NO. 25-6926

IN THE
SUPREME COURT OF THE UNITED STATES

BILLY LEON KEARSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR MARCH 3, 2026, AT 6:00 P.M.

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

I. Whether certiorari review should be denied because the Florida Supreme Court rejected the successive postconviction claims based on independent and adequate state law grounds of untimeliness, lack of diligence to excuse the time bar, procedural bar and/or legal insufficiency?

II. Whether this Court should grant review of a decision of the Florida Supreme Court that affirmed the denial of an intellectual disability claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), based on an adequate and independent state law procedural bar?

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The decision of which Petitioner seeks discretionary review is *Kearse v. State*, No. SC2026-0250 & SC2026-0251, 2026 WL 523132 (Fla. Feb. 25, 2026). This capital case is before this Court upon the decision of the Florida Supreme Court denying Petitioner's successive postconviction appeal and successive state habeas petition under an active death warrant.

JURISDICTION

Petitioner, Billy Leon Kearse ("Kearse"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision, however, because the issues raised were resolved on independent and adequate state law grounds this Court lacks jurisdiction.

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

The State does not accept Kearse's statement of the facts The facts directly contradict the complete factual development present in the record. Kearse relies on selected portions of his first self-serving police statement to cast aspersions on the victim, Officer Danny Parrish, to suggest Parrish was responsible for Kearse's reaction, and to excuse his own conduct. (Pet. 6; S1ROA-R 8-19). The record refutes Kearse's revision of the facts.

Kearse is under an active death warrant based on his November 8, 1991, conviction for first-degree murder of Fort Pierce Police Officer Danny Parrish and his March 24, 1997, death sentence. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995) (affirming convictions, remand for re-sentencing); *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000) (affirming death sentence), *cert. denied*, 532 U.S. 945 (2001). Over the thirty-five years since the murder, Kearse pursued direct appeals, four state postconviction motions with an evidentiary hearing and related appeals, two state habeas corpus petitions, and federal habeas review, none of which were successful.[1]

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[1] To the extent that prior cases are relevant to the issue before this Court the following cases are referenced: **Direct Appeal** ("1ROA-R" for the record and "1ROA-T" for the transcript) case number SC1960-79037 - *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); **Direct Appeal of Resentencing** ("2ROA-R" "2ROA-T") case number SC1960-90310 - *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), *cert. denied*, 532 U.S. 945 (2001); **Original Postconviction appeal and petition for state habeas review** ("1PCR") case number SC05-1876 - *Kearse v. State*, 969 So. 2d 976 (Fla. 2007) (affirming summary denial of claim that his 1991 trial was unfair due to uniformed officers in the courtroom among other claims and denying claim his death sentence is unconstitutional based on an expansion of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005)); First Successive Postconviction Appeal ("2PCR") case number SC08-1986 - *Kearse v. State*, 11 So. 3d 355 (Fla. 2009) (unpublished); **Second Successive Postconviction Appeal**

On January 29, 2026, Florida Governor Ron DeSantis signed a death warrant setting Kearse's execution for March 3, 2026. On February 9, 2026, Kearse filed his fourth successive postconviction motion, fifth overall, which was summarily denied. (5PCR 915-36). He appealed under case number SC2026-0251 and filed a related state habeas petition in case number SC2026-0250. On February 25, 2026, the Florida Supreme Court affirmed the summary denial of postconviction relief and denied the state habeas petition. *Kearse v. State*, No. SC2026-0250 & SC2026-0251, 2026 WL 523132 (Fla. 2026).

Facts of Crime and Penalty Phase

On direct appeal, the Florida Supreme Court set forth the facts of the crime. Kearse was charged with robbery with a firearm and first-degree murder in the January 18, 1991, death of Fort Pierce police officer Danny Parrish. *Kearse v. State*, 662 So. 2d 677, 680 (Fla. 1995). Upon seeing "Kearse driving in the wrong direction on a one-way street," Parrish called in the vehicle's license plate number and stopped the car. *Id.* When Kearse failed to produce a driver's license and gave multiple aliases, none matching "any driver's license history," Parrish demanded

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("3PCR") case number SC11-244 – *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011) (unpublished); **Successive state habeas petition** case number SC12-1349 – *Kearse v. Tucker*, 100 So. 3d 1148 (Fla. 2012 (denying petition on the merits; table decision without published opinion); **Third Successive Postconviction Appeal** ("4PCR") case number SC18-458 – *Kearse v. State*, 252 So. 3d 693 (Fla. 2018), *cert. denied*, 587 U.S. 922 (2019); **Fourth Successive Postconviction Appeal/Active Warrant** - *Kearse v. State*, No. SC2026-0250 & SC2026-0251, 2026 WL 523132 (Fla. 2026) ("5PCR") and **Federal Habeas Corpus Appeal** - *Kearse v. Sec'y, Fla. Dep't of Corr.*, No. 15-15228, 2022 WL 3661526 (11th Cir. 2022) (affirming denial of federal habeas petition including Eighth Amendment challenge to his death sentence based on *Atkins* and *Roper*), *cert. denied*, 143 S. Ct. 2439 (2023). An "S" before the record type indicates a supplemental record.

