IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,

Appellant,

vs. Case No. 90,310

STATE OF FLORIDA,

Appellee.

______________________________/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS v

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 8

ISSUE I 8

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO RETURN VENUE TO ST. LUCIE COUNTY UPON DEFENDANT'S REQUEST (Restated).

ISSUES II, III, XIV, XV AND XVI 13

WHETHER THE STATE'S NOTICE UNDER RULE 3.202 WAS TIMELY, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE, WHETHER RULE 3.202 IS CONSTITUTIONAL ON ITS FACE, WHETHER RULE 3.202 VIOLATED THE EX POST FACTO CLAUSE, AND WHETHER RULE 3.202 IS UNCONSTITUTIONAL AS APPLIED (Restated).

ISSUE IV 27

WHETHER APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE TO THOSE OF OTHER DEFENDANTS UNDER SIMILAR CIRCUMSTANCES (Restated).

ISSUE V 40

WHETHER THE TRIAL COURT PROPERLY EVALUATED IN ITS SENTENCING ORDER APPELLANT'S MITIGATING EVIDENCE (Restated).

ISSUE VI 44

WHETHER THE TRIAL COURT FAILED TO CONSIDER AS NONSTATUTORY MITIGATION APPELLANT'S "MENTAL OR EMOTIONAL DISTURBANCE" (Restated).

ISSUE VII 47

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO DISQUALIFY THE PROSECUTOR (Restated).

ISSUE VIII 49

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT (Restated).

ISSUE IX 52

WHETHER THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL BY INFORMING THE JURY THAT APPELLANT HAD BEEN FOUND GUILTY AND THAT AN APPELLATE COURT HAD REMANDED THE CASE FOR SENTENCING (Restated).

ISSUE X 56

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR LEAVE TO INTERVIEW JURORS (Restated).

ISSUE XI 58

WHETHER APPELLANT VALIDLY WAIVED HIS RIGHT TO BE PRESENT AT ALL PRETRIAL CONFERENCES (Restated).

ISSUE XII 64

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CAUSE CHALLENGE TO JUROR JEREMY OVER APPELLANT'S OBJECTION (Restated).

ISSUE XIII 67

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO STRIKE FOR CAUSE JURORS BARKER AND FOXWELL (Restated).

ISSUE XVII 81

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE JURY AN INSTRUCTION ON VICTIM IMPACT EVIDENCE (Restated).

ISSUE XVIII 84

WHETHER THE TRIAL COURT GAVE INSUFFICIENT WEIGHT TO APPELLANT'S AGE AS A MITIGATING FACTOR (Restated).

ISSUE 87

WHETHER THE TRIAL COURT SHOULD HAVE MERGED THE "FELONY MURDER" AGGRAVATING FACTOR WITH THE "AVOID ARREST/HINDER LAW ENFORCEMENT/MURDER OF A LAW ENFORCEMENT OFFICER" AGGRAVATORS (Restated).

ISSUE XX 90

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

ISSUE XXI 93

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE VICTIM (Restated).

ISSUE XXII 98

WHETHER ELECTROCUTION IS CRUEL AND UNUSUAL (Restated).

CONCLUSION 99

CERTIFICATE OF SERVICE 99

TABLE OF CITATIONS

CASES
PAGE(S)

Alvord v. State,
322 So. 2d 533 (Fla. 1975),
cert. denied, 428 U.S. 923 (1976)
34

Amendments to Florida Rule of Criminal Procedure 3.220,
674 So. 2d 83 (Fla. 1995)
14,18

Armstrong v. State,
642 So. 2d 730 (Fla. 1994)
24,26,37,38,39

Baptist Hosp. of Miami, Inc. v. Maler,
579 So. 2d 97 (Fla. 1991)
57,58

Blanco v. State,
706 So. 2d 7 (Fla. 1997)
86

Bogle v. State,
655 So. 2d 1103 (Fla. 1995)
48

Bonifay v. State,
680 So. 2d 413 (Fla. 1996)
82,84

Brown v. State,
526 So. 2d 903 (Fla. 1988)
36

Bundy v. State,
455 So. 2d 330 (Fla. 1984)
10

Burns v. State,

699 So. 2d 646 (Fla. 1997)
34,36,37,38,39

Campbell v. State,
571 So. 2d 415 (Fla. 1990)
41,42,43

Capehart v. State,
583 so.2d. 1009 (Fla. 1991),
cert. denied, 112 S.Ct. 955 (1992)
93

Cole v. State,
280 So. 2d 44 (Fla. 4th DCA 1973)
10

Cole v. State,
701 So. 2d 845 (Fla. 1997)
42

Davis v. State,
698 So. 2d 1182 (Fla. 1997)
23,27

Dillbeck v. State,
643 So. 2d 1027 (Fla. 1994),
cert. denied, 514 U.S. 1022 (1995)
23,25,26

Duest v. State,
462 So. 2d 446 (Fla. 1985)
50

Echols v. State,
484 So. 2d 568 (Fla. 1985)
22

Elledge v. State,
706 So. 2d 1340 (Fla. 1997)
23,27

Farina v. State,
679 So. 2d 1151 (Fla. 1996)
48

Fitzpatrick v. State,
527 So. 2d 809 (Fla. 1988)
34,35

Floyd v. State,
569 So. 2d 1225 (Fla. 1990)
28

Garcia v. State,
492 So. 2d 360 (Fla. 1986)
63,64

Gore v. State,
706 So. 2d 1328 (Fla. 1997)
12

Grossman v. State,
525 So. 2d 833 (Fla. 1988)
22,37,93

Gunsby v. State,
574 So. 2d 1085 (Fla. 1991),
cert. denied, 116 L. Ed. 2d 102 (1992)
34

Hitchcock v. State,
673 So. 2d 859 (Fla. 1996)
4,52,55

Hooker v. State,
497 So. 2d 982 (Fla. 2d DCA 1986)
58

Hudson v. State,
23 Fla. L. Weekly S71 (Fla. Feb. 5, 1998)
43

Hudson v. State,
538 So. 2d 829 (Fla. 1989),
cert. denied, 493 U.S. 875 (1990)
34

Huff v. State,

569 So. 2d 1247 (Fla. 1990)
86

Jackson v. State,
704 So. 2d 500 (Fla. 1997)
43,46

James v. State,
695 So. 2d 1229 (Fla. 1997)
50,51

Johnson v. State,
660 So. 2d 637 (Fla. 1995)
73

Jones v. State,
440 So. 2d 570 (Fla. 1983)
37

Jones v. State,
701 So. 2d 76 (Fla. 1997)
99

Kearse v. State,
662 So. 2d 677 (Fla. 1995)
61,84,85,89,92

Kimbrough v. State,
700 So. 2d 634 (Fla. 1997)
67

King v. State,
514 So. 2d 354 (Fla. 1987),
cert. denied, 487 U.S. 1241 (1988)
97

Kohut v. Evans,
623 So. 2d 569 (Fla. 4th DCA 1993)
10

Livingston v. State,
565 So. 2d 1288 (Fla. 1988)
35,36

Lusk v. State,
446 So. 2d 1038 (Fla.),
cert. denied, 469 U.S. 873 (1984)
18

MacPhee v. State,
471 So. 2d 670 (Fla. 2d DCA 1985)
64

Mahn v. State,
23 Fla. L. Weekly S219 (Fla. April 16, 1998)
86

McKinney v. State,
579 So. 2d 80 (Fla. 1991)
37

Meggs v. McClure,
538 So. 2d 518 (Fla. 1st DCA 1989)
48

Mendoza v. State,
700 So. 2d 670 (Fla. 1997)
73,81

Moore v. State,
701 So. 2d 545 (Fla. 1997)
87

Nunez v. State,
665 So. 2d 301 (Fla. 4th DCA 1995)
48

Parker v. State,
641 So. 2d 369 (Fla. 1994)
50

Penn v. State,
574 So. 2d 1079 (Fla. 1991)
82

Phillips v. State,
705 So. 2d 1320 (Fla. 1997)
37

Preston v. State,
607 So. 2d 404 (Fla. 1992),
cert. denied, 113 S. Ct. 1619,
123 L. Ed. 2d 178 (1993)
97

Reaves v. State,
639 So. 2d 1 (Fla. 1994)
37,39,42

Reynolds v. State,
696 So. 2d 1275 (Fla. 5th DCA 1997)
63

Rhodes v. State,
547 So. 2d 1201 (Fla. 1989)
51

Richardson v. State,
437 So. 2d 1091 (Fla. 1983)
25,26

Richardson v. State,

604 So. 2d 1107 (Fla. 1992)
51

Rivera v. State,
545 So. 2d 864 (Fla. 1989)
37

Robertson v. State,
611 So. 2d 1228 (Fla. 1993)
36

Rogers v. State,
511 So. 2d 526 (Fla. 1987),
cert. denied, 484 U.S. 1020 (1988)
93

Ross v. Oklahoma,
487 U.S. 81 (1988)
81,82

San Martin v. State,
705 So. 2d 1337 (Fla. 1997)
67

Scott v. State,
23 Fla. L. Weekly S175 (Fla. Mar. 26, 1998)
18

Shellito v. State,
701 So. 2d 837 (Fla. 1997)
86,87

Shere v. State,
579 So. 2d 86 (Fla. 1991)
36,58

Simpson v. State,
474 So. 2d 383 (Fla. 4th DCA 1985)
12

Smith v. State,
699 So. 2d 629 (Fla. 1997)
68,72,73

Spencer v. State,
645 So. 2d 377 (Fla. 1994)
50,51

State v. Clausell,
474 So. 2d 1189 (Fla. 1985)
48

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986)
98

State v. Gary,
609 So. 2d 1291 (Fla. 1992)
11

State v. Hamilton,
574 So. 2d 124 (Fla. 1991)]
57,58

State v. Henry,
456 So. 2d 466 (Fla. 1984)
34

State v. Johnson,
616 So. 2d 1 (Fla. 1993)
25

State v. Kelley,
588 So. 2d 595 (Fla. 1st DCA 1991)
25,26

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982)
54,55,81,83,96,99

Street v. State,
636 So. 2d 1297 (Fla. 1994)
37

Sullivan v. State,
303 So. 2d 632 (Fla. 1974)
51

Teffeteller v. State,
495 So. 2d 744 (Fla. 1986),
cert denied, 465 U.S. 1074 (1987)
97

Tillman v. State,
471 So. 2d 32 (Fla. 1985)
54,55,81,83,96,99

Valle v. State,
581 So. 2d 40 (Fla. 1991)
47,97

Van Poyck v. State,
23 Fla. L. Weekly 275 (Fla. May 14, 1998)
69

Wainwright v. Witt,
469 U.S. 412 (1985)
25,66,67

Walker v. State,
330 So. 2d 110 (Fla. 3d DCA 1976)
58

Wardius v. Oregon,
412 U.S. 470 (1973)
22

Washington v. State,
432 So. 2d 44 (Fla. 1983)
36

Wike v. State,
698 So. 2d 817 (Fla. 1997)
97

Williams v. State,
438 So. 2d 781 (Fla.),
cert. denied, 465 U.S. 1109 (1983)
19,22

Williams v. State,
689 So. 2d 393 (Fla. 3d DCA),

rev. denied 697 So. 2d 513 (Fla. 1997)
58

Woods v. State,
490 So. 2d 24 (Fla. 1986),
cert. denied, 479 U.S. 954 (1987)
22

RULES
PAGES

Fla. R. Crim. P. 3.202(d)
20

Fla. R. Crim. P. 3.180
64

Fla. R. Crim. P. 3.202
3,5,6,13,14,15,17
20,22,23,24,25,26,62

Fla. Stand. Jury Instr. (Crim.) 74 (Mar. 1997)
54

IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,

Appellant,

vs. Case No. 90,310

STATE OF FLORIDA,

Appellee.

_________________________________/

PRELIMINARY STATEMENT

Appellant, BILLY LEON KEARSE, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R [vol]," reference to the transcripts will be by the symbol "T [vol]," and reference to the supplemental pleadings and transcripts will be by the symbols "SR [vol]" or “ST [vol]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Because of its page limit and time constraints, the State will accept Appellant's statement of the case and facts as reasonably accurate.

SUMMARY OF ARGUMENT

Issue I - Kearse waived his right to be tried in the county where the offense occurred when he obtained a change of venue during the original trial. Once changed to Indian River County, it remains there unless and until an appellate court rules otherwise, or unusual circumstances require a transfer back to the originating venue. Kearse could not merely waive his previous change of venue and effect a transfer back to St. Lucie County.

Issue II - The State filed its notice of intent to seek the death penalty within 45 days of this Court's opinion adopting amendments to Rule 3.202. Thus, its notice was timely.

Issue III - Defense counsel's own lack of diligence in securing expert witnesses and having Kearse evaluated and tested created his needed for additional time. Under the circumstances, the trial court did not abuse its discretion in denying Kearse's motion for continuance.

Issue IV - Kearse's sentence is proportionate to those of other defendants under similar circumstances.

Issue V - The trial court properly articulated and analyzed Kearse's nonstatutory mitigating circumstances.

Issue VI - The trial court did, in fact, consider, find, and assign weight to Kearse's mental mitigation as nonstatutory mitigation upon its rejection of such evidence as statutory mitigation.

