prior testing and records, it showed moderate brain dysfunction in the left hemisphere which had existed at least since eight years of age. Kearse was indecisive, insecure, and defensive, with a tendency to be hyperactive and react without thinking. (2ROA-T 2175-87, 2190-97). No malingering was detected, although the indicator scale was elevated (2ROA-T 2188-89, 2192-99, 2227-33). After reviewing all of his testing, along with Kearse's prior evaluations, background information, school records, and Dr. Kushner's 1981 files, Dr. Petrilla concluded Kearse suffered a long-term disability; the dysfunction was developmental in nature and long-standing. It was his conclusion that two statutory mitigators existed: (1) Kearse was suffering under extreme emotional disturbance at the time of the crime and (2) due to his emotional disturbance, he was substantially incapable of conforming his conduct to the requirements of the law. (2ROA-T 2200-03).

Dr. Lipman, a neuropharmocologist, testified that he met with Kearse and his mother in addition to reviewing school records ordering brain scans and consulting with other experts. (2ROA-T 2239, 2247). His evaluation and review revealed that Kearse had neurodevelopmental problems from an early age and such was due to Bertha Kearse's alcohol abuse during pregnancy causing Kearse to suffer from Fetal Alcohol Effect ("FAE") a milder form of Fetal Alcohol Syndrome. Kearse did not meet all the criteria for the syndrome as he did not have the typical facial/physical characteristics associated with the syndrome. However, he did suffer from FAE as evidenced by Kearse's hyperactivity as a child, impulsivity, under-weight at birth, small during early childhood, and educationally sub-normal. Kearse had a pervasive developmental disability from infancy. (2ROA-T 2247-51). The testing Dr. Lipman ordered, in consultation with Dr. Blumenkoff, established damage to Kearse's left brain, although such was not diagnostic. One of the effects of alcohol ingested in utero, is brain dysfunction. The school and psychological records support the finding of FAE and are consistent with the findings of Drs. Petrilla and Petrilla/Kusher. All showed a pervasive developmental abnormality from a very early onset. (2ROA-T 2254-63).

Kearse discussed the murder with Dr, Lipman, and based upon these discussions, Dr. Lipman believed Kearse was confabulating, i.e., he was rationalizing what happened, but at the same time believing what he was reporting. As such, what Kearse was saying was untrue, but because he believed it to be true, he was not lying. Dr. Lipman did not believe everything Kearse was telling him about the murder as he had irrational elements to his story, however, he was not lying; he was confabulating. Kearse was filling in the gaps in his account with what seemed reasonable to him, and had become "memory." (2ROA-T 2263-68). Dr. Lipman concluded that what Kearse was reporting was "pure impulsiveness" and

rationalizations. Kearse's actions show there was no careful forethought; he was just exploding. It was Dr. Lipman's opinion Kearse consciously did not think that the only way to avoid arrest was to kill Parrish. (2ROA-T 2265-71).

Also reviewed by Dr. Lipman was the testing done by the State's expert, Dr, Martell, and the MMPI results obtained by Dr. Petrilla and Dr. Kushner's 1981 report. As part of that review, Dr. Lipman consulted with Drs. Friedman and Levine (2ROA-T 2287-90). He opined that Kearse had a verbal memory disorder and was not malingering on the MMPI (2ROA-T 2292, 2295).

The State's witness, Dr. Martell, qualified as an expert in forensic neuropsychology. (2ROA-T 2345). Upon Dr. Martell's review of all materials generated in the case, he concluded that neither mental mitigator applied, there was no evidence of a severe mental or emotional disturbance, and Kearse was malingering. (2ROA-T 2355, 2357-58, 2369-70, 2412). Kearse did not meet the criteria for a panic disorder, and Fetal Alcohol Effect is not a mental disorder. Moreover, the profession is trying to eliminate the term Fetal Alcohol Effect because the symptoms can occur naturally (2ROA-T 2370-72). While Dr. Lipman noted that Kearse had a low birth weight and developed more slowly to support the FAE finding, Dr. Martell's review of the records showed Kearse had a normal birth weight, walked and talked at an early age, and had no abnormal developmental features, thereby, undercutting the FAE conclusion. (2ROA-T 2374-75).