Kearse get out of his vehicle and place his hands on the car's roof. *Id*. As "Parrish was attempting to handcuff Kearse, a scuffle ensued,[2] Kearse grabbed Parrish's weapon and fired fourteen shots," thirteen of which "struck Parrish, nine in his body and four in his bullet-proof vest."[3] *Id*. "A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female[4] drive away from the scene, and called for assistance" on Officer Parrish's radio. *Id*. Paramedics

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[2] During his initial police interview, Kearse stated he had scratches on his body from the fight with the officer but upon further questioning, Kearse admitted that the scratches were the result of his earlier fight with his stepfather. (1ROA-T1388-89). Kearse described his altercation with Parrish and explained how the handcuffs hit him in the eye; Kearse, however, admitted the contact was not intentional. Kearse told the police he used a two-handed grip when holding the gun because it gives "better control, better accuracy." (1ROA-T 1397-98). Kearse said the gun clicked fourteen times and Parrish said: "Don't do it, man, don't do it." Also, Kearse confessed "I'm sorry for what I did but I thought it was him or me." Kearse explained that he was worried because he was on probation but had yet to report and there was an outstanding warrant. (1ROA-T1400-02; S1ROA-R 26-43).

[3] One of the bullets shattered Parrish's leg below the knee and one severed his spinal cord. (1ROA-T 1537-57, 1563-64).

[4] Rhonda Pendleton was the passenger with Kearse at the time Parrish stopped Kearse. On the afternoon of the crime, Kearse told her that he had an argument with his stepfather resulting in visible scratches on his arms and neck. (1ROA-T 1452-53 1457). Later that day, Pendleton and Kearse went for pizza and, on the return trip, Kearse went the wrong way down a one-way street. Parrish pulled them over for that traffic infraction and when the officer asked Kearse for his license and registration, Kearse claimed to have left them home. Kearse gave a false name.. Parrish then asked Kearse to get out of the car and Kearse complied. When Parrish told Kearse to put his hands on top of the car, Pendleton heard Kearse say, "Don't touch me man" followed by a shot and Parrish saying, "Oh God!" When Pendelton looked toward the men, she saw Kearse wrestling with and shooting Parrish. Kearse held the gun with both hands. Kearse then got back in the car and drove off, running a stop sign. Pendelton saw a taxi as they left the area. When Pendelton asked Kearse why he shot the officer, he admitted "that his probation was suspended and the police were looking for him already." (1ROA-T 1458-70).

"transported Parrish to the hospital where he died from the gunshot injuries."[5] *Id*.

Responding officers "issued a be-on-the-lookout (BOLO) for a black male driving a dark blue 1979 Monte Carlo." *Id*. Law enforcement found the car and Officer Parrish's gun at the address where Kearse was arrested. *Id*. After being read his *Miranda*[6] rights "and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop." *Id*. (1ROA-T 1296-97). Kearse's jury convicted him of both indicted counts and recommended death. *Id*.

On direct appeal, Kearse raised twenty-five issues, none involving the fairness of his 1991 trial based on uniformed officers being in the courtroom. *Kearse*, 662 So. 2d at 680-81. The Florida Supreme Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase trial. *Kearse*, 662 So. 2d at 686.

The new penalty phase began on December 9, 1996, and the State offered testimony to support the first-degree murder and robbery of Officer Parrish for which Kearse was convicted mirroring the testimony provided in the initial trial. *See Kearse v. State*, 770 So. 2d 1119, 1121-22 (Fla. 2000). The defense mitigation case consisted of Kearse's testimony along with the testimony of school officials, family members, a friend, and mental health professionals. These witnesses discussed Bertha Kearse's drinking during her pregnancy, Kearse's difficult family life, and the designation by the school that Kearse was learning disabled and

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[5] All of the bullets recovered from Parrish's body were fired from his service weapon which was found at the scene where Kearse said he had hidden it. (1ROA-T 1285-96, 1387-1604, 1627-39).

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

emotionally dysfunctional. The defense case also included that Kearse suffered from Fetal Alcohol Effect, had brain dysfunction, concentration and behavioral problems, and had low intellectual function but was not intellectually disabled. Dr. Petrilla offered that two statutory mental health mitigators applied to Kearse: (1) Kearse was suffering under extreme emotional disturbance at the time of the crime and (2) due to his emotional disturbance, Kearse was substantially incapable of conforming his conduct to the requirements of the law. *See Kearse v. State*, 969 So. 2d 976, 983-85 (Fla. 2007).