Issue VII - Kearse made no showing of actual prejudice from Assistant State Attorney David Morgan's prosecution of his case following Mr. Morgan's election to the county court bench. Kearse could have questioned the jury panel about Mr. Morgan's recent election, but he did not do so. Therefore, the trial court did not abuse its discretion in denying Kearse's motion to disqualify Mr. Morgan from his case.

Issue VIII - Kearse failed to preserve this issue for review. Regardless, the prosecutor's single comment, standing alone, was not so egregious that it vitiated the entire resentencing proceeding. Rather, as in other cases involving a similar comment, the prosecutor's comment was harmless beyond a reasonable doubt.

Issue IX - Kearse failed to preserve this issue for review. Regardless, the trial court's instructions to the jury regarding their role in resentencing Kearse following appellate proceedings followed the standard jury instruction

or its precursor from Hitchcock. As for the State's comment regarding the jury's role, it is apparent from the record as a whole that it was an inadvertent misstatement that was harmless beyond a reasonable doubt.

Issue X - Kearse failed to meet the standard for obtaining leave to interview the jurors in his case. His grounds for doing so were vague and failed to show that he would be entitled to a new trial if true.

Issue XI - Although Kearse was absent from the January 30 hearing, the trial court took under advisement defense counsel's request for a transfer of venue back to St. Lucie County. It did not rule on the request until the next hearing when Kearse was present. At that hearing, Kearse filed a written waiver of his presence at all pretrial proceedings. Thus, he was validly absent from the June 21 hearing. Regardless, the trial court again took under advisement defense counsel's request for a transfer of venue back to St. Lucie County until Kearse could be present. It ruled on the request at the next hearing in Kearse's presence.

Issue XII - Juror Jeremy stated many times that her feelings against the death penalty substantially impaired

her ability to be a fair and impartial juror. The trial judge, who was able to assess Ms. Jeremy's demeanor, ultimately determined that she met the standard for excusal for cause. This Court should give tremendous deference to that determination, which is supported by the record.

Issue XIII - Both juror Barker and Foxwell indicated that they could put aside any biases and follow the law as instructed. Even if Kearse's cause challenges were improperly denied, however, Kearse makes no claim that any of the jurors who actually sat were unqualified. In fact, Kearse has not alleged, in any respect, that his jury was unfair. Thus, even if Harry Foxwell and Josephine Barker should have been excused for cause, any error was harmless where Kearse has failed to show any prejudice by the jury that actually served.

Issue XIV - This Court has previously rejected Kearse's constitutional challenges to Rule 3.202.

Issue XV - Kearse failed to preserve his <u>ex post facto</u> challenge to Rule 3.202. Regardless, this Rule was properly applied to him at the time of his trial.

Issue XVI - Kearse failed to preserve his challenge to the application of Rule 3.202 to his case. Regardless, this Court has previously rejected his claim.

Issue XVII - Kearse did not make the same objections to the State's proposed victim-impact instruction that he now makes. Thus, they were not preserved for review. Regardless, the instruction was proper, in that it channeled the jury's consideration of the victim-impact evidence and was a proper statement of the law.

Issue XVIII - The weight given to a mitigating factor is solely within the trial court's discretion. Under the circumstances of this case, it cannot be said that no reasonable person would give little weight to Kearse's age of eighteen at the time of the murder.

Issue XIX - This Court previously held that the "felony murder" aggravator was not improperly doubled with the "avoid arrest/hinder law enforcement/murder of a law enforcement officer" aggravating factors. Since there were no material changes in the evidence, and since Kearse failed to reveal any exceptional circumstances to warrant reconsideration of this issue, it is the law of the case.

Issue XX - The record supports the trial court's finding of the "felony murder" aggravating factor in this case. Even were it not supported by the record, there is no reasonable possibility that the sentence would have been different had the trial court not considered it.

Issue XXI - Kearse did not make the same objections in the trial court that he makes now. Therefore, the new objections were not preserved for review. Regardless, the medical examiner's testimony, and certain autopsy photographs, were properly admitted to put this murder in context and to prove the aggravating factors.

Issue XXII - Kearse did not preserve this issue for review. Regardless, this Court has previously held that electrocution is not cruel and unusual punishment.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO RETURN VENUE TO ST. LUCIE COUNTY UPON DEFENDANT'S REQUEST (Restated).

At Kearse's original trial, the defense successfully moved to change venue from St. Lucie to Indian River County because of pretrial publicity. (R II 187). Following the jury's sentencing recommendation, the trial court moved the case back to St. Lucie County for final sentencing, as a matter of convenience. (R II 242-43). As a result, Kearse's appeal originated from and was remanded to St. Lucie County.

In January 1996, at an initial status conference after remand, the State and defense counsel indicated that they wanted to hold the resentencing in St. Lucie County, where the crime originated, despite the previous change of venue. They agreed, however, that Kearse's input was needed, so the trial court reset the hearing and ordered Kearse's appearance. (T VI 18-23). A week later, defense counsel renewed his request to hold the resentencing in St. Lucie County, but the State had changed its position, believing that venue was still in Indian River County pursuant to the previous change of venue, and that Kearse could not simply waive venue back to St. Lucie County. When Kearse indicated personally that he wanted the

resentencing in Indian River County, the trial court found that venue lay in Indian River County. (T VII 31-42; R III 456-57).

In June 1996, after defense counsel had recused Judge Walsh and Judge Trowbridge had been appointed, defense counsel renewed his request to hold the resentencing in St. Lucie County. (R III 489-90). At the next motion hearing, the State maintained that Kearse could not waive venue back to St. Lucie County; rather, he had to move for a change of venue. Defense counsel indicated that Kearse had previously said he wanted the resentencing in Indian River County because he had been charged with aggravated battery on several jail guards and did not want to stay at the St. Lucie County jail. Since he had been acquitted of those charges, he wanted to hold the resentencing in St. Lucie County. Because the trial court wanted Kearse's opinion on the matter, and Kearse was not present, the trial court took the motion under advisement until it could speak with Kearse. (T IX 80-101).

At the next hearing, the attorneys reargued their positions regarding venue, and Kearse indicated that he wanted the resentencing in St. Lucie County. (T X 104-16). The trial court denied Kearse's motion, however, finding that

Kearse had waived his right to be tried in the county where the offense occurred when he obtained a change of venue in the original trial. He could not then waive the change of venue at his pleasure. Moreover, given that this was a murder of a law enforcement officer and a capital case, there would likely be significant pretrial publicity, even for the resentencing. Thus, it would be more expedient to remain in Indian River County and avoid any pretrial publicity problems in St. Lucie County. (T X 121-23).

In this appeal, Kearse claims that he had a fundamental right to be resentenced in the county where he committed the offense, and that he had the right to waive his previous change of venue. **Brief of Appellant** at 21-29. The State submits, as the trial court found, that Kearse waived his right to be tried in the county where he committed the offense by moving for a change of venue during the original trial. See Bundy v. State, 455 So. 2d 330, 339 (Fla. 1984) ("By asking for a change of venue, Bundy waived his right to be tried in Leon County."). Transferring the case to Indian River County totally divested St. Lucie County of jurisdiction. See Kohut v. Evans, 623 So. 2d 569, 571 (Fla. 4th DCA 1993) (finding that Florida Rule of Criminal Procedure

3.240(j) "contemplates the complete divestment of jurisdiction of the transferring court"). When the original trial judge transferred Kearse's case back to St. Lucie County for final sentencing (R III 448-451), he did so improperly. By doing so, he "produce[d] the anomaly of . . . sentencing by a different court than that in which the defendant was convicted." Cole v. State, 280 So. 2d 44, 45 (Fla. 4th DCA 1973). As in Cole, the order transferring the cause back to St. Lucie County could be treated as an administrative order for the convenience of the trial judge, but adjudication and sentence should be treated as an adjudication and sentence of Indian River County. Id. Since Kearse never raised an issue concerning venue on appeal, however, this Court accepted the appeal from St. Lucie County and remanded it to St. Lucie County. But venue properly remained in Indian River County.

Once the case was remanded, it was not improper, as a matter of convenience, and with the parties' consent, for the trial court to hold preliminary hearings and conferences in St. Lucie County. However, the penalty phase proceeding before the jury had to be held in Indian River County. As this Court has previously held, "absent extraordinary circumstances, a trial judge's order granting a change of

venue may not be reviewed by a successor trial judge in the new venue. Once such an order has been issued, it must be honored in the new venue unless and until a proper appellate court rules otherwise." State v. Gary, 609 So. 2d 1291, 1294 (Fla. 1992).

Since venue was not an issue on appeal, this Court's remand to St. Lucie County was not a "ruling" on the matter. Moreover, Kearse presented no "extraordinary circumstances" to the successor judge to warrant a formal and proper transfer of venue back to St. Lucie County. Simply wanting to do so bestowed no power on the new judge to grant such a request.

Kearse contends on appeal, however, that "[a] state may not constitutionally prohibit a defendant's withdrawal of a waiver of a constitutional right." **Brief of Appellant** at 23. However, this Court determined in State v. Gary that "the interests of justice require a rule designed to inhibit trial courts from engaging in a 'ping-pong game' by transferring a case back and forth, thereby jeopardizing the rights of the parties and undermining public confidence in the judicial function." 609 So. 2d 1294. Moreover, a defendant does not have an unqualified right to withdraw a previous waiver at any time. For example, once a defendant waives the right to a

trial and pleads guilty, he or she may not automatically withdraw the waiver. Similarly, a defendant may waive the presentation of mitigation, but may not withdraw that waiver after the sentencing is complete. Here, Kearse sought to withdraw a waiver after the trial court had changed venue, conducted the trial, and adjudicated him. Contrary to Kearse's contention, there must be a time at which a defendant is estopped from withdrawing a waiver. In this case the time had run out.

Kearse cites to Simpson v. State, 474 So. 2d 383 (Fla. 4th DCA 1985) and Gore v. State, 706 So. 2d 1328 (Fla. 1997), to support his position that a resentencing proceeds de novo in all respects. In neither case, however, was the issue of venue raised or discussed. There is no indication how either of those cases came to be tried in their original venues. Thus, they are unavailing to his cause.

Here, the trial court originally granted a change of venue because of extensive pretrial publicity. Kearse had shot and killed a Fort Pierce police officer with the officer's own service revolver following a routine traffic stop. That this Court had vacated Kearse's death sentence was undoubtedly news in itself. Kearse presented no evidence or

even argument to suggest that the pretrial publicity for Kearse's resentencing would have been any less than that for his original trial. The resentencing court was justifiably concerned that, if it transferred the case back to St. Lucie County, and the pretrial publicity made it impossible to pick a jury, it would have to change venue again. Its denial of Kearse's request to transfer the case to St. Lucie County for all of its stated reasons was not error. Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUES II, III, XIV, XV AND XVI

WHETHER THE STATE'S NOTICE UNDER RULE 3.202 WAS TIMELY, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE, WHETHER RULE 3.202 IS CONSTITUTIONAL ON ITS FACE, WHETHER RULE 3.202 VIOLATED THE EX POST FACTO CLAUSE, AND WHETHER RULE 3.202 IS UNCONSTITUTIONAL AS APPLIED (Restated).[1]

This Court remanded this case for resentencing on December 11, 1995. (R III 400). On January 1, 1996, Florida Rule of Criminal Procedure 3.202 became effective. As released, subsection (a)

[1] Because the factual basis for all of these issues are intertwined, the State has combined them to avoid duplicative responses. Following a statement of the factual predicate, the State will subdivide each claim and address them in the order Appellant has raised them.

required the State to file within ten days of arraignment its notice of intent to seek the death penalty in order to invoke the provisions of the rule. Subsection (c) required the defense to file its notice of intent to present expert testimony of mental mitigation within 45 days of the State's notice. The filing of this notice triggered the State's ability to seek its own mental examination of the defendant.

On March 18, 1996, Kearse filed a "Notice of Reliance on Mental Health Based Mitigating Factors," naming as witnesses the mental health experts who testified at Kearse's original penalty phase. (R III 465). On May 2, 1996, this Court amended subsections (a) and (c) of Rule 3.202 to change the State's filing requirement to 45 days following arraignment, and the defense's filing requirement to no fewer than 20 days before trial. This Court's opinion specifically stated that the amendments would become effective upon issuance of the opinion. <u>Amendments to Florida Rule of Criminal Procedure 3.220</u>, 674 So. 2d 83, 84-85 (Fla. 1995) (on reh'g) ("The amendments shall become effective upon the release of this opinion.").