Dr. Martell agreed Kearse was weak in some areas, but overall, there was no brain damage and his brain scans were normal (2ROA-T 2376). Contrary to Dr. Petrilla's conclusion, Dr. Martell found the testing showed Kearse was mildly impaired in attention concentration, but most areas were normal. When Dr. Petrilla tested Kearse, the results showed moderate to severe depression, and depression can affect IQ because the subject is apathetic. Such may account for Kearse's low verbal IQ inattention, and lack of concern. (2ROA-T 2380-83).

It was Dr. Martell's conclusion that Kearse had a conduct disorder, and that he made a choice not to apply himself in school because he did not want to be there. (2ROA-T 2386). Such conclusion is in agreement with Dr. Desai who had evaluated Kearse in 1983, and the records bear out Dr. Martell's conclusion. (2ROA-T 2387-89). Based on this, Dr. Martell found Kearse to have an anti-social personality disorder. (2ROA-T 2388-89). Kearse also met six of the seven criteria for sociopathy and scored within the range for psychopathy. Neither sociopathy nor psychopathy constitute extreme mental or emotional disturbance. There is no history of Kearse having a severe mental disorder. (2ROA-T 2399-2402). The MMPI test had elevated levels in the F-scale indicating malingering. From the 1991 MMPI results, Dr. Martell found psychopathic deviance, antisocial tendency, and mania. (2ROA-T 2402-04). There was a much greater effort in 1996 by Kearse to fake his test results. The MMPI indicate extremely disturbed paranoid schizophrenia, but there is no evidence of such behavior. Hence, Dr. Freidman's conclusions upon which Dr. Lipman relied are incorrect. The tests are not valid. (2ROA-T 2404-11).

According to Dr. Martell, the statutory mental mitigation did not apply because Kearse knew he committed a traffic infraction and might get arrested; he

lied to escape the consequences. Further, he consciously shot the officer after obtaining his gun and continued shooting even after Parrish had fallen. Kearse took the gun from the scene because his prints were on the weapon, and left the scene with his headlights extinguished, later hiding the gun and car. When confronted by the police, Kearse lied (2ROA-T 2412-20). Instead of finding "confabulation", Dr. Martell concluded Kearse was a pathological liar. (2ROA-T 2424).

. . . As part of his preparation of the school educators and Pamela Baker, Udell sent them their prior testimony. His strategy behind calling Kearse's teachers and family was to have them put everything about Kearse into context. Udell used the teachers to educate the jury, and as surrogates if the mental health experts were not believed, the teachers could say "forget the mental health experts, we are on your level, this is a good kid." (PCR 131, 158-59). The educators noted Kearse had attended a center for emotionally disturbed youth, had learning disabilities, and was emotionally disturbed. They also noted that Kearse was small for his age which supported the FAE finding of Dr. Lipman. The teachers noted Kearse had failed in school and had difficulty functioning at his correct age level. Both the teachers and family discussed Kearse's home life and the fact he was neglected. (PCR 138-41). The family reported Bertha Kearse's drinking during her pregnancy and afterwards. Again, this went to the FAE finding and other emotional problems. (PCR 141-47, 149-50).

. . . Udell did not recall whether he had birth records or not, but would be surprised that he did not get them in light of the fact the defense was seeking a FAS or FAE finding by Dr. Lipman. (PCR 127). Also obtained were Kearse's school records, which included health and mental health records done by the school. Udell had the records from the juvenile system. He supplied the mental health experts, Drs. Petrilla and Lipman,[7] with the reports/evaluations of prior mental health examinations completed by Drs. Desai and Linda Petrilla. Udell researched Kearse's prior criminal history and corresponded with Benjamin Robinson, the Superintended at the Bell Avenue Youth Detention Center. (PCR 131-33, 137-38, 147, 150). From these records Dr. Petrilla was able to find Kearse had brain damage and Dr. Lipman found FAE. (PCR 150).

Dr. Petrilla had worked with Udell on other capital cases and had testified for Kearse in the first penalty phase. The doctor was supplied with Kearse's criminal/social history documents, eye-witness statements, and prior psychological examinations by other experts, as well as all prior testimony from the experts and educators. (PCR 153-53, 155-56, 158-59). Udell's correspondence and communications with Dr. Petrilla showed that they exchanged thoughts about the case with Dr. Petrilla giving Udell suggestions. Udell wanted Dr. Petrilla to explain Kearse's juvenile offenses and show that they were petty, thus, allowing the jury to find the mitigator of "lack of prior significant criminal record." Before making this decision, Udell weighed it against opening the door to less useful information.

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[7] Dr. Lipman was hired because the defense was not successful in the first penalty phase, therefore, Udell wanted to add something to the presentation. (PCR 134).