For the State, Dr. Martell, an expert in forensic neuropsychology, concluded that neither mental health mitigator applied, that there was no evidence of severe mental or emotional disturbance, and that Kearse was malingering. The doctor also rejected the notion Kearse was confabulating, instead finding he was a pathological liar with an antisocial personality disorder. Dr. Martell refuted the opinion that Kearse suffered from Fetal Alcohol Effect. (2ROA-T 2355, 2357-58, 2369-76, 2380-83, 2388-89, 2412).

The jury unanimously recommended death, and on March 25, 1997, the trial court again sentenced Kearse to death for the first-degree murder of Officer Parrish. In aggravation, the court found: the "murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement, and the victim was a law enforcement officer engaged in performance of his official duties (merged into one factor)." *Kearse*, 770 So. 2d at 1123. The statutory mitigator of "age" was given "some but not much weight." *Id*. Kearse offered forty non-statutory

mitigating factors, but the court found only that "Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this resulted in psychological and emotional problems." *Id*. In sentencing Kearse, the trial court determined that the established mitigators "neither individually nor collectively, were 'substantial or sufficient to outweigh the aggravating circumstances.'" *Id*.

Kearse raised twenty-two issues in his re-sentencing appeal none challenging the fairness of his re-sentencing based on uniformed officers in the courtroom. *Kearse*, 770 So. 2d at 1122-23. The Florida Supreme Court rejected each claim and affirmed the death sentence. *Kearse*, 770 So. 2d at 1135. On March 26, 2001, this Court denied certiorari. *Kearse v. Florida*, 532 U.S. 945 (2001).

Original Postconviction Litigation

On October 3, 2001, Kearse filed a "shell" motion under Florida Rule of Criminal Procedure 3.851, a verified Rule 3.851 motion on June 21, 2002, and an amended motion on March 1, 2004. (1PCR 1, 1110-84, 1191-92, 1197, 1458-1572). The postconviction court held an evidentiary hearing on claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984), alleged violations under *Brady v. Maryland*, 373 U.S. 83 (1963), and allegations of newly discovered evidence. A claim challenging the uniformed officers in the 1991 courtroom was summarily denied. He did not raise a claim challenging the fairness of his 1996 penalty phase based on the presence of uniformed officers in the courtroom. At the evidentiary hearing, Kearse presented his trial counsel, Robert Udell, Esq., and multiple expert and lay witnesses. The State presented Dr. Daniel

Martell. Relief was denied and Kearse appealed. (1PCR-37 5703-40).

On postconviction appeal, Kearse raised four claims and two claims in his state habeas corpus petition. *Kearse*, 969 So. 2d at 982. The appeal addressed: (1) ineffectiveness of penalty phase counsel; (2) error to deny his newly discovered evidence claim; (3) error to deny public records; and (4) error to summarily deny several postconviction claims including officers in the 1991 courtroom. *Id.* at 982. The state habeas petition addressed ineffective assistance of appellate counsel, that lethal injection is unconstitutional, and his death sentence is unconstitutional based on *Atkins* and *Roper*. *Id.* at 990. The Florida Supreme Court affirmed the denial of postconviction relief and denied the habeas petition. *Id.* at 989, 992.

In the state habeas litigation, the Florida Supreme Court rejected the claim that Kearse's low mental functioning (79 IQ) and age (eighteen years-three months) at the time of the murder rendered his capital sentence unconstitutional opining:

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

Kearse, 969 So. 2d at 991–92. Again, citing *Hill*, 921 So. 2d at 584, the court rejected the claim that Kearse's age, just over eighteen-years-old at the time of the crime,

combined with "low level intellectual functioning and mental and emotional impairments," bars his execution under *Roper v. Simmons*, 543 U.S. 551 (2005). *Kearse*, 969 So. 2d at 991-92.

Successive Postconviction Litigation Cases

Between 2007 and 2019, Kearse filed multiple successive rule 3.851 motions and a successive state habeas petition. Relief was denied on all. *See Kearse v. State*, 11 So. 3d 355 (Fla. 2009) (affirming denial of challenge to the 2007 lethal injection protocols); *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011) (affirming the denial of request to reconsider *Strickland* claim because trial counsel was disbarred recently); *Kearse v. Tucker*, 100 So. 3d 1148 (Fla. 2012) (denying on the merits state habeas petition seeking reconsideration of "newly discovered evidence claim" rejected in original postconviction appeal) (table - unpublished); *Kearse v. State*, 252 So. 3d 693, 694 (Fla. 2018) (rejecting *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) challenge as Kearse received a unanimous jury recommendation and *Hurst* was not retroactive to cases final in 2001), *cert. denied*, 587 U.S. 922 (2019).