On June 4, 1996, thirty days after the amendments became effective, the State filed its Notice of Intent to Seek the Death Penalty. (R III 487). Two weeks later, the trial court set the

trial for December 9, 1996, upon agreement of the parties. (R III 488). A week after that, on June 21, 1996, the defense sought and obtained the appointment of a crime scene expert and a fetal alcohol syndrome expert, the identity of whom were then undetermined. (R III 491-92, 493). Three months later, the trial court specifically appointed Dr. Lipman as a fetal alcohol syndrome expert. (R IV 507-08). A month later, and only seven weeks before trial, defense counsel sought and obtained authorization to have neuroradiological tests performed on Kearse. (R IV 518-22, 523-24). On November 18, 1996, twenty-one days before trial, defense counsel filed his Notice of Intent to Present Expert Testimony in Mitigation, listing Dr. Lipman as a mental health expert. (R IV 534-36). Nine days later, the State sought permission to have its own mental health expert examine Kearse. (R IV 538-39). It also filed a supplemental answer to demand for discovery, listing Drs. Martell and Mayberg as potential rebuttal witnesses.[2] In response to the State's motion, defense counsel moved for a continuance or, in the alternative, moved to strike the State's rebuttal witnesses. He also moved to limit the scope of the compelled mental health evaluation, to limit the use of any information gathered from the

---

[2] Although this pleading does not appear in the record on appeal, defense counsel referenced this pleading in his Motion for Continuance. (R IV 545-48).

compelled mental health evaluation, to prohibit the application of Rule 3.202, and to declare Rule 3.202 unconstitutional. (R IV 545-48, 549-52, 553-67, 568-70, 571-73).

At the hearing on December 3 (six days before trial), defense counsel argued that Rule 3.202 did not apply to resentencings and that, if it did, the State did not comply with the rule because it did not file its notice of intent to seek the death penalty within 45 days of arraignment. (SR I 3-14, 17-22). The State responded that the applicable provisions of the rule became effective on May 2, 1996, that it did apply to this proceeding, and that the State filed its notice within the 45-day period. (SR I 14-17). The trial court granted the State's motion to evaluate Kearse. (SR I 23-25). It denied Kearse's motion to strike the testimony of the State's expert, Dr. Martell, but it took under advisement Kearse's motion to strike the testimony of Dr. Mayberg. (SR I 25-30). It also denied Kearse's motion for a continuance, noting that the rule contemplated a very short time between the guilt and penalty phases for the State to obtain its own evaluation and for the parties to prepare. (SR I 30).

On the day of trial, defense counsel renewed his motion to continue the trial because the State's late notice of witnesses precluded counsel from investigating the State's experts'

credentials. (T XIII 170-83). In the alternative, he renewed his motion to strike Drs. Martell and Mayberg from the State's witness list. (T XIII 186088).

The State responded that the defense's problems were of their own making because of their late notice of mitigation witnesses. The defense had been running tests on Kearse since late October, and the defense did not serve its notice of intent to rely on mental health mitigation until November 14. That notice triggered the State's ability to have its own expert evaluate the defendant. In response, the State disclosed its witness list on November 20. The State could not relate the substance of its witnesses' testimony until the State's witnesses reviewed Kearse's test results and the defense witnesses' depositions. However, the defense had yet to provide the State with the test results, and the defense witnesses, at least Dr. Lipman, could not relate his conclusions because he had yet to review certain test results. Dr. Petrilla, another defense witness, had been refusing to supply his raw data to the State, and the defense had just supplied such data the day of trial. Thus, because the defense was not diligent in obtaining its experts, in testing Kearse, and in providing the information to the State, the State had not been able to prepare its rebuttal witnesses and provide the defense with that information. Moreover,

a continuance would effectively preclude Assistant State Attorney Morgan from prosecuting the case because he would be leaving the office at the end of December to assume the bench. Thus, a continuance would prejudice the State. (T XIII 188-98).

The trial court ruled that Rule 3.202 applied and that everyone's notices were timely. Because the rule contemplated quick action between the guilt and penalty phases of a trial, the last-minute scrambling to depose and investigate each other's witnesses was foreseeable under the rule. Both parties would be able to depose witnesses during the evenings and on weekends. In June, it had set the trial for December upon agreement of the parties. Thus, it denied defense counsel's motion to continue and motion to strike witnesses. (T XIII 211-16).

A. Timeliness of State's Notice

In Issue II of this appeal, Kearse claims that the State's June 4 Notice of Intent to Seek the Death Penalty was untimely because it was not filed within 45 days of this Court's mandate or within 45 days of the effective date of Rule 3.202, i.e., January 1, 1996. Kearse contends that, because the State's notice is the triggering event for allowing the State to employ its own mental health expert to evaluate Kearse, and because the notice was untimely, the trial

court abused its discretion in forcing him to undergo a compelled evaluation. **Brief of Appellant** at 30-31.

The State submits, as the trial court found (T XIII 211), that its notice was timely. As noted previously, the rule became effective on January 1, 1996. However, both the State and the defense bar filed motions for rehearing, which this Court granted in part. In doing so, this Court amended subsections (a) and (c), which altered the deadline for the State's Notice of Intent. In its opinion adopting the amendments to these two subsections, this Court specifically stated that the effective date of these amended provisions was the date of the opinion, which was May 2, 1996. Amendments to Florida Rule of Criminal Procedure 3.220, 674 So. 2d 83, 84-85 (Fla. 1995) (on reh'g). The State filed its Notice of Intent on June 4. Thus, it was clearly within 45 days of the effective date of the amended rule provisions.

B. Denial of Kearse's Motion for Continuance

In Issue III of this appeal, Kearse claims that the trial court abused its discretion in denying his Motion for Continuance made six days before trial. **Brief of Appellant** at 32-37. As this Court has previously held, "[t]he granting or denial of a motion for continuance is within a court's discretion and will not be overturned absent a palpable abuse of discretion." Lusk v. State,

446 So. 2d 1038, 1040 (Fla.), cert. denied, 469 U.S. 873 (1984). See also Scott v. State, 23 Fla. L. Weekly S175, 175 (Fla. Mar. 26, 1998)("The granting or denying of a continuance is within the sound discretion of the trial court. A court's ruling will be sustained absent an abuse of discretion, i.e., it will be sustained unless no reasonable person would take the view adopted by the trial court."). Moreover, "'[w]hile death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review *with caution* the exercise of *experienced discretion* by a trial judge in matters such as a motion for a continuance.'" Williams v. State, 438 So. 2d 781, 785 (Fla.) (emphasis in original) (quoting Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925 (1977)), cert. denied, 465 U.S. 1109 (1983).

Defense counsel's need for a continuance was of his own making and did not warrant a continuance of the trial. Following the recusal of two judges, Judge Trowbridge was appointed and set the trial for December 9, 1996. At a later hearing, he noted that this date was selected "after everybody agreed this was going to be an acceptable time." (R III 488; T XI 141-42). Meanwhile, six months had passed from remand before defense counsel sought expert witnesses beyond those appointed during the original trial. (R III

491-92). It then took defense counsel an additional <u>three months</u> to find a specific expert on fetal alcohol syndrome (R IV 507-08), and <u>a month</u> beyond that to obtain authorization for neuroradiological tests (R IV 523-24). By that time, there were only six weeks left before trial.

Twenty-one days before trial, defense counsel finally filed his Notice of Intent to Present Expert Testimony in Mitigation, listing his newly acquired fetal alcohol syndrome expert. (R IV 534-36). Under Rule 3.202, this notice triggered the State's right to seek an evaluation by one of its own experts, which it sought twelve days later (R IV 538-39). Fla. R. Crim. P. 3.202(d). The State then four days later (now nine days before trial) filed a supplemental answer to demand for discovery, listing two of its own witnesses, Drs. Martell and Mayberg, as rebuttal witnesses. Because Judge Trowbridge was unavailable, the State could not get a hearing on its motion for a compelled evaluation until December 3 (six days before trial). At that hearing, the State explained that the defense could not depose the State's experts because the State's experts had not been able to review the defense experts' findings because the defense experts had yet to conclude their own evaluations. (SR I 14-17).

Even by the day of trial, the defense had provided none of the neuroradiological test results to the State. Moreover, the defense expert, Dr. Petrilla, had refused to provide the State with his raw data, which the State's expert needed to rebut Dr. Petrilla's testimony. Finally, the State had been unable to depose Dr. Lipman, the defense's fetal alcohol syndrome expert, because Dr. Lipman had not seen all of the neuroradiological test results. Thus, again, the State's expert, Dr. Martell, could not provide defense counsel with a summary of his testimony because he did not know what Dr. Lipman's testimony was going to be. (T XIII 188-98).

Ultimately, the trial court was faced with both parties scrambling to depose and investigate each other's expert witnesses. Because Rule 3.202 contemplated quick action between the guilt and penalty phases of a trial, the court believed that such scrambling was inherent in the process. Both parties could depose and investigate during the evenings and on the weekends.

The trial court was also faced with the prospect of continuing the trial into the Christmas holidays, as defense counsel suggested. As it was, the jury did not render its recommendation until December 19--only six days before Christmas. Invariably certain jurors would have had plans to travel for the holidays, and it would not have been fair to require their presence immediately

preceding and following Christmas Day. After all, the trial court had already granted hardship challenges to those venirepersons who had travel plans prior to December 19. Others could have, and would have, been excused for the same reason if informed that the trial would be held during the holiday season.

Finally, the trial court was faced with losing the lead prosecutor in the new year when he assumed the county court bench. Assistant State Attorney David Morgan had prosecuted Kearse originally and was the lead attorney on the resentencing. While State Attorney Bruce Colton or Assistant State Attorney Lawrence Mirman could have taken the lead, either one or both may have needed significant time to prepare, thereby pushing the trial well into the new year.

Where the trial court was faced with all of these circumstances, it cannot be said that no reasonable person would have denied Kearse's motion for continuance. As noted previously, it is this Court's obligation to review with caution the trial court's exercise of experienced discretion in this matter. See Williams, 438 So. 2d at 785. Under these circumstances the trial court did not abuse its discretion in denying Kearse's motion for continuance. See Grossman v. State, 525 So. 2d 833, 836 (Fla. 1988); Woods v. State, 490 So. 2d 24, 26 (Fla. 1986), cert. denied,

479 U.S. 954 (1987); Echols v. State, 484 So. 2d 568, 572 (Fla. 1985). Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

C. Constitutionality of Rule 3.202

In Issue XIV of this appeal, Kearse claims that Rule 3.202 is unconstitutional on its face because it violates the principles of Wardius v. Oregon, 412 U.S. 470 (1973), which requires reciprocal discovery from the State if the defendant is compelled to provide discovery. Specifically, Kearse alleges that Rule 3.202 required him to file a notice of intent to rely on mental health mitigation testimony, but did not require the State to file a corresponding notice of intent to rely on aggravation witnesses or mental health experts to rebut mitigation. He also alleges that Rule 3.202 required him to list the statutory and nonstatutory mitigating circumstances he intended to present, but did not require the State to present its list of intended aggravating factors. Finally, he alleges that Rule 3.202 required him to list his mitigation witnesses without any corresponding duty by the State to list its aggravation or rebuttal witnesses. According to Appellant, "Rule 3.202 is exactly the sort of one-sided rule condemned in Wardius and its progeny." **Brief of Appellant** at 74-77.

The State submits that this Court has addressed and rejected all of these concerns in Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994), cert. denied, 514 U.S. 1022 (1995); Elledge v. State, 706 So. 2d 1340, 1345 (Fla. 1997) (reaffirming Dillbeck); and Davis v. State, 698 So. 2d 1182 (Fla. 1997) (same). After all, Rule 3.202 was adopted as a result of, and in response to, the common law enunciated in Dillbeck. Kearse has presented no additional arguments that would legitimately challenge the constitutionality of this rule. Therefore, this issue should be rejected.

D. Ex post facto challenge to Rule 3.202

In Issue XV of this appeal, Kearse claims that the trial court's application of Rule 3.202 to his case violated the ex post facto clause of the state and federal constitutions. Specifically, he alleges that the rule, though one of procedure, is substantive in nature, was applied retrospectively to his case, and severely burdened his presentation of mitigation. **Brief of Appellant** at 78-80.

Kearse challenged the ex post facto application of this rule in a pretrial motion (R IV 568-70), but he never argued it before the trial court, and, more importantly, he never received a ruling on it. On December 3, 1996, the State called up for hearing its

own Motion to Allow State's Mental Health Expert to Examine Defendant. Judge Trowbridge was unavailable to hear the motion, so Chief Judge Kanarek agreed to do so. At that hearing, defense counsel indicated that he had filed, and asked the court to hear, numerous motions challenging the applicability, use, scope, and constitutionality of Rule 3.202, along with his motion for continuance/motion to strike witnesses. (SR I 7-8; T XIII 211). In responding to the State's motion, defense counsel argued that a compelled evaluation "violate[d] [Kearse's] Fifth and Sixth Amendment rights, Eighth amendment rights and the Constitution of the United States," but he did not elaborate on this statement. (SR I 10-11). Defense counsel's main arguments were (1) that the rule did not apply because this was a resentencing and the rule applied only to original trials, and (2) that, even if it did apply, the State was untimely in filing its Notice of Intent to Seek the Death Penalty, which triggers the applicability of the rule. (SR I 3-14). At the end of the discussion, the trial court granted the State's motion for a compelled evaluation, then asked defense counsel if he had motions pending. (SR I 23-25). Defense counsel mentioned his motion for continuance/motion to strike witnesses, which the State objected to, and which the trial court denied in part. (SR I 25-30). Following that discussion, the

trial court asked again if there were any other pending motions, and defense counsel mentioned only some pending motions in limine that Judge Trowbridge needed to rule on. (SR I 30). Nothing more was ever said about counsel's constitutional motions, nor did the trial court ever enter written orders on these motions.