Ultimately, the juvenile record was used because Dr. Petrilla could explain that the crimes were minor/petty. (PCR 152-56).

State's Post-Hearing Memorandum, pages 64 - 76.

As to Kearse's specific claims of ineffectiveness, it is apparent from the record that 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.

And although there is no evidence that Udell conducted a deposition of Dr. Martell, at the evidentiary hearing Udell stated that he already knew what Dr. Martell was going to say regarding "which mitigating factors didn't exist." (PCR 337-38). Udell was unable to recall the specific circumstances under which he obtained information on the substance of Dr. Martell's testimony but concluded that he most likely acquired details of Dr. Martell's report through discussions with the prosecutors and through Udell's familiarity with the work of Dr. Martell's partner, Dr. Dietz. In support of Udell's explanation, it is evident to this Court from Dr. Petrilla's and Dr. Lipman's testimony during the second penalty phase that Udell anticipated that Kearse's personality profile would be at issue, particularly with respect to any indication of malingering. Also, it is apparent that Udell knew the childhood diagnosis of conduct disorder would be problematic where Udell determined it would be an effective strategy to present the testimony of teachers and counselors to provide alternative explanations for Kearse's childhood conduct. Thus, the Court finds Udell's

strategy to proceed without deposing Dr. Martell reasonable under the circumstances.

As to Kearse's claims that Udell was ineffective for failing to adequately prepare Dr. Lipman, the Court finds that Kearse fails to meet the burden of proving ineffective assistance of counsel. At the evidentiary hearing it was established that Dr. Lipman did not have access to a transcript of Rhonda Pendleton's eyewitness testimony. However, Dr. Lipman testified that he was provided the substance of Pendleton's observations of Kearse during the traffic stop but that this method of receiving information was inferior to receiving a transcript of the testimony and having an opportunity to interview Pendleton with respect to Kearse's demeanor at the time of the murder. (PCR 481-82). Even if Udell failed to provide the transcript and Dr. Lipman was not provided the opportunity to interview Pendleton, the Court finds 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.

In addition, Kearse challenges Udell's examination of Dr. Lipman concerning his reliance on other mental health experts. Kearse contends that Udell improperly exposed the weakness in Dr. Lipman using another doctor's work. The Court evaluated this claim in the context of Dr. Lipman's penalty phase testimony. The Court finds that Udell was clarifying Dr. Lipman's consultation with other experts in response to the State's bench challenge that Dr. Lipman was practicing psychology without a license. Further, the Court finds no bar to Dr. Lipman testifying to the other mental health experts' opinions upon which he relied. Although Kearse can point to examples where these experts could have been more authoritative in delivering their opinions first- hand, 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.

Next, Kearse cites to Udell's cross examination of Dr. Martell as evidence that Udell was inadequately prepared to present a case of mental mitigation. Kearse contends that Udell should have attacked Dr. Martell's method of conducting the compelled mental health examination of Kearse, should have called Dr. Alan Friedman to testify directly to rebut Dr. Martell's opinion that Kearse was malingering, and should have enabled Dr. Lipman to perform a qualitative analysis of Kearse's neuropsychological test results in comparison with published data. The Court finds that even though Udell did not pursue these approaches to undercut Dr. Martell's opinion, 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.

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 order made by Kearse's childhood psychiatrist Dr. Desai. 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 of 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.

CLAIM V

THE DEFENDANT'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS. COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

Kearse claims that counsel was ineffective for failing to object to the introduction of non-statutory aggravating circumstances thereby rendering Kearse's death sentence fundamentally unfair. Kearse contends that the prosecutor's comments characterizing Kearse as a bully who didn't want to work and as lacking in redeeming value amounted to non-statutory aggravating factors. The Court disagrees and finds the argument, when taken in context, fair reply in contradiction of Kearse's evidence of mitigation. (2ROA 2547-2589, 2594, 2612-2615.) *Breedlove v. State*, 413 So. 2d 1, 18 (Fla. 1982).

In addition, Kearse claims that the trial court improperly considered lack of remorse as a non-statutory aggravating circumstance. However, in support Kearse provides an inaccurate citation to the record. Further, examination of the sentencing order reveals no

reference to remorse in support of the aggravating circumstances. Thus, the Court finds this portion of the claim legally insufficient.