Federal Litigation

Kearse filed his federal habeas corpus petition on July 16, 2009, and, after litigating its timeliness,[7] on September 1, 2015, the petition was denied on the merits. On appeal, the Eleventh Circuit Court of Appeals addressed three claims including whether Kearse's death sentence is unconstitutional under an

[7] *Kearse v. Sec'y, Fla. Dep't of Corr.*, 669 F.3d 1197 (11th Cir. 2011) (remand for consideration of timeliness of federal petition); *Kearse v. Sec'y, Fla. Dep't of Corr.,* 736 F.3d 1359 11th Cir. 2013) (remand for consideration of petition on the merits).

extension/combination of *Atkins* and *Roper*. On August 25, 2002, each claim was rejected. *Kearse v. Sec'y, Fla. Dep't. Corr.,* No. 15-15228, 2022 WL 3661526 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2439 (2023).

Fourth Successive Postconviction Litigation (Active Warrant)

On February 3, 2026, Kearse filed public record demands on multiple agencies, including the Florida Department of Corrections, and after a hearing, all demands were denied. (5PCR 494-501). On February 6, 2026, Kearse sought to extend the time for the filing of his successive postconviction relief motion. After the Florida Supreme Court ruled on the same request, the trial court extended the date for the filing of the successive Rule 3.851 motion by two days. (5PCR 557-61).

On February 9, 2026, Kearse filed his fourth successive motion wherein he raised three claims: (1) his 1996 penalty phase was unfair due to the presence of law enforcement officers in the courtroom; (2) he is intellectually disabled and barred from execution; and (3) the "surprise" signing of his death warrant coupled with the shortened warrant period denies him due process. (5PCR 599-742). Simultaneously, he filed motions to stay his execution and interview Juror Matthews. (5PCR 743-58). He also demanded additional public records from the Attorney General, State Attorney, and Saint Lucie County Sheriff. (5PCR 569-98). The Agencies and State filed objections to the demands and to the motion to interview the juror. (5PCR 839-46).

After the State responded to the successive motion on February 11, 2026, Kearse filed a Motion to Declare § 921.137(4), Fla. Stat. Unconstitutional, asserting

the standard of proof, "clear and convincing," was unconstitutional for being too high. The State objected. (5PCR 766-91,792-800, 832-36). Later that day, the court heard argument. (5PCR 871-913). On the following day, the court cancelled the evidentiary hearing and denied Kearse's renewed Motion to Continue, the additional public records demands, and Motion to Interview Juror. (5PCR 956-59). On February 15, 2026, the postconviction court summarily denied relief. (5PCR 915-36). Kearse appealed and filed a second successive state habeas petition.

On February 25, 2026, the Florida Supreme Court affirmed the denial of relief and denied habeas relief. *Kearse,* 2026 WL 523132 at *2-7. The Florida Supreme Court rejected each claim on state law grounds concluding the claims were either untimely, procedurally barred, or legally insufficient.[8] The constitutional challenge to the burden of proof was not reached as the underlying intellectual disability claim was rejected on procedural grounds. *Kearse,* 2026 WL 523132 at *6. Kearse seeks certiorari review of that decision.

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[8] The Florida Supreme Court found: (1) Kearse's claim of newly discovered evidence of a constitutionally unfair penalty phase based on uniformed officers in the courtroom to be untimely and procedurally barred; (2) Kearse's request to interview a juror untimely and no good cause was offered for the late request nor did Kearse assert a legally valid basis for the request; (3) Kearse's public records demands were untimely and were filed without leave of the court and the denial of access to the records did not violate the state or federal constitutions as the allegations were vague and conclusory; (4) Kearse's claim of newly discovered evidence of intellectual disability based on a post-warrant IQ test was untimely, procedurally barred, and legally insufficient; (5) the Court did not have to reach the constitutional challenge to the burden of proof necessary to establish intellectual disability because the underlying claim was untimely, procedurally barred, and legally insufficient; and (6) Kearse's claim that his capital sentence was unconstitutional under an extension and combination of *Atkins* and *Roper* was procedurally barred. *Kearse*, 2026 WL 52313 *2-7.

REASONS FOR DENYING THE WRIT

ISSUE I

Certiorari review should be denied because the Florida Supreme Court rejected the successive postconviction claims based on independent and adequate state law grounds of untimeliness, lack of diligence to excuse the time bar, procedural bar and/or legal insufficiency.

Kearse challenges the Florida Supreme Court's decision on his post-warrant litigation. Although the Florida Supreme Court applied independent and adequate state law grounds to deny relief based on procedural bars, Kearse claims that the ruling shows that the Florida Supreme Court failed to provide adequate appellate review in violation of the Constitution. This attempt to create a constitutional issue where there is none should be rejected. Equally clear is that Kearse's allegation is nothing more than disappointment with the Florida Supreme Court recognizing that the uniformed officers' presence in the 1996 courtroom was discoverable decades earlier and that he could have pursued his new stand-alone *Atkins* claim any time after his case became final in 2001 through the ensuing twenty-five years. Kearse's failings do not transform the Florida Supreme Court's application of state procedural law into a constitutional claim necessitating this Court's consideration. The procedural grounds the state courts used to deny relief are well recognized as independent and adequate state law grounds which do not raise a colorable constitutional claim or a basis for certiorari review. This Court should deny certiorari.