It is well-settled that an appellant must obtain rulings on his or her motions in order to raise the issues on appeal. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where trial court took motion under advisement, but never made ruling); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (holding that defendant failed to preserve evidentiary issue for review by failing to obtain ruling on motion for mistrial); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting clarity of rule that failure to obtain ruling on motion effectively waives motion). This is true for a constitutional motion, as well, unless it is strictly a facial challenge based on the violation of a fundamental right. State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental. . . . [F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a

denial of due process."). Since Kearse failed to obtain a ruling on his ex post facto challenge, he failed to preserve this issue for review.

Even had it been preserved, it is without merit. Rule 3.202 was merely a codification of an evolutionary refinement in the law. It was not a judicial upheaval or substantive, fundamental change in the law that would prevent its application under Wainwright v. Witt, 469 U.S. 412, 424-26 (1985), to all cases pending trial upon its adoption. After all, the rule was adopted based on legal principles and procedures applied to preceding cases. See Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994), cert. denied, 514 U.S. 1022 (1995).

Moreover, Kearse refused in the present case to discuss the facts of the crime with the State's expert, Dr. Martell. (T XXVII 2357-67). Thus, the State presented no testimony based on any self-incriminatory statements by Kearse. As a result, Kearse was not prejudiced by any application of Rule 3.202.

E. Constitutionality of compelled mental health evaluations

Finally, in Issue XVI of this appeal, Kearse claims that "[t]he entire concept of compelled mental health evaluations for penalty phase violates the United States and Florida Constitutions." By analogizing to an insanity defense, Kearse

contends that the State can compel a mental health evaluation in that context because a defendant does not have a constitutional right to present such a defense, and because the state is free to narrow and limit the definition of insanity. In contrast, he asserts, a defendant has a constitutional right to present mitigation evidence, which the State has no ability to limit or narrow. Thus, Kearse believes, the State should not be allowed to compel a defendant to provide evidence against himself or herself in order to limit or narrow his or her presentation of mitigation. **Brief of Appellant** at 81-83.

Again, Kearse failed to present this challenge to the trial court and obtain a ruling on the issue; therefore, he failed to preserve it for review. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991). Regardless, this Court rejected this argument in Dillbeck v. State, 643 So. 2d at 1030-31; Elledge, 706 So. 2d at 1345; and Davis, 698 So. 2d at 1191. Kearse has presented no compelling reason to recede from those opinions. Finally, as noted above, Kearse refused to discuss the facts of the crime with the State's expert; thus, he was not forced to incriminate himself in any way. As a

result, his constitutional right to be free from compelled self-incrimination was not violated.

ISSUE IV

WHETHER APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE TO THOSE OF OTHER DEFENDANTS UNDER SIMILAR CIRCUMSTANCES (Restated).

Regarding the murder of Officer Parrish, the trial court found the existence of two aggravating factors: "committed during the course of a robbery" and "avoid arrest/hinder law enforcement/murder of a law enforcement officer." Although it also found the existence of one statutory mental mitigator, to which it gave "some but not much weight," as well as several nonstatutory mitigating factors, to which it gave little or some weight, it ultimately determined that "the statutory and nonstatutory mitigating circumstances found proven above are not individually or in toto substantial or sufficient to outweigh the aggravating circumstances." (R V 706-09).

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990).

Here, the evidence established that Kearse drove Rhonda Pendleton to Domino's Pizza in Derrick Pendleton's car and, on the way back to Derrick's house, drove the wrong way down a one-way street. (T XXII 1637-38). Officer Parrish pulled Kearse over and when Kearse provided no driver's license attempted to obtain his name and date of birth for a records check. (T XXII 1639-40). After Kearse gave the officer several false names and dates of birth, Officer Parrish decided to arrest Kearse. (T XX 1210-15; XXII 1640-44). While the officer attempted to handcuff him, Kearse struggled, and the officer pulled his service weapon. Kearse grabbed the officer's gun, shot him twice, paused, then shot him twelve more times, before fleeing the scene with the officer's weapon. (T XX 1367-68; XXII 1644-48). Kearse told Rhonda Pendleton and the police that he shot the officer because he had just gotten out of prison and was on probation, and he feared that there was a warrant for his arrest because he had failed to pay money to his probation officer. (T XXII 1525, 1536, 1650). When Kearse got to Derrick Pendleton's house, he pulled the car around back and backed it up to the house so no one could see the license plate easily, flattened one of the tires to make it look inoperable, and buried the officer's gun in the back yard because it had his fingerprints on it. (T XXI 1472, 1475-76, 1479; XXII

1535). He then made numerous false statements to the police regarding the murder: First, he told them he threw the gun into a canal, and even showed them where he allegedly threw it. (T XXI 1415, 1419, 1422, 1430, 1472-75). Second, he claimed that Officer Parrish scratched him on the face and neck during their struggle when, in fact, Kearse had received the scratches earlier in the evening during an altercation with his stepfather. (T XXI 1478; XXII 1524, 1530). Third, he insinuated that Officer Parrish purposely hit him in the face on two occasions with his handcuffs, then later admitted that he believed it was unintentional. (T XXI 1421-22, 1436, 1439, 1441-42, 1471-72; XXII 1529, 1569-70). Finally, Kearse stated that the gun kept discharging in his hand, but later admitted that he intentionally pulled the trigger all fourteen times. (T XXI 1421-22, 1478, 1483; XXII 1534, 1563).

To mitigate this senseless murder, Appellant presented evidence to establish that he was only eighteen years old at the time of the murder. Although the trial court found this mitigator to exist, apparently believing that it had to, it gave it "not much weight" for the following reasons:

> [T]he evidence shows that defendant had already been through many stages of the criminal justice system including state prison time. Although eighteen years of age at the time, defendant exhibited sophistication rather than naivete. The obvious intent of

> this statutory mitigator is to give consideration to a youth who acts from immaturity. This is just not the case here and the mitigator is entitled to some but not much weight.

(R V 708).

Kearse also alleged as a mitigating circumstance that he cooperated with the police and confessed to the crime. Although the trial court found this mitigator to exist, it gave it "little weight" for the following reasons:

> The evidence shows that defendant initially did anything but cooperate and that even after he was confronted with evidence of his guilt, he blamed the conduct of the officer for the killing. While the Court must find that the defendant did confess, little weight should be given to this act under the circumstances . . . .

(R V 709).

In fact, the record reveals, as noted above, that Kearse told the police many lies about the murder and only confessed after being confronted with conflicting evidence. For example, Kearse told the police that he threw the gun in a canal, that he gave Officer Parrish his true name and date of birth, that Officer Parrish intentionally hit him twice in the face with his handcuffs, that Officer Parrish scratched him on the neck during their struggle, and that the gun just kept jumping in his hand. Moreover, Kearse testified at trial that after he (Kearse) got out of the car Officer Parrish grabbed his arm and forcefully turned

him to face the car. This action angered Kearse, and Kearse decided not to cooperate with the officer. The pith of Kearse's testimony was the Officer Parrish caused the chain of events that led to his death by touching Kearse's arm. (T XXIV 1849-65, 1900).

Kearse also asserted in mitigation that his behavior at trial was acceptable. Although the trial court found this mitigator to exist, it gave it only "some weight." There was no evidence, however, that Appellant would behave well in prison if given a life sentence, or that he was rehabilitatable.

Next, Kearse presented evidence that he had a difficult childhood and suffered psychological and emotional difficulties as a result thereof. While the trial court rejected evidence of fetal alcohol effect and organic brain damage, which Kearse does not challenge, it gave only "some weight" to Kearse's disadvantaged childhood and low level of intellectual functioning.

Of the 32 individual nonstatutory mitigating circumstances that the trial court considered and grouped into categories of "disadvantaged childhood" and "low level of intellectual functioning," many of them were significantly disputed not only by the State's expert, but by Kearse's own witnesses. For example, Dr. Petrilla, one of Kearse's experts, testified that Kearse's full-scale I.Q. is 79, which is at the very top of the "borderline" range

of 70-79, and only one point below the "low average" range. (T XXVI 2159). In his opinion, which contradicts the testimony of Kearse's lay witnesses from the school system, Kearse is <u>not</u> mentally retarded. (T XXVI 2159). As for the difference between Kearse's performance I.Q. score of 89 and his full-scale score of 79, which Dr. Petrilla found indicative of some physical or emotional dysfunction, Dr. Martell, the State's expert, testified that sophisticated neurological tests revealed no evidence of physiological abnormalities. (T XXVI 2156; XXVII 2376). Dr. Martell also opined that depression can have a significant effect on a person's I.Q. scores because a depressed subject tends to think and respond more slowly than normal, and many of the tests are timed. (T XXVII 2381-84). He found Kearse to be depressed when he met with him, and a test Dr. Petrilla performed indicated that Kearse was moderately to severely depressed at the time of his evaluation. (T XXVII 2382). Dr. Martell also questioned the standards that Dr. Petrilla used in assessing Kearse's I.Q. According to Dr. Martell, the standards Dr. Petrilla used do not account for any difference in age, sex, race, or level of education. (T XXVII 2379). When Dr. Martell applied standards that took those factors into account, Kearse scored in the normal I.Q. range in most areas. Although he scored mildly impaired in

attention and concentration, Dr. Martell believed that Kearse's depression accounted for those lower scores because depression causes apathy. (T XXVII 2379-82).

Kearse presented evidence through school teachers and administrators, and through Pamela Baker, a licensed mental health counselor, that Kearse had a difficult time in school and was learning disabled and severely emotionally handicapped. (T XXIII 1757-60, 1764-66, 1777-86; XXV 2033-40). Dr. Martell, however, believed that Kearse made a choice not to apply himself in school because he did not want to be there. (T XXVII 2386; XXVIII 2395). Dr. Martell also opined that Kearse suffered from a conduct disorder during his youth, which was characterized by a lack of respect for others and repeated violations of social rules and norms. (T XXVII 2386-89). This was corroborated by both Dr. Desai, who evaluated Kearse when he was eight, and Pamela Baker, who had significant contact with Kearse in his youth, who also believed that Kearse had a conduct disorder. (T XXV 2091-96). According to Pamela Baker, such a disorder generally leads to sociopathy and, according to Dr. Martell, Kearse is, in fact, a sociopath. (T XXV 2096; XXVII 2389; XXVIII 2399). Mr. Martell secondarily diagnosed Kearse as a psychopath. (T XXVIII 2400). In his opinion, however, neither of these disorders constituted an

extreme mental or emotional disturbance. (T XXVIII 2401). In fact, he could find no history of any severe mental disorder. (T XXVIII 2402).

As for Kearse's intellectual functioning at the time of trial, Ms. Baker testified that Kearse taught himself how to read and write in prison (T XXV 2052), and Dr. Martell testified that Kearse had to read at least at a sixth-grade level in order to take the MMPI test that Dr. Petrilla administered twice (T XXVII 2386). Thus, while Kearse may have been developmentally disabled as a child, he now knows how to read and write, and has an I.Q. at least in the low "low average" or high "borderline" range, if not, as Dr. Martell believed in the "normal" range.

Finally, Kearse asserted in mitigation that he had entered the adult penal system at a very early age. While the trial court found that this fact was true, it "fail[ed] to see how this could be mitigating factor. If it is, somehow, it is entitled to little weight." (R V 709). The State submits that this is not, as a matter of law, mitigating in nature, and Kearse has provided no authority to the contrary.

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. <u>Gunsby v. State</u>, 574 So. 2d 1085, 1090 (Fla. 1991), <u>cert. denied</u>,

116 L. Ed. 2d 102 (1992); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

The two aggravating factors found in this case are supported by competent, substantial evidence and, according to the trial court, far outweigh the mitigating evidence presented. In Burns v. State, 699 So. 2d 646, 650 (Fla. 1997), this Court agreed with the trial court in that case that the murder of a law enforcement is entitled to "great weight." The trial court in this case conscientiously concluded that death was warranted. Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders.

Those cases to the contrary cited by Appellant are easily distinguishable. In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), although the defendant shot two police officers while

holding others hostage, this Court found his death sentence disproportionate where there was substantial evidence by a "panel of experts" that Fitzpatrick had extensive brain damage and that his emotional age was between nine and twelve years of age. Such evidence established two statutory mental mitigators and the statutory mental mitigator of age: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So. 2d at 811-12. Given that the trial court found no evidence of organic brain damage or a low emotional age in mitigation in Appellant's case, Appellant can hardly compare himself to Fitzpatrick.

Similarly, in Livingston v. State, 565 So. 2d 1288 (Fla. 1988), which involved the murder of a convenience store clerk, this Court found that

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth [seventeen years of age], inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation [prior violent felony and felony murder].