CLAIM VI

THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY PREJUDICIAL PRETRIAL PUBLICITY, BY THE LACK OF AN ADEQUATE CHANGE OF VENUE, AND BY THE EVENTS IN THE COURTROOM DURING THE TRIAL. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD AND/OR THE TRIAL COURT ERRED.

The sixth claim involves three issues. In the first issue, Kearse claims that the trial court erred or trial counsel was ineffective for changing venue of the 1991 guilt phase from St. Lucie County to Indian River County. Kearse contends that "[t]he inflammatory nature of the pretrial publicity which saturated the community up to and including the time of Mr. Kearse's trial clearly narrated a different change of venue." (See amended motion, item 5, page 46.) However, Kearse alleges no facts to demonstrate that the change of venue to Indian River County was improper or to show how the change of venue otherwise prejudiced the outcome of the guilt phase.[8] Thus, the Court finds this claim legally insufficient.

In the second issue, Kearse claims that he was denied a fair trial due to the presence of uniformed law enforcement officers in and around the courtroom during the 1991 guilt phase. Kearse contends that "[the] presence of a multitude of officers, in a case

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[8] Examination of the record reveals that venue was never raised as an issue on Kearse's first appeal. However, venue was raised on appeal of the second penalty phase where Kearse challenged the decision denying change of venue back to St. Lucie County. No abuse of discretion was found in keeping venue in Indian River County. *Kearse*, 770 So. 2d at 1123-24 (Fla. 2000).

involving a police officer victim, creates an unacceptable risk . . . of impermissible factors coming into play." (See amended motion, item 11, page 48.) Kearse avers that the presence of the officers created a hostile courtroom and a threat to the trial process. However, Kearse alleges no facts to explain the unacceptable risk, the impermissible factors, the threat, or the hostile courtroom created by the mere presence of the officers; and Kearse does not otherwise demonstrate prejudice caused by the conduct of the officers. Further, Kearse did not raise this constitutional challenge on direct appeal. Thus, the Court finds this claim legally insufficient and procedurally barred.

In the third issue, Kearse claims that the second penalty phase was tainted by juror misconduct. This matter was raised on direct appeal where Kearse challenged the denial of a motion to interview jurors for alleged misconduct. The Florida Supreme Court found that Kearse's allegations did not meet the standard for juror interviews and thus found that the court did not err in denying the motion. *Kearse*, 770 So. 2d at 1127-28. Therefore, the Defendant's claim is procedurally barred where the issue was raised and rejected on appeal.

CLAIM VII

THE FLORIDA CAPITAL SENTENCING PROCEDURES VIOLATED THE DEFENDANT'S RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT ON ALL OF THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

Kearse claims that Florida's capital sentencing procedures violate the Defendant's constitutional guarantee pursuant to *Ring v. Arizona*, 122 S. Ct. 2428 (2002), to a jury determination of guilt on the aggravating circumstances required for a death sentence. Kearse's claim is procedurally barred where the Supreme Court of Florida has found that

Ring does not apply retroactively in Florida to cases on collateral review and where Kearse's judgment and sentence became final in 2001 before *Ring* was decided. *Johnson v. State*, 30 Fla. L. Weekly S297, 35 (April 28, 2005).

CLAIM VIII

THE DEFENDANT CLAIMS THAT HIS DEATH SENTENCE IS UNCONSTITUTIONALLY BASED ON AN AUTOMATIC AGGRAVATOR OF FELONY MURDER.

Kearse contends that his death sentence is unconstitutionally based upon an automatic aggravator of felony murder. Kearse claims that the issue was inadequately preserved by trial counsel and/or inadequately raised by appellate counsel. The Court finds Kearse's claim as to trial counsel merely conclusory and his claim as to appellate counsel not cognizable in a Rule 3.851 motion. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989); *Downs v. State*, 740 So. 2d 506, 509 n. 5. (Fla. 1999). Therefore, both claims are procedurally barred and Kearse is not entitled to relief.

CLAIM IX

THE DEFENDANT IS INSANE TO BE EXECUTED.

Kearse claims that he is insane to be executed. This claim is not ripe for review since no death warrant has been signed. *Griffin v. State,* 866 So. 2d 1, 21-22 (Fla. 2003), *cert. denied*, *Griffin v. Florida*, 125 S. Ct. 413 (U.S., 2004). Therefore, Kearse is not entitled to relief.

The Defendant's motion is denied. The Defendant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED in Chambers in Ft. Pierce, St. Lucie County, Florida this 30th day of August, 2005.

MARC A. CIANCA
SENIOR CIRCUIT JUDGE

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