When both state and federal questions are involved in a state court

proceeding, this Court has no jurisdiction to review the case if the state court judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the state court's decision. *See Foster v. Chatman*, 578 U.S. 488, 497 (2016). This "adequate and independent state grounds" rule stems from the fundamental principle that this Court lacks jurisdiction to review matters of state law. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). This Court has stated that its "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And [that] power is to correct wrong judgments, not to revise opinions" or "render an advisory opinion." *Id.* "[I]f the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Id.* at 126. Thus, if a state court's decision is separately based on state law, this Court "will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

A. Overview

In order to address Kearse's first question, this Court must recall that since the first-degree murder of Officer Parrish in January 1991, Kearse has litigated two direct appeals, five postconviction relief motions with their attendant appeals, three state habeas petitions, and a federal habeas petition and appeal.[9] Included in these

[9] *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), *cert. denied*, 532 U.S. 945 (2001); *Kearse v. State*, 969 So. 2d 976 (Fla. 2007); *Kearse v. State*, 11 So. 3d 355 (Fla. 2009); *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011); *Kearse v. Tucker*, 100 So. 3d 1148 (Fla. 2012); *Kearse v. State*, 252 So. 3d 693 (Fla. 2018), *cert. denied*, 587 U.S. 922 (2019); *Kearse v. Sec'y, Fla. Dep't of Corr.*, No. 15-

challenges were allegations that his 1991 trial was unfair because uniformed officers were in the courtroom and that he should be exempt from the death penalty because of an extension of *Atkins* and *Roper* due to his IQ,[10] mental health, and his age at the time of the crime. In his post-warrant fifth postconviction motion, Kearse raised, for the first time, that too many uniformed officers were in his 1996 courtroom and that he is intellectually disabled.

Kearse comes before this Court asserting that the Florida Supreme Court abdicated its duty to adjudicate his appeal by resting its decision on procedural grounds including lack of diligence. A comparison of state postconviction rules and federal habeas statutes governing successive postconviction claims based on newly discovered evidence establishes that Florida's review is more lenient than Federal standards which also apply procedural grounds to deny successive claims. Under Florida law, to bring a successive postconviction claim outside of the one-year time limitation based on newly discovered evidence, the defendant must prove both that (1) the evidence was not known by him, his counsel, or the trial court at the time of the trial and could not have been known by the *use of due diligence*, and (2) that the evidence must be of such a nature that *it would probably produce an acquittal on retrial*. *Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (emphasis supplied). Conversely, in order to obtain a second or successive federal habeas review based on

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15228, 2022 WL 3661526 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2439 (2023); *Kearse v. State*, No. SC2026-0250 & SC2026-0251, 2026 WL 523132 (Fla. Feb. 25, 2026).

[10] The 1991 and 1996 testimony revealed that Kearse had WAIS-R scores of 78 from his school years and 79 when tested after the murder. *Kearse*, 969 So. 2d at 989, 991-92.

newly discovered evidence, the defendant must first gain the approval of the appropriate United States Circuit Court of Appeals and show "(B)(i) the factual predicate for the claim could not have been discovered previously through the *exercise of due diligence*; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be *sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense*. *See* 28 U.S.C.A. § 2244 (2)(B)(i) (ii) (emphasis supplied). The "would probably produce an acquittal" standard applied in state court is more lenient than the "clear and convincing evidence" standard that no reasonable factfinder would have found the applicant guilty. Kearse cannot show a constitutional infirmity in his state successive postconviction review.

B. Kearse Has Not Established a Constitutional Claim.

In support of his constitutional challenge, Kearse suggests that the Florida Supreme Court abdicated its appellate review because it did not reverse any post-warrant cases in 2025 or 2026. (Pet. 22). For support he points to Justice Stevens's concurring opinion in *Barclay v. Florida*, 463 U.S. 939, 973 (1983), discussing the number of cases the Florida Supreme Court reversed on direct appeal. That is a false comparison and should not sway this Court to consider certiorari review. In post-warrant cases in Florida, an inmate has litigated his direct appeal, state postconviction litigation including a state habeas petition, and presented his federal habeas petition to the United States district and appellate court. Many of the