565 So. 2d 1292. Here, in contrast, there is no evidence that Appellant suffered "severe beatings," much less evidence that anyone took "great pleasure" in abusing him. In fact, Pamela Baker admitted that Kearse's mother admitted to "whipping" him, whereas Kearse characterized it as a "beating." (T XXV 2113-14). Other than Kearse's self-serving characterization of his childhood during preparations for trial, there was no corroborative evidence that Kearse suffered from either sexual abuse or excessive physical abuse. In fact, Dr. Martell found it significant that the SCAN program closed Kearse's file because it found no evidence of abuse by the mother. He also found significant Dr. Desai's opinion in 1983 that Kearse's problems were behavioral and emotional in nature. (T XXVIII 2422). As for allegations of sexual abuse, Dr. Martell testified that he questioned Kearse extensively about his sexual history, and Kearse made no allegations of abuse by his mother's friend or another child. Rather, he related that his first sexual encounter was with a 12 to 13-year-old girl, whom he had been "seeing" for quite some time. (T XXVIII 2423). He found no evidence in the records provided to corroborate the allegations of sexual abuse Kearse made to Pamela Baker prior to resentencing. (T XXVIII 2424). Moreover, unlike in Livingston, Kearse's intellectual functioning is anything but "marginal." Finally, unlike in

Livingston, there is no evidence that Kearse abused drugs or alcohol.[3]

To support its argument that Kearse's death sentence is proportionately warranted, the State relies on Burns, 699 So. 2d at 649-50, Armstrong v. State, 642 So. 2d 730 (Fla. 1994), and Reaves v. State, 639 So. 2d 1 (Fla. 1994).[4] In Burns, a highway patrol

---

[3] Kearse's remaining cases are equally distinguishable. Both Brown v. State, 526 So. 2d 903 (Fla. 1988), and Washington v. State, 432 So. 2d 44 (Fla. 1983), were override cases, and thus are not comparable in proportionality review. See Burns, 699 So. 2d at 649 n.5 ("The remainder of the cases on which Burns relies are jury override cases. Jury override cases involve a wholly different legal principle and are thus distinguishable from the instant case."). In Robertson v. State, 611 So. 2d 1228 (Fla. 1993), this Court remanded for reweighing after striking two aggravators and merging two others. In Shere v. State, 579 So. 2d 86 (Fla. 1991), which does not involve the murder of a law enforcement officer, this Court found the defendant's sentence proportionate. Finally, in McKinney v. State, 579 So. 2d 80 (Fla. 1991), which also did not involve the murder of a law enforcement officer, this Court found the defendant's sentence disproportionate after striking two aggravating factors, thereby leaving only the "felony murder" aggravator and "substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history."

[4] See also Grossman v. State, 525 So. 2d 833 (Fla. 1988) (affirming death sentence for murder of wildlife officer with "felony murder," "avoid arrest/hinder law enforcement," and HAC in aggravation, and nothing in

trooper pulled over Burns and a companion, ran a computer check, then asked if he could search the car. While searching the trunk, the trooper found cocaine. A struggle between Burns and the trooper ensued, Burns gained control over the trooper's gun and shot him, then fled. The trial court found only one aggravating factor: "avoid arrest/hinder law enforcement/murder of a law enforcement officer." In mitigation, it found Burns' age (42) and lack of a significant criminal history as statutory mitigation, and poor childhood environment, socially disadvantaged, intelligent,

---

mitigation); Phillips v. State, 705 So. 2d 1320 (Fla. 1997) (affirming death sentence for murder of parole supervisor with "under sentence of imprisonment," "prior violent felony," "hinder law enforcement," and CCP in aggravation, and low intelligence, poor family background, and abusive childhood in mitigation); Rivera v. State, 545 So. 2d 864 (Fla. 1989) (affirming death sentence for murder of police officer with "prior violent felony," "great risk," "felony murder," and "avoid arrest" in aggravation, and nothing in mitigation); Street v. State, 636 So. 2d 1297 (Fla. 1994) (affirming death sentence for murder of two police officers with "prior violent felony," "felony murder," and "avoid arrest/hinder law enforcement/murder of a law enforcement officer" in aggravation, and some degree of mental or emotional disturbance, a lack of formal education, a low I.Q., and a low level of brain functioning in mitigation); Jones v. State, 440 So. 2d 570 (Fla. 1983) (affirming death sentence for murder of police officer with "prior violent felony," "hinder law enforcement," and CCP in aggravation, and nothing in mitigation).

continuously employed after high school, contributed to society, supported his family, honorable discharge from military, remorse, good prison record, appropriate behavior in court, spiritual growth. 699 So. 2d at 648-49. This Court found Burns' sentence proportionate, finding the merged aggravators entitled to great weight, noting the absence of statutory mental mitigators, and noting that the trial court gave the statutory and nonstatutory mitigators only minimal weight.

Similarly, in Armstrong, the defendant and a companion robbed a Church's Fried Chicken restaurant and shot to death one of the two police officers who responded to the silent alarm. 642 So. 2d 733. In aggravation, the trial court found the "prior violent felony," "felony murder," and "avoid arrest/murder of a law enforcement officer" aggravators. Id. at 734. In mitigation, it found no statutory mitigating circumstances, but it found the following nonstatutory circumstances: significant physical problems as a child, helped others, good father and provider, witnessed physical as a child against his mother, could be productive in prison, good prospect for rehabilitation, codefendant received a life sentence, life imprisonment without parole is other sentencing option, religious beliefs, and failed to receive adequate medical care as

child. Id. This Court found Armstrong's sentence proportionately warranted. Id. at 739-40.

Likewise, in Reaves, a deputy sheriff responded to a 911 call at a convenience store and upon arrival ran a records check on Reaves. When a gun fell out of Reaves' shorts, the deputy put his foot on it, but Reaves managed to retrieve it and shoot the deputy seven times. 639 So. 2d at 3. In aggravation, the trial court found the "prior violent felony," "avoid arrest," and HAC factors, the latter of which this Court struck on appeal. In mitigation, the trial court found no statutory mitigating circumstances, but found as nonstatutory mitigation that Reaves had been honorable discharged from the service, had a good reputation in the community up to the age of sixteen, was a considerate son to his mother, and was good to his siblings. Id. at 3 nn.2,3. This Court found Reaves' sentence proportionately warranted, given the two "strong aggravating factors found and relatively weak mitigation." Id. at 3 (footnote omitted).[5]

As in Burns, Armstrong, and Reaves, Appellant's death sentence is proportionate to those of other defendants in similar cases.

[5] Notably, this Court used Armstrong and Reaves to support its affirmance of Burns' sentence, even though Armstrong and Reaves had additional aggravators and slightly less mitigation than did Burns. Burns, 699 So. 2d at 650.

Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Officer Parrish.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY EVALUATED IN ITS SENTENCING ORDER APPELLANT'S MITIGATING EVIDENCE (Restated).

In its written sentencing order, the trial court made the following findings regarding Kearse's nonstatutory mitigation:

> Defendant's attorney has listed forty such possible factors but with no written or oral argument at the penalty phase to support them. The Court has considered whether each of these has been established by the greater weight of the evidence.
>
> Items 1 and 2 relate to lack of heightened premeditation and lack of being, heinous, atrocious, or cruel. This Court doubts that the absence of a statutory aggravating factor can become a non-statutory mitigating factor. Even if it could be, the evidence here, while not sufficient for aggravating factors, certainly does not disclose anything meritorious in the manner of this murder. The officer was hit by thirteen bullets, begged for his life, and was partially paralyzed before he died. The Court cannot find that the greater weight of this evidence establishes either of these suggested mitigating factors.
>
> Item 3 is "Time between any decision to cause death and the shooting insufficient to allow cool and thoughtful consideration of conduct." For the reasons discussed in Items 1 & 2 above, the Court cannot find that this suggested mitigating factor has been established by the greater weight of the evidence.
>
> Item 4 relates to defendant's cooperation with law enforcement, confession, and sincere remorse. The evidence shows that defendant initially did anything but cooperate and that even after he was confronted with evidence of his guilt, he blamed the conduct of the

> officer for the killing. While the Court must find that the defendant did confess, little weight should be given to this act under the circumstances and the Court cannot find from the greater weight of the evidence any true remorse.
>
> Item 5. The Court finds that the defendant's behavior at the trial was acceptable and will give this some weight.
>
> Items 6 through 39 are a laundry list of factors that essentially relate to defendant's difficult childhood and his psychological and emotional condition because of it. While the Court finds that the greater weight of the evidence does not establish fetal alcohol effect or organic brain damage, there was evidence regarding the remaining conditions and the Court has considered individually and will give some weight to each of these suggested factors.
>
> Item 40 states "Defendant entered the adult penal system at a very early age." While this is true, the Court fails to see how this could be a mitigating factor. If it is, somehow, it is entitled to little weight.

(R 708-09).

In this appeal, Kearse claims that the trial court failed to properly analyze items 6 through 39 of his list of nonstatutory mitigation, in violation of Campbell v. State, 571 So. 2d 415 (Fla. 1990), and its progeny. **Brief of Appellant** at 46-49. First, although the trial court did not specifically list each and every nonstatutory mitigator presented, it specifically referred to defense counsel's sentencing memo, which did list each and every factor. (R V 690-91). Thus, by reference to this pleading, the

trial court sufficiently articulated Kearse's nonstatutory mitigation.

Second, in Campbell, this Court established guidelines for analyzing nonstatutory mitigation. In doing so, this Court stated, "As with statutory mitigating circumstances, proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." 571 So. 2d at 419 n.3. As examples, this Court explained that

> [v]alid nonstatutory mitigating circumstances include but are not limited to the following:
> 1) Abused or deprived childhood.
> 2) Contribution to community or society as evidenced by an exemplary work, military, family, or other record.
> 3) Remorse and potential for rehabilitation; good prison record.
> 4) Disparate treatment of an equally culpable codefendant.
> 5) Charitable or humanitarian deeds.

Id. at 419 n.4. Since Campbell, this Court has rejected challenges to written sentencing orders where the trial court categorized the defendant's mitigation, as opposed to specifically detailing every conceivable variation on the theme. E.g., Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994) ("Although Reaves proffered nonstatutory factors in greater number, the judge reasonably grouped several proffered mitigating factors into three."); Cole v. State, 701 So. 2d 845, 852 (Fla. 1997) (affirming trial court's

treatment of mitigation where court classified nonstatutory mitigation into three categories).

Kearse cites to two cases wherein this Court remanded for more significant analysis of aggravating and mitigating factors. But in each of those cases, the analysis of mitigation was significantly less detailed and articulate than the analysis in this case. For example, in Hudson v. State, 23 Fla. L. Weekly S71, 72 (Fla. Feb. 5, 1998), the trial court devoted only two sentences to Hudson's nonstatutory mitigation, which apparently included significant evidence of a deprived childhood. Similarly, in Jackson v. State, 704 So. 2d 500, 506 (Fla. 1997), the trial court devoted only one sentence to Jackson's nonstatutory mitigation, which included significant evidence of childhood abuse, and domestic violence and drug/alcohol abuse as an adult. More importantly, in each of those cases, the trial court rejected the defendant's mitigation without explaining the inconsistencies in the evidence or the lack of evidence to support the circumstances.

Here, on the other hand, the trial court "considered whether each of [the 40 possible factors] ha[d] been established by the greater weight of the evidence." (R 708) (emphasis added). As to items 6 through 39, the trial court indicated that it had considered each individually and that, with the exception of

organic brain damage, it had given "some weight to each of these suggested factors." (R 708). It had earlier explained, in relation to the two statutory mental mitigators, why it had rejected the evidence of organic brain damage. Thus, it is clear from the order that the trial court considered each of the 34 factors individually, that it had found all but one to exist, and that it gave some weight to each. This is all that Campbell and its progeny require. Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE VI

WHETHER THE TRIAL COURT FAILED TO CONSIDER AS NONSTATUTORY MITIGATION APPELLANT'S "MENTAL OR EMOTIONAL DISTURBANCE" (Restated).

In its written sentencing order, the trial court made the following findings regarding Kearse's statutory mental mitigation:

> **a. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.**
>
> **b. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.**
>
> Each of these possible mitigating factors must be considered in two ways: first, on the basis of the extensive psychological evidence presented, and second, in the light of the evidence regarding the defendant's conduct at the time of the offense.
>
> There is no doubt but that defendant grew up in bad circumstances. His childhood and early family training were horrible. The evidence does not establish that defendant has

> organic brain damage from any source including fetal alcohol syndrome. He obviously has some personality disorders and has indulged in bad conduct all of his life. While the experts who testified disagreed, the court finds that any mental or emotional disturbance was not "extreme."
>
> The evidence shows that defendant exhibited a clear thinking process throughout the criminal episode. He lied to the officer about his name to the extent that the officer made several attempts to verify it in different forms. When this failed, defendant had presence of mind to take the officer's pistol. He fired fourteen shots in several groups with pauses in between during which the officer begged for his life. He then thought to keep the pistol with his fingerprints on it and to later hide it. He made an effort to conceal the automobile. When questioned after the offense, he led the officers on a wild goose chase for the pistol. This evidence shows defendant's ability to appreciate the criminality of his conduct, to make conscious choices about that conduct, and to purposely engage in the criminal activities. The Court finds that neither of these two statutory mitigating factors has been proven by the greater weight of the evidence.

(R V 707-08).

In his sentencing memo to the court, defense counsel listed 40 nonstatutory mitigating factors that he believed had been proven by the evidence. Among those were the following:

> 6. Fetal alcohol effect including hyperactivity, attention deficit disorder, poor judgment and delayed learning.
>
> 7. Organic brain damaged.
>
> 8. Low I.Q., impulsive, and unable to reason abstractly.