Florida defendants, like Kearse, have conducted successive state postconviction litigation, some spanning twenty or thirty years. *See Heath v. State*, No. SC2026-0112, 2026 WL 320522 (Fla. Feb. 3), *cert. denied*, No. 25-6746, 2026 WL 363902 (U.S. Feb. 10, 2026); *Jones v. State*, 419 So. 3d 619 (Fla.), *cert. denied*, 146 S. Ct. 79 (2025); *Hutchinson v. State*, 416 So. 3d 273 (Fla.), *cert. denied*, 145 S. Ct. 1980 (2025); *Zakrzewski v. State*, 415 So. 3d 203 (Fla.), *cert. denied*, 146 S. Ct. 57 (2025); *Gudinas v. State*, 412 So. 3d 701 (Fla.), *cert. denied*, 145 S. Ct. 2833 (2025); *Tanzi v. State*, 407 So. 3d 385 (Fla.), *cert. denied*, 145 S. Ct. 1914 (2025). The fact that there have not been any post-warrant reversals over the last year does not indicate a lack of appellate review, only that there was nothing of substance that had not been raised during the prolonged postconviction process available to Florida capital defendants rendering their post-warrant claims untimely and procedurally barred.

Moreover, Kearse does not inform this Court what would be the appropriate number of cases that should be reversed to satisfy an observer that the appeal process is being upheld. Fatal to his petition, Kearse has not cited a case where this Court announced any percentage of reversals necessary to prove an appellate court is providing constitutionally adequate review. Kearse's argument is misleading and not worthy of certiorari review.

Similarly unavailing for his attack on the Florida Supreme Court's denial of relief is Kearse's suggestion that the state law requires he have an opportunity to present evidence. (Pet. 22). Kearse had his opportunity to present fully plead, legally sufficient colorable claims and to explain why those claims were not raised

in a timely manner. Under Florida law, each claim must include "a detailed allegation of the factual basis for any claim, for which an evidentiary hearing is sought." *See* Fla. R. Crim. P. 3.851(e)(1)(D). When a successive claim is filed, Florida law provides it must be dismissed "if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C)." *See* Fla. R. Crim. P. 3.851(e)(2). Kearse's failure to make that minimal showing does not call into question the Florida Supreme Court's conclusion that the claims were not timely filed or discovered with due diligence. The state circuit court and Florida Supreme Court were in the position to assess Kearse's claims of newly discovered evidence and the diligence he used in discovering them decades after his case became final. The Florida Supreme Court's determination that Kearse was not diligent in discovering uniformed officers attended the 1996 penalty phase or in pursuing his *Atkins* claim any time after 2002 and certainly within a year of October 2024, does not establish that the Florida Supreme Court abdicated its duty to conduct an appellate review. In fact, it shows the opposite as the state courts addressed the preliminary procedural requirements first, as required by Florida law.

Kearse's suggestion that the Florida Supreme Court blindly adhered to the

State's procedural defenses (Pet. 23) is belied by the fact that the Court independently assessed Kearse's *Atkins* claim and determined that it was legally insufficient for not alleging that Kearse had current adaptive deficits to support his intellectual disability claim,[11] an argument not plead by the State or found by the trial court. Under Florida law, in conformance with *Atkins*,

> "Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty." . . . A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) *concurrent deficits in adaptive behavior*; and (3) manifestation of the condition before age eighteen. *See* . . . § 921.137(1), Fla. Stat. The defendant has the burden to prove that he is intellectually disabled by clear and convincing evidence. . . . § 921.137(4), Fla. Stat. . . . .

Salazar v. State, 188 So.3d 799, 811–12 (Fla. 2016) (citations omitted, emphasis supplied). *See also, Williams v. State*, 226 So. 3d 758, 768 (Fla. 2017). In *Dufour v. State*, 69 So. 3d 235, 248 (Fla. 2011), the Florida Supreme Court defined what "concurrent deficits" meant in an intellectual disability claim. It noted that the definition in § 921.137 and Fla. R. Crim. P. 3.203 provides that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition which means "that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there

[11] A review of Kearse's post-warrant Rule 3.851 motion shows that his claim of adaptive deficits rests solely on information from his school years. (5ROA 615-16; Petitioner's Appendix Vol. 2 pgs. 57-59). Kearse's mental health expert during the warrant, Dr. Ouaou, administered the WAIS-V, but did not report administering tests for adaptive functioning. His review and discussion of adaptive deficits relied upon reports/records/testimony from Kearse's school years. (5PCR 732-33; Petitioner's Appendix Vol. 2 pgs. 174-75).

must be current adaptive deficits. *See Jones v. State*, 966 So.2d 319, 326 (Fla. 2007)." *Dufour*, 69 So. 3d at 248. Because Kearse relied on records and testimony regarding his status before he turned eighteen, he did not make out a legally sufficient claim. Clearly, the Florida Supreme Court's assessment was correct and proves it thoroughly and independently reviewed Kearse's claim.

C. The Florida Supreme Court's Finding of Lack of Diligence Rendering the Claims Untimely and Procedurally Barred Establishes the Judgment Rests on Independent and Adequate State Law Grounds.

Kearse argues that the Florida Supreme Court erred in finding a lack of diligence in bringing his constitutional challenge to officers in his 1996 courtroom and in raising an *Atkins* claim. Kearse asserts that he could not have discovered that there were uniformed officers in his 1996 courtroom absent Juror Matthew's post-warrant social media comment on February 3, 2026. This is despite the fact that his 1996 counsel noted the presence of officers in the 1991 trial and alerted the trial court that an order on the matter may be required if it reached a critical point during resentencing. (2ROA-R 532-33; 2ROA-T 216-18).[12] Kearse's suggestion that because the record contained no direct reference to the presence of law enforcement in the courtroom, he had no inkling that this was a potential issue and further he had no basis to investigate it is not well taken.

In Florida, postconviction review is not limited to what may be gleaned from the record. In fact, postconviction counsel is appointed at the time the direct appeal

[12] This fact alone shows that collateral counsel could have investigated whether there were officers in the 1996 courtroom. At a minimum he could have asked his client, trial counsel, and the defense witnesses what they saw.

mandate is issued. Kearse has not pointed to a case which holds that postconviction counsel may not go outside the appellate record to make a case for postconviction relief. It is expected that postconviction counsel will independently investigate trial counsel's effectiveness and raise those issues which collaterally attack the conviction and sentence. Counsel is not limited to the cold record. Collateral counsel is provided access to public records, trial counsel's file, and to investigate the case through discussion with his client and investigation/contact with defense counsel, and other potential witnesses, including experts, witnesses, and the friends and family members of the defendant to name a few. Those investigations could include discussions about the case, what transpired in the courtroom, and the atmosphere of the trial to discern what collateral issues should be raised on postconviction review. *See* Fla. R. Crim. P. 3.851 and 3.852. *See also*, § 27.7001 et. seq.

Likewise, Kearse argues that he could not have raised an *Atkins* claim until February 2026 after the issuance of the WAIS V. This is despite his raising a related *Atkins*/*Roper* issue in his initial state habeas petition but not seeking new IQ testing after *Hall v. Florida*, 572 U.S. 701 (2014) and *Walls v. State*, 213 So. 3d 340 (Fla. 2016) were issued, after the publication of the Weschler Adult Intelligence Scale IV (WAIS) in 2008, or not for fifteen months after the newest IQ test, the WAIS V, was published in October 2024. Further, he refuses to accept that he failed to plead that he has concurrent deficits in adaptive functioning which rendered his claim legally insufficient under Florida law.

Kearse asks this Court to excuse his failings in not bringing these claims

during the more than two decades of postconviction litigation by asserting he was not expected to pursue a futile act. (Pet. 29). As noted above, Kearse was content to rest on his WAIS-R results from 1981 and 1991 without seeking a new evaluation even after the WAIS-IV was published. He also did not raise the *Atkins* claim after *Hall v. Florida* and *Walls* were decided where this Court found that a brightline cutoff of IQ scores without consideration of the standard error of measurement was improper. He also waited over a year after the WAIS V was published to raise the claim. Kearse's contention that he could not raise his *Atkins* claim before February 2026 because he is not required to pursue a futile act is not supported by the record. He cannot speculate that the claim would have been a futile act because he never took the intervening WAIS-IV test. Because he could have investigated and pursued an *Atkins* claim well before his warrant was signed, the Florida Supreme Court correctly applied state procedural law and found it barred in the post-warrant litigation. *See Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025) (finding "in an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred"). The claim that the Florida Supreme Court somehow erred in applying state procedural law under these circumstances cannot be countenanced. This Court should decline Kease's suggestion and deny certiorari.

ISSUE II

This Court Should Deny Certiorari Review of the Florida Supreme Court's Judgment Affirming the Denial of the Intellectual Disability Claim Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), Because It Was Based on an Adequate and Independent State Law Procedural Bar.

Kearse seeks review of the Florida Supreme Court's decision finding his intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), untimely, procedurally barred, and insufficiently pled in affirming the denial of relief. Kearse argues that he is exempt from execution because he is intellectually disabled under *Atkins* (barring execution of the intellectually disabled). He argues that categorical prohibitions from execution, such as *Atkins* claims, should not be subject to procedural bars. However, this Court lacks jurisdiction over this question due to the adequate and independent state law bars. The issue is even less worthy of this Court's consideration now when it involves a jurisdictional procedural bar and is being raised during active warrant litigation. Review should be denied.