9. Impulsive person with memory problems and impaired social judgment.

10. Difficulty attending to and concentrating on visual and auditory stimuli.

11. Difficulty with perceptual organizational ability and poor verbal comprehension.

12. Impaired problem solving ability.

13. Impaired cognitive flexibility.

14. Deficits in visual and motor performance.

15. Lower verbal intelligence.

16. Poor auditory short-term memory.

17. Mildly retarded and functioned at a third or fourth grade level.

18. Developmentally learning disabled.

19. Slow learner and needed special assistance school.

20. The Defendant was severely emotionally handicapped.

21. Impaired memory.

22. Impoverished academic skills.

23. Mental, emotional and learning disabilities.

24. Delayed developmental milestones.

25. Severely emotionally disturbed child.

26. Difficult childhood.

27. Socially and economically disadvantaged.

28. Impoverished background.

29. Improper upbringing.

30. Defendant was malnourished.

31. No opportunity to bond with natural father.

32. Father died when Defendant was young and he grew up without a male role model.

33. Defendant came from a broken home and raised in poverty.

34. Raised in a dysfunctional family.

35. Alcoholic mother.

36. Neglect by mother.

37. Childhood trauma.

> 38. Defendant subjected to physical and sexual abuse.
>
> 39. Mother gave up on Defendant at an early age and he raised himself in the streets.

(R V 691-92). In analyzing these factors, the trial court made the following findings:

> Items 6 through 39 are a laundry list of factors that essentially relate to defendant's difficult childhood and his **psychological and emotional condition** because of it. While the Court finds that the greater weight of the evidence does not establish fetal alcohol effect or organic brain damage, there was evidence regarding the remaining conditions and the Court has considered individually and will give some weight to each of these suggested factors.

(R V 709) (emphasis added).

Kearse does not challenge the trial court's rejection of the statutory mental mitigators, but complains that the trial court failed to explain, as required by Jackson v. State, 704 So. 2d 500, 506 (Fla. 1997), why the evidence did not constitute nonstatutory mental mitigation. **Brief of Appellant** at 50-51. From the excerpts of the sentencing order above, it is clear that the trial court did, in fact, consider Kearse's mental health evidence as nonstatutory mitigation. Not only did it consider such evidence, it found such evidence to exist and gave each of the nonstatutory factors "some weight." (R V 709). Cf. Valle v. State, 581 So. 2d 40, 48 (Fla. 1991) (finding that trial court considered mental

mitigation as nonstatutory mitigation after rejecting same as statutory mitigation). Therefore, this Court should reject this claim and affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO DISQUALIFY THE PROSECUTOR (Restated).

Two months before trial, Kearse moved to disqualify Assistant State Attorney David Morgan from prosecuting Kearse's resentencing. He alleged that Morgan had just recently been elected to the county court bench and would be well-known to, and well-liked by, the venire. (R IV 512-13). After a hearing, the trial court denied the motion, because counsel's rationale would preclude every attorney who was waiting to take the bench, and every judge who had retired from the bench, from practicing law because of their status. More importantly, it found that defense counsel could question the venire about Mr. Morgan's election, and the trial court or counsel could excuse anyone who was unfairly biased towards the State because of his election to the bench. (T XI 143-49).

In this appeal, Kearse claims that the trial court abused its discretion in denying his motion for disqualification because there was an appearance of impropriety in allowing an elected judge to

prosecute him prior to the judge's investiture. **Brief of Appellant** at 52-55. In a case cited to by Kearse, this Court indicated that it evaluated on a case-by-case basis situations involving the appearance of impropriety that may demand disqualification. Bogle v. State, 655 So. 2d 1103, 1106 (Fla. 1995). On the facts of that case, disqualification of the prosecutor was unwarranted.

In order to disqualify a state attorney, a defendant must show actual prejudice. Nunez v. State, 665 So. 2d 301, 302 (Fla. 4th DCA 1995); see also Farina v. State, 679 So. 2d 1151, 1157 (Fla. 1996) ("[W]e do not believe that Farina suffered any actual prejudice that would require disqualification" of the prosecutor); State v. Clausell, 474 So. 2d 1189, 1190 (Fla. 1985) (finding disqualification proper only when specific prejudice demonstrated). "Actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So. 2d 518, 519 (Fla. 1st DCA 1989). Moreover, "[d]isqualification of a state attorney must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." Id.

Kearse made no such showing of prejudice to the trial court. Kearse alleged only an appearance of impropriety, which is legally insufficient to warrant disqualification. Moreover, any prejudice to Kearse that might have flowed from Mr. Morgan's election to the

bench could have been easily ascertained and remedied. As the trial court suggested, Kearse could have questioned the venire about Mr. Morgan's recent election to the bench to determine whether any of the jurors had voted for him or would otherwise be biased or partial to the State because of his election. Kearse failed to do so and should not now be heard to complain that he received an unfair trial by biased or partial jurors.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT (Restated).

Prior to trial, Kearse filed a Motion in Limine, seeking to preclude the State from arguing to the jury "that they should show the Defendant the same mercy which he showed to the victim on the day of his death." (R III 484). Just prior to jury selection, defense counsel started to raise the motion, but deferred it to another time. (T XIII 222-23). He made no further attempt to raise the issue.

Several days later, in concluding his opening statement, the prosecutor made the following comments before the jury:

> We are here because this Defendant is guilty of murder. We are here because the Defendant wants to live, even though he denied that right to Officer Parrish. The bottom line, Ladies and Gentlemen, is we're here

> seeking justice on behalf of Officer Danny Parrish. A voice we're going to bring from you from six years ago demand justice. We are here asking you to show this Defendant the same mercy he showed Officer Parrish, except in this courtroom it will be in accordance with the law.

(T XIX 1149). Immediately thereafter, defense counsel moved for a mistrial, which the trial court denied. (T XIX 1150-51).

In this appeal, Kearse claims that these comments prejudiced his right to a fair trial, and thus the trial court abused its discretion in denying his motion for mistrial. **Brief of Appellant** at 56-58. Initially, the State submits that this issue was not preserved for appeal, but notes conflicting case law regarding preservation. When defense counsel objected to the State's guilt-phase closing argument, he made only a motion for mistrial. (T XIX 1150-51). In Duest v. State, 462 So. 2d 446, 448 (Fla. 1985), this Court held that "[t]he proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks." This holding was reaffirmed several years ago in Parker v. State, 641 So. 2d 369, 376 & n.8 (Fla. 1994). Several weeks after Parker, however, this Court issued Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994), wherein this Court held that "a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal. The issue is preserved if the defendant makes a timely

specific objection and moves for a mistrial." This holding in Spencer was recently affirmed in James v. State, 695 So. 2d 1229 (Fla. 1997) ("As we explained in Spencer . . . , defense counsel may conclude upon objection that a curative instruction will not cure the error and choose not to request one.").[6] Despite the primacy of James, the State maintains that Appellant failed to satisfy his burden when he failed to seek a curative instruction.

Be that as it may, this Court has previously stated that "prosecutorial error alone does not automatically warrant a mistrial." Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989). Unlike in Rhodes, relied upon by Kearse, this was a single comment that, standing alone, was not so egregious that it vitiated the entire resentencing proceeding. Id. at 1206 (holding that cumulative effect of five improper comments was prejudicial error).

[6] By implication, Spencer and James have receded from a long line of cases typified by Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974), wherein this Court held that if a party complaining of an improper comment rejects an offer of a curative instruction the party has invited error and may not complain on appeal. Under Spencer and James, it is solely within the complaining party's discretion to decide whether a curative instruction will cure the error. Thus, under these cases, the party could reject an offered instruction with impunity, an action condemned in Sullivan and its progeny.

Rather, as in Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), the prosecutor's comment was harmless beyond a reasonable doubt. As detailed in Issue IV, supra, the quality and quantity of aggravating factors and the minimal mitigation in this case supports a sentence of death, and there is no reasonable possibility that the jury's twelve to zero recommendation, or the trial court's ultimate sentence, would have been different had the State not made these comments. Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE IX

> WHETHER THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL BY INFORMING THE JURY THAT APPELLANT HAD BEEN FOUND GUILTY AND THAT AN APPELLATE COURT HAD REMANDED THE CASE FOR SENTENCING (Restated).

During the State's initial opportunity to question the venire, the State noted at sidebar that several jurors had indirectly asked why they were being empaneled to consider Kearse's sentence. As a result, the State asked the court to instruct the jury as indicated in Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). In response, defense counsel said, "Judge, we have no objection to you reading this instruction to the jury at this time if that's the State's desire." (T XIII 303). Thereafter, the trial court made the following comment to the venire:

> Ladies and Gentlemen of the Jury, I'm going to answer a question that may be in the back of many of your minds.
>
> An appellate court has reviewed and affirmed the Defendant's conviction of the murder of Officer Danny Parrish. However, the appellate court sent the case back to this Court with an instruction that the Defendant is to have a new trial at this time to decide what sentence should be imposed. And that's the reason we are here. And as you've been told, the conviction stands, but we are here to have a new trial at this time to decide what sentence should be imposed and this jury will make a recommendation on that.

(T XIII 304).

The following day, new people joined the venire, so the State requested that the trial court repeat the instruction to the new panel. (T XV 522-23). <u>Without objection</u> from defense counsel, the trial court made the following comment:

> For the benefit of the new jurors, an Appellant Court has reviewed and affirmed the Defendant's conviction in this case for the murder of Officer Danny Parrish. However, the Appellant Court sent this case back to this Court with instructions that the Defendant is to have a new trial at this time to decide what sentence should be imposed. The jury that we select in this case will be a jury that makes a recommendation to me as to what sentence should be imposed in this case.

(T XV 523).

Finally, after the jury had been sworn, the State submitted to the court proposed preliminary instructions, and defense counsel specifically indicated that he had <u>no objection</u> to them. (T XIX

1133). From those proposed instructions, the trial court gave, in pertinent part, the following instruction during its standard preliminary instructions to the jury:

> Ladies and Gentlemen of the Jury, the Defendant has been found guilty of the first degree murder of Danny Parrish and consequently you will not concern yourself with the question of his guilt. An appellate court has reviewed and affirmed the Defendant's conviction for the first degree murder of Danny Parrish. However, the appellate court sent the case back to this Court with instructions that the Defendant is to have a trial at this time to decide what sentence should be imposed.

(T XIX 1137).

In this appeal, Kearse claims that these three instructions emphasized the fact that "another jury had sentenced Appellant to death and that the case will be scrutinized by an appellate court." In Kearse's opinion, "a jury should not be made aware, either directly or indirectly, of a prior jury's action or that there will be review by an appellate court." **Brief of Appellant** at 59-60.

Initially, the State submits that Kearse has failed to preserve this issue for review. Defense counsel specifically approved the first and last instruction and made no objection to the second. Therefore, Kearse cannot now challenge those instructions on appeal, absent fundamental error. See Tillman v.

State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

The instructions were not erroneous; *a fortiori*, they were not fundamentally erroneous. Contrary to Appellant's assertion, they did not indicate, either directly or indirectly, what sentence the prior jury had recommended. Rather, they were verbatim from the standard jury instructions adopted by this Court following Hitchcock. Fla. Stand. Jury Instr. (Crim.) 74 (Mar. 1997). In proposing and adopting this instruction, this Court obviously did not consider improper any reference to an appellate court having reviewed the conviction and sentence. Kearse has failed to show that this Court erred in adopting that instruction.

Cumulative to these three instructions, Kearse claims prejudice from a comment the prosecutor made during jury selection. While questioning a potential juror, the prosecutor said, "You heard what Judge Trowbridge said about the fact that this Defendant has been found guilty and the Supreme Court has affirmed that conviction, and has said that there should then be a proceeding to recommend death. Do you have any concern or problem about that?" (T XIV 470). Defense counsel made no objection to this statement. Thus, he failed to preserve this issue for appeal. Tillman v.

State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Regardless, when one reads the entire voir dire in toto, it is obvious that this was an inadvertent misstatement that Kearse is taking out of context. Not only had the trial court just recently read the Hitchcock instruction explaining their function, but the prosecutor had also previously explained, on several occasions, the two possible penalties and the process of weighing the aggravating and mitigation factors. (T XIII 239, 246, 256-58, 260-61, 272-73, 298-99, 342, 374, 410). This comment, which defense counsel did not even object to, was cured by the totality of the comments and the trial court's instructions. It certainly did not vitiate Kearse's entire resentencing. Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR LEAVE TO INTERVIEW JURORS (Restated).

On January 30, 1997, six weeks after the jury rendered its recommendation of death and was excused from service in this case, defense counsel filed a motion to interview the jurors. Attached to the motion was an affidavit by Assistant Public Defender Margaret Anderson, who averred that she was eating lunch with a colleague on December 19, 1996, when four unnamed persons wearing juror buttons were seated nearby. During the course of her lunch, she overheard "the jurors engage in discussions of occurrences in the courtroom." She could not recall specifics, but recalled hearing one juror state, "'I can't believe Udell said that.'" She overheard another juror state, "'I watched his face - that was a bad thing.'" She related this occurrence to defense counsel on December 20, 1996, and defense counsel filed his motion on January 30, 1997. (R IV 674-77).

On March 12, 1997, the trial court held a hearing on defense counsel's motion. Defense counsel rested on his motion, and the State rested on its response. The trial court denied the request to interview the jurors. (T XXX 2703-04).

In this appeal, Kearse claims that the trial court abused its discretion in refusing to allow the defense to interview the jurors

"to ascertain the degree of jury misconduct and the degree of prejudice from the misconduct." **Brief of Appellant** at 61-62. The State submits that Kearse did not meet the standard for obtaining juror interviews in this case. In Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 100 (Fla. 1991), this Court stated that, "in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it," juror interviews are never permissible "unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in [State v. Hamilton, 574 So. 2d 124 (Fla. 1991)]." In Hamilton, this Court enunciated the following standard for obtaining a new trial:

> Under Florida law, a trial court has wide discretion in deciding whether or not to grant a new trial. However, this discretion is not without limit:
>
> > The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result.... However, when an alleged error is committed which does no substantial harm and the defendant is not materially prejudiced by the occurrence, the court should deny the motion for a mistrial.

574 So. 2d at 126 (quoting Perry v. State, 146 Fla. 187, 200 So. 525, 527 (1941) (citations omitted)).

Applying these legal standards to this case, the State submits that Kearse's sworn factual allegations were too vague and speculative to determine whether, if true, they would require a new trial. The jurors' alleged statements--"I can't believe Udell said that" and "I watched his face - that was a bad thing"--were equivocal in nature. As such, the trial court could easily have construed them to be unrelated to the facts of the case, and thus not a violation of its directive not to discuss the facts prior to deliberation. Given the vague nature of the overheard statements, Kearse failed to meet his burden under Hamilton and Maler. Therefore, the trial court did not abuse its discretion in denying Kearse's motion to interview the jurors. See Shere v. State, 579 So. 2d 86, 94-95 (Fla. 1991) (finding no abuse of discretion in denying jury interview where letter to newspaper editor alleging jury misconduct was unsupported by sworn affidavits or other evidence, was sent anonymously, failed to name any of the jurors it accused, and there was no way the trial court reasonably could have identified the accused jurors to single them out for interviews); Williams v. State, 689 So. 2d 393, 397-98 (Fla. 3d DCA), rev. denied 697 So. 2d 513 (Fla. 1997); Hooker v. State, 497 So. 2d 982,

984 (Fla. 2d DCA 1986); Walker v. State, 330 So. 2d 110, 112 (Fla. 3d DCA 1976). As a result, this Court should affirm the trial court's ruling and Kearse's sentence of death for the murder of Officer Parrish.

ISSUE XI

WHETHER APPELLANT VALIDLY WAIVED HIS RIGHT TO BE PRESENT AT ALL PRETRIAL CONFERENCES (Restated).

This Court remanded this case for resentencing on December 11, 1995. After Judge Shack recused himself and Judge Walsh was appointed, Judge Walsh held a status conference on January 30, 1996. At the beginning of the hearing, Judge Walsh asked why Kearse had been sent back to prison, and defense counsel responded, "Judge, that was done by agreement between the parties as a courtesy to the administration of the jail." (T VI 2). The judge then commented, "I don't have any motions without the Defendant here so we'll just do a status and see where we are and [where] we're going, how's that. We can do that without the Defendant, everybody in agreement, Mr. Udell?" (T VI 2). Both parties agreed. (T VI 2). They then discussed the time frame for litigating the resentencing; the trial court appointed an investigator for the defense; they discussed a possible forthcoming recusal motion; they discussed the appointment of the trial court and defense counsel on

Kearse's then-pending aggravated battery cases, which the State wanted to expedite and use as aggravation in the capital case; and they discussed the issue of venue. (T VI 2-6, 6-7, 7-8, 9-18, 18-23). As to venue, both parties agreed that the trial court should hold the resentencing in St. Lucie County, but both acknowledged that they should obtain Kearse's presence and opinion on the matter. So the trial court took that issue under advisement. (T VI 18-23).

A week later, Kearse filed a written waiver of his presence at all pretrial conferences. (R III 445). At a hearing that same day, with Kearse present, the trial court acknowledged receipt of the written waiver and informed Kearse that the court and attorneys wanted to discuss the issue of venue in his presence. Defense counsel then requested that the court hold the resentencing in St. Lucie County, but the State had changed its position, believing that venue was still in Indian River County pursuant to the previous change of venue, and that Appellant could not simply withdraw his previously granted motion for change of venue. When Kearse indicated personally that he wanted the resentencing in Indian River County, the trial court found that venue lay in Indian River County. (T VII 31-42; R III 456-57).

Four and a half months later, after Kearse successfully moved to recuse Judge Walsh from the case, defense counsel renewed his

motion to hold the resentencing in St. Lucie County. (R III 489-90). At the next motion hearing, defense counsel raised the issue in Kearse's absence. The State maintained that Kearse could not waive venue back to St. Lucie County; rather, he had to move for a change of venue. Defense counsel indicated that Kearse had previously said he wanted the resentencing in Indian River County because he had been charged with aggravated battery on several jail guards and did not want to stay at the St. Lucie County jail. Since he had been acquitted of those charges, he wanted to hold the resentencing in St. Lucie County. Unfamiliar with the prior hearing before Judge Walsh, Judge Trowbridge wanted Kearse's opinion on the matter, so he took the motion under advisement until he could speak with Kearse. (T IX 80-101).

At the next hearing, the attorneys reargued their positions regarding venue, and Kearse indicated personally that he wanted the resentencing in St. Lucie County. (T X 104-16). The trial court denied Kearse's motion, however, finding that Kearse had waived his right to be tried in the county where the offense occurred when he obtained a change of venue in the original trial. He could not then waive the change of venue at his pleasure. Moreover, given that this was a murder of a law enforcement officer and a capital case, there would likely be significant pretrial publicity, even

for the resentencing. Thus, it would be more expedient to remain in Indian River County and avoid any pretrial publicity problems. (T X 121-23).

In this appeal, Kearse claims that he was denied his fundamental right to be present at all pretrial proceedings because, although he filed a written waiver of his presence, the trial court did not engage him in a colloquy to determine whether he was voluntarily, knowingly, and intelligently waiving his right. In addition, he alleges that his absence at the January 30 hearing was not harmless because he would have known the State was agreeing to venue in St. Lucie County and could have taken advantage of that agreement. Likewise, his absence at the June 21 hearing was not harmless because the State was representing their belief of Kearse's state of mind, and he should have been there to represent his true state of mind. **Brief of Appellant** at 63-67.

As for Kearse's claim that the trial court failed to conduct a colloquy with him to determine whether he was voluntarily, knowingly, and intelligently waiving his right to be present, such a colloquy is unnecessary in this instance. Florida Rule of Criminal Procedure 3.180(a)(3) provides, in pertinent part, that "[i]n all prosecutions for crime the defendant shall be present: . . . at any pretrial conference, unless waived by the defendant in

writing." The rule requires only a waiver in writing. It does not require a waiver hearing, nor should it. Cf. Reynolds v. State, 696 So. 2d 1275, 1275 (Fla. 5th DCA 1997) (quashing capias for defendant's arrest, issued upon defendant's absence at docket sounding, where defendant had previously filed written waiver).

Regardless, even if something more than a signed, written waiver is required, Kearse's absence at these two pretrial conferences was harmless beyond a reasonable doubt. See Garcia v. State, 492 So. 2d 360, 364 (Fla. 1986) ("It is clear then that while rule 3.180(a) determines that the involuntary absence of the defendant is error in certain enumerated circumstances, it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible."). Although Kearse was not at the January 30 status conference when the parties discussed the issue of venue, and he had not yet filed his written waiver, the trial court ultimately took the issue of venue under advisement until Kearse could be present. As discussed previously in Issue I, venue was proper in Indian River County and Judge Trowbridge, a successor judge following Kearse's previous change of venue, had little authority, absent unusual circumstances, to reconsider the previous order changing venue to Indian River County. Even if the parties, including Kearse, had

agreed to move venue to St. Lucie County, the trial court could have lawfully denied the request. Thus, Kearse suffered no prejudice by his absence at the January 30 hearing when the State initially agreed to transfer venue. Cf. Garcia, 492 So. 2d at 363 ("Appellant has not shown that he was prejudiced by his absence inasmuch as no adverse rulings were made on the motions."); MacPhee v. State, 471 So. 2d 670, 670-71 (Fla. 2d DCA 1985) (finding harmless defendant's absence from hearing wherein defense counsel waived speedy and obtained continuance, because defendant was present at next hearing when defense counsel obtained second continuance, which thereby waived speedy).

By the June 21 hearing, Kearse had filed a written waiver of his right to be present at all pretrial conferences.[7] When defense

[7] Opposing counsel suggests that the written waiver was a forgery or a fake because Kearse's name was printed on the waiver and the waiver was not notarized. **Brief of Appellant** at 64 & n.15. First, defense counsel discussed at the January 30 status conference that his client wanted to waive his presence at all pretrial conferences, and counsel indicated that he would file a written waiver as soon as possible. (T VI 2-6). He filed the written waiver six days later in open court at a hearing in Kearse's presence. (R III 445). He certainly had no reason to forge Kearse's signature on the document. Second, the trial court discussed the written waiver with Kearse at that hearing, and Kearse made no dissent. (T VII 30). Third, Rule 3.180 does not require the defendant's signature to

counsel renewed his request to transfer venue back to St. Lucie County, Judge Trowbridge, being newly appointed and unfamiliar with the request, took it under advisement until Kearse was present. Thus, the trial court made no decision regarding venue at this hearing. He waited until the next hearing, when Kearse was present, to discover personally Kearse's state of mind and to rule on defense counsel's motion. Thus, Kearse was not, in any way, prejudiced by his absence at the June conference. Cf. Garcia, 492 So. 2d at 363; MacPhee, 471 So. 2d at 670-71. As a result, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CAUSE CHALLENGE TO JUROR JEREMY OVER APPELLANT'S OBJECTION (Restated).

During the State's first day of questioning the venire, it asked Patricia Jeremy her feelings about the death penalty. Ms. Jeremy explained that she was a proponent of the death penalty in college, but was leaning more toward the position that she did not think it was the right solution. (T XIV 385). When asked if she

---

be notarized. He was, after all, represented by counsel.

thought her feelings would impair her ability to follow the law, she responded,

> As everyone else here, I'm a law abiding citizen, I know I could follow the law. It's just that I think -- I think I would possibly be impaired. Only because I feel that even before I hear any of the evidence, I just feel that I most likely would not be able to vote for the death penalty for this gentleman.

(T XIV 386-87). When the State tried to pin her down and asked again if her feelings would prevent or substantially impair her ability to follow the law, she responded, "I do believe it would be impaired, yes, sir." (T XIV 388).

The next day, during defense counsel's questioning, Ms. Jeremy explained that she had lost sleep over her potential to be selected as a juror. When defense counsel admitted he had no notes on her feelings about the death penalty, she explained that she was a proponent in college, "but now [she's] really much stronger opposed to the death penalty." (T XVI 776-77). She believed that two wrongs did not make a right. (T XVI 778). When defense counsel asked her if she could be fair and impartial, she responded, "I could try. Knowing that the other alternative is a true life sentence, I think -- I just -- I can't see voting for the death penalty knowing that the other option would be in my mind, it's just as strong about deterring crime, if you will." (T XVI 778).

When the State questioned her again, Ms. Jeremy reaffirmed, "I do believe I would be impaired in my heart, I just don't feel it's the right solution." (T XVIII 1056). Later she stated that there was a remote possibility that she could find herself voting for a death sentence, but "[she was] more convinced that [she] could not impose the death penalty on this man." (T XVIII 1060). Ultimately, she agreed that her ability to follow the law was impaired, but she was not sure to what extent. (T XVIII 1060-61).

When the State moved to challenge Ms. Jeremy for cause, the defense objected, but made no argument, and the trial court excused Ms. Jeremy from the jury. (T XVIII 1093). The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980)). It does not require that a juror's bias be proved with "unmistakable clarity." Id. Moreover, "because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . deference must be paid to the trial judge who sees and hears the juror." Id. at 424-26. See also Gore v. State,

706 So. 2d 1328, 1332 (Fla. 1997) ("A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency.").

In this case, Ms. Jeremy was uncomfortable saying that her attitudes substantially impaired her ability to follow the law. She believed that she was a law-abiding citizen, and she wanted to follow the law. But she did not believe that the death penalty was a viable sentencing option, especially since the alternative option was life imprisonment without parole. Despite her conflicted emotions, she stated on more than one occasion that her feelings substantially impaired her ability to be a fair and impartial juror. The trial judge, who was able to assess Ms. Jeremy's demeanor, ultimately determined that she met the Witt standard. This Court should give tremendous deference to that determination, which is supported by the record. Cf. San Martin v. State, 705 So. 2d 1337, 1343 (Fla. 1997) ("The jurors who were excused for cause had expressed their personal opposition to the death penalty and had, at best, responded equivocally when asked whether they could put aside their personal feelings and follow the law."); Kimbrough v. State, 700 So. 2d 634, 639 (Fla. 1997) ("Although the prospective juror did respond in the affirmative to a question by the defense attorney asking if she could follow the oath she would

be administered and apply the law as instructed by the judge, she had clearly expressed uncertainty several times during the interview."); Smith v. State, 699 So. 2d 629, 636 (Fla. 1997) (finding no abuse of discretion in excusing juror for cause where juror equivocally expressed impaired ability to follow law).

ISSUE XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO STRIKE FOR CAUSE JURORS BARKER AND FOXWELL (Restated).

During jury selection, Kearse sought to excuse for cause Richard Aldrich (T XVI 654-55; R IV 592), Norman Wells (T XVI 655), Marian Weber (T XVI 833), Rosemarie Hatch (T XVIII 1029), Timothy Walker (T XVIII 1088-89), John King (T XVIII 1089), Harry Foxwell, (T XVIII 1089-90), James Hiland (T XVIII 1090), Alana Renz (T XVIII 1091-92), Wade Combs (T XVIII 1092-93), Claire Matthews (T XVIII 1097-98), Josephine Barker (T XVIII 1098-99), Martha Hudson (T XVIII 1100-01), Imogene Grass (T XVIII 1101-02), Shirley Murphy (T XVIII 1102-03), and John Kurtz (T XVIII 1103-04). The trial court granted his challenges to Wells, Hatch, King, Hiland, Hudson, Murphy, and Kurtz. (T XVI 655; XVIII 1029, 1089, 1090, 1101, 1103, 1104). Of those against whom the trial court denied challenges for cause, defense counsel peremptorily struck all but Aldrich, Walker, Matthews, and Grass. (T XVIII 1094-1105).

Eventually defense counsel used all of his allotted peremptory challenges and sought an unspecified number of additional challenges because “he ha[d] been improperly denied various challenges for cause.” (T XVIII 1105). When he identified Timothy Walker and Russell Bevard as jurors he would like to strike if given more challenges, the State interrupted and noted that he had never challenged Bevard for cause. (T XVIII 1105). When reminded by the State that he had to name jurors he would like to strike if given the opportunity, defense counsel responded, “Well, I can state for the record that the jurors that the Judge -- that we challenged for cause and which were denied.” (T XVIII 1106). When pressed for their identity, defense counsel named Timothy Walker, Harry Foxwell, Alana Renz, and Wade Combs, all of whom, except for Walker, counsel had already stricken peremptorily. (T XVIII 1106). When pressed again for the names of those jurors whom defense counsel had challenged for cause, but whom defense counsel had not struck peremptorily and whom he would strike with the extra challenges, defense counsel named only Claire Matthews. (T XVIII 1107-08). Thus, of those jurors who were actually on the panel and whom defense counsel had attempted to strike for cause, counsel named only Timothy Walker and Claire Matthews. He did not name Richard Aldrich and Imogene Grass. Before the trial court swore in

the jurors, defense counsel reserved his objections previously made.[8] (T XVIII 1111).

On appeal, however, he does not challenge the qualifications of anyone who actually sat on the jury. Rather, he challenges only the trial court's denial of his cause challenges against Harry Foxwell and Josephine Barker, both of whom he struck peremptorily. As discussed below, the State submits that the trial court did not abuse its discretion in denying defense counsel's cause challenge as to these two potential jurors.

A. Juror Foxwell

During the State's initial questioning of the venire, Harry Foxwell indicated that he was a proponent of the death penalty and that he could follow the law as explained by the court. He understood that the death penalty was not automatically imposed for every convicted murdered. He indicated that he could vote for life if the State had not met its burden and that he could vote for death if it had met its burden. (T XIII 318-27).

The next day, during defense counsel's questioning, Mr. Foxwell questioned why they were resentencing Kearse and indicated that he

---

[8] The State agrees that Kearse preserved his objections to Walker and Matthews. It does not agree, however, that he preserved his objections to Aldrich and Grass. See Van Poyck v. State, 23 Fla. L. Weekly 275, 275 n.3 (Fla. May 14, 1998).

should have been sentenced within a year after his conviction. (T XVI 703-06). Shortly thereafter, defense counsel asked him, "Notwithstanding your frustrations, you can sit through this next week and follow the instructions and listen to the evidence?" and Mr. Foxwell responded, "Sure." (T XVI 707). He indicated he would not vote for death because of his frustrations with the system. (T XVI 707-08). He admitted, however, that he was a strong proponent of the death penalty and, when asked why, he said, "That's a horrible thing, taking a life. What could be any worse than that? Huh? . . . That's why you got the death penalty. That's how I feel. . . . Unless you change my mind, but you're going to have to do a lot of talking." (T XVI 708-09). When asked if he would tend to recommend death "under these facts based on your feelings," Mr. Foxwell noted that Kearse had already been convicted and believed it was Kearse's burden to convince him to impose life. (T XVI 709-10). Defense counsel asked him what he would consider in mitigation, and Mr. Foxwell responded, "I can't understand how he had the policeman's gun. How are you going to get around telling me that that was right?" (T XVI 710-11). Defense counsel then explained that mitigation did not justify the killing. "[W]e're going to try to convince you to give him life." (T XVI 711). From the nature of his following responses, Mr. Foxwell obviously

misunderstood the nature of mitigation, and defense counsel attempted to explain it to him. (T XVI 711-14). Counsel then asked Mr. Foxwell if he could follow the instructions as he had just explained them, and Mr. Foxwell responded that he would. (T XVI 714-15). He also indicated that he had no problem with the different burdens of proof between the State and the defense. (T XVI 715-16).

The following day, during the State's rebuttal questions, the prosecutor asked Mr. Foxwell if he would be able to decide the case based on the facts and law presented, and Mr. Foxwell responded, "I would try my damnedest." (T XVIII 1048). The State noted Mr. Foxwell's previous comments that defense counsel would have to convince him to recommend life and then explained that, under the law, Mr. Foxwell had to consider all of the aggravating and mitigating evidence, but he did not have to believe it. Mr. Foxwell understood. (T XVIII 1049-50). When asked if he would consider whatever is proposed by the defense or the State, Mr. Foxwell responded, "Whatever is said I've got to look at it and listen to it, I have to consider it of course." (T XVIII 1051). And when the prosecutor commented that both parties wanted the jury to consider their evidence, Mr. Foxwell stated, "I haven't tried him

yet. I don't know what I'm going to do until I hear what is said." (T XVIII 1051).

When the defense moved to strike Mr. Foxwell for cause, the State objected, arguing that Mr. Foxwell stated that he would follow the law.

> In addition, Your Honor, as you recall, this was a juror, once it was pointed out to him, that the law required that he consider the mitigating circumstances, he certainly was clear that he would be able to consider them. Amount of weight the jurors give to them is up to the jurors, but he clearly said he would be able to consider the aggravating and mitigating circumstances.

(T XVIII 1089-90). Without further argument from defense counsel, the trial court denied the motion for cause. (T XVIII 1090). Defense counsel later excused Mr. Foxwell peremptorily (T XVIII 1095).

The test for determining juror competency is "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Smith v. State, 699 So. 2d 629, 635 (Fla. 1997). The decision to grant or deny a challenge for cause is within the trial court's discretion and should not be disturbed absent manifest error. Id. Because the trial court is in a better position to assess the propriety of the challenge, this Court

should not substitute its judgment where the record supports the trial court's decision. Id.

Here, Mr. Foxwell expressed his belief in the death penalty and his frustrations with the criminal justice system. From the nature of his answers, however, it was obvious that Mr. Foxwell did not have a good grasp of the process or his role in sentencing. Once it was explained to him, he unequivocally stated to both the State and defense counsel that he would follow the law. When read in the context of the entire voir dire, the record supports the trial court's finding the Mr. Foxwell could put aside any biases and follow the law. Given the trial court's superior vantage point, this Court should defer to its determination. Cf. Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997) ("None of the three prospective jurors to whom appellant points on appeal gave answers indicating that he or she would fail to follow the judge's instructions or would apply the death penalty automatically."); Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) ("As the trial court below suggested, jurors brought into court face a confusing array of procedures and terminology they may little understand at the point of voir dire. It may be quite easy for either the State or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties

and the niceties of the law. The trial court is in the best position to decide such matters where, as here, the record strongly supports such a change of heart. Moreover, the courts should not become bogged down in semantic arguments about hidden meanings behind the juror's words. So long as the record competently supports the trial court's interpretation of those words, appellate courts may not revisit the question.").

B. Juror Barker

During the State's initial questioning of the venire, Josephine Barker indicated that she and her husband had moved to Indian River County 15 years ago from Long Island, New York. Her husband had retired as an Inspector after 29 years with the Nassau County Police Department. He was third in command under the Chief of Police. (T XV 530-33). Mrs. Barker had "no problem with" the death penalty and understood that it was not automatically imposed on every murderer. (T XV 535). Following the State's explanation of the penalty phase process, including the weighing of aggravators and mitigators, Mrs. Barker indicated that she understood the process and would follow the instructions as given. (T XV 535-38). She would not automatically vote for either life or death. (T XV 540). When asked if her husband's status as a retired police officer would "cause [her] any hesitation to vote for life if the

State [did not] prove its case," Mrs. Barker responded, "I honestly don't think it would." (T XV 540-41).

During defense counsel's questioning, counsel expressed his concern that Mrs. Barker's husband was a retired police officer and the victim was a police officer. (T XVII 881-82). When he asked Mrs. Barker if she could handle the photographs of the victim that the State was going to present, Mrs. Barker made the following comments:

> MS. BARKER: Oh, yes, I think so. I too had a very troubled night last night. I was -- wrestled with myself with the death penalty or life in prison without the hope of parole. I would have to be assured that the perpetrator would not be put into a prison where conjugal visits would be allowed or perhaps the fact that he could get out on a technicality. I am a proponent of the death penalty, I always have been. It isn't anything that I felt likely should happen. I could go both ways. As long as I was assured that there would be no chance of parole at any time, I could be swayed for life in prison.
>
> MR. UDELL: Well, I don't think you're going to hear any evidence about that.
>
> MS. BARKER: Excuse me?
>
> MR. UDELL: I don't think anybody from the Department of Corrections is going to come in here and tell you the law or any of that. The law is, there are only two possible sentences in this case, death in the electric chair or life imprisonment without eligibility for release. The words, I can't change the words, I can't define them, they seem to speak for themself.
>
> MS. BARKER: It's just that we do read about conjugal visits.

MR. UDELL: I understand. We read every day about someone sentenced to life in California, three years later they cut them loose. Polly Klaus' murderer. We sit there and shake our heads and go, what are we doing? I can't give you any more assurance.

MS. BARKER: I understand.

MR. UDELL: Does that satisfy you or does that give you -- I can't give you assurance, I can't tell you anything. I mean 25 years from now we could be living on Mars, who knows what's going to be happening. I mean 25 years from now there may be peace and love in the world and no weapons. I mean society changes, who knows.

MS. BARKER: I know.

MR. UDELL: Can I assume from what you're telling me, that without some ability to give you these assurances, you're going to be concerned about it?

MS. BARKER: Well, there too, I would have to weigh the evidence and decide.

(T XVII 883-85).

Defense counsel then returned to the issue of her husband being a retired police officer and expressed concern that she would be emotionally influenced by the State's evidence, to which she replied,

MS. BARKER: I don't think it would influence me.

MR. UDELL: Even when you see the pictures of the person lying in the street, you're not going to put your husband's picture on that?

MS. BARKER: I don't think I would. I think I could separate myself.

MR. UDELL: How about going home and speaking to him at night after the verdict?

MS. BARKER: I hadn't even thought of that.

> MR. UDELL: Have you discussed the case with him at all?
> MS. BARKER: Did I discuss it with him?
> MR. UDELL: Yes?
> MS. BARKER: No, I did not. He didn't question me either. He realizes that I was not supposed to speak to anyone about it.

(T XVII 886-87).

Defense counsel also questioned Mrs. Barker extensively about her ability to weigh aggravating and mitigating factors, her ability to consider the testimony of lay and expert witnesses, and her ability to be fair and impartial to both parties. Mrs. Barker adamantly believed that she could listen to the evidence and make a fair and impartial determination:

> MR. UDELL: Aggravating factors, mitigating factors, balancing the two, weighing them against each other, any problem with those concepts?
> MS. BARKER: None at all.
> MR. UDELL: Any reason why you couldn't do that intellectual and human analysis that you're going to have to go through?
> MS. BARKER: I'm sure I could.
> MR. UDELL: You told us you envision circumstances in which it's quite clear to you death is the only appropriate sentence?
> MS. BARKER: Could you repeat that.
> MR. UDELL: You assume there are circumstances in which you could see that a crime so heinous and a person so horrible that you could recommend death?
> MS. BARKER: I could. After weighing all the evidence.
> MR. UDELL: You apparently could see circumstances under which a true life sentence could be appropriate?
> MS. BARKER: I'm sorry?

MR. UDELL: You also can envision circumstances in which you would find life?

MS. BARKER: Yes.

MR. UDELL: You understand to not only look at how the homicide occurred, but who the person is?

MS. BARKER: Yes.

MR. UDELL: Some people tell us I don't care who the person is, they did what they did, doesn't matter who they are. Understand we're going to get into who Billy is?

MS. BARKER: Yes.

MR. UDELL: Any problem with that?

MS. BARKER: No.

MR. UDELL: I connection with that, some of the people who are going to testify are teachers. Any reason why you couldn't listen to their testimony?

MS. BARKER: Yes, I could listen.

MR. UDELL: Some people will tell you teachers -- these generalizations that lawyers do when we're picking juries. We have generalizations of who's pro defense and who's pro law enforcement and teachers seem to fall in that label category. Do you see teachers in that way?

MS. BARKER: Not in all cases.

MR. UDELL: Some of the other people who are going to testify in this case on maybe both sides are what we call experts, and if they testify, the Judge may give you an instruction