A. Jurisdiction and Matters of State Law

Whether a claim of intellectual disability, filed in state court, pursuant to a state rule of court, is procedurally barred and insufficiently pled is solely a matter of state law. These procedural bars were adequate and independent state law grounds precluding this Court's review. This Court has explained that if "the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This Court's

jurisdiction "fails" if the non-federal ground is independent and adequate to support the judgement. *Long*, 463 U.S. at 1038, n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). If the state law ground is not clear from the face of the state court's opinion, this Court assumes the state court decided the question based on federal law. *Glossip v. Oklahoma*, 604 U.S. 226, 242-43 (2025). A decision is independent if it "does not depend on a federal holding" and is "not intertwined with questions of federal law." *Glossip*, 604 U.S. at 242 (2025) (citing *Foster v. Chatman*, 578 U.S. 488, 498 (2016), and *Long*, 463 U.S. at 1040-41). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

The Florida Supreme Court found the intellectual disability claim untimely because Kearse failed to raise it within the one-year time limitation imposed by state rule 3.851(d)(1) and Kearse did not meet any of the exceptions to that time limit specified in rule 3.851(d)(2). *Kearse*, 2026 WL 523132, at *5. Kearse's judgement and sentence were final in 2001 when this Court denied his petition for certiorari. Fla. R. Crim. P. 3.851(d)(1)(B) (judgement becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). The Florida Supreme Court also specifically addressed Kearse's purported excuse that it was only with the 2024 release of the WAIS-V that he could have "discovered" he was intellectually disabled. "To be considered timely filed as newly discovered evidence, a claim must be filed within one year of the date upon which

the claim became discoverable through due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008)". *Id.* The Florida Supreme Court again found that Kearse was not diligent in pursuing the intellectual disability claim since he failed to raise it within a year of the release of the test. *Id.*

The Florida Supreme Court also affirmed the circuit court's denial of the claim as procedurally barred, citing to *Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025) ("[I]n an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred.") The court observed that Kearse litigated numerous postconviction cases since his conviction was final as well as sought full federal review but never raised a claim that he was intellectually disabled under *Atkins*. *Kearse,* 2026 WL 523132 at *6. The decision regarding the procedural bar was based solely on state law grounds.

Finally, the Florida Supreme Court determined that Kearse failed to sufficiently plead the claim since he did not address the second prong of the intellectual disability test. Florida prohibits death sentences for intellectually disabled defendants. Florida's "Imposition of the death sentence upon an intellectually disabled defendant prohibited" statute, section 921.137(1), Florida Statutes (2024), provides:

> As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a

> standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), Fla. Stat. (2024).

Under current Florida law, if a capital defendant fails to prove any one of the three prongs of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled. *Franqui v. State*, 301 So. 3d 152, 154 (Fla. 2020); *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla. 2020) ("if a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled").

Kearse failed to plead an allegation that he *currently* suffers from adaptive deficits in functioning. *See Williams v. State*, 226 So. 3d 758, 771 (Fla. 2017) (finding that the data provided regarding Williams's adaptive deficits was "insufficient to satisfy the second prong of the intellectual disability test because it [did] not address Williams's current adaptive behavior"); *State v. Jackson*, No. 3D22-1451,2025 WL 3703628, at *6 (Fla. 3d DCA Dec. 22, 2025) (observing that "adaptive deficits must not only be present during childhood and adolescence, but also that impairment must be an ongoing issue"). "Adaptive deficits exist when at least one domain—conceptual, social, and/or practical—'is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or

more life settings at school, at work, at home, or in the community.' *Wright*, 256 So. 3d at 773." *Kearse,* 2026 WL 523132 at *6. In his postconviction motion, Kearse only pointed to, and detailed, his difficulties in functioning as a child and adolescent under the age of eighteen. Never did he state that he now has adaptive deficits. In fact, one of his teachers noted that he had learned to read and write while in prison. (5PCR 108). "Under Florida law, the first prong must exist 'concurrently' with the second prong, 'which this Court has interpreted to mean that the two must exist 'at the same time.' *Wright*, 256 So. 3d at 773 (quoting *Dufour*, 69 So. 3d at 248)." *Kearse*, 2026 WL 523132, at *6. Again, the Florida Supreme Court dispatched the issue solely on state law grounds.

The procedural bars were clear from the face of the opinion and are solely a matter of state law. The Florida Supreme Court's analysis regarding the procedural bars mentioned only state law; it was not intertwined with federal law in any manner. So, the procedural bar is jurisdictional and this Court lacks jurisdiction over this question.

This Court has explicitly recognized Florida's time and procedural bars as adequate state-law grounds which deprive this Court of jurisdiction. *Walker v. Martin*, 562 U.S. 307, 315 (2011) (recognizing that time bars are an independent and adequate state-law ground precluding review). Additionally, this Court recently denied review of a procedurally barred intellectually disability claim in *Jones v. State*, 419 So. 3d 619 (Fla.), *cert. denied*, 146 S. Ct. 79 (2025). This Court should do likewise in this case.

CONCLUSION

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

Respectfully submitted,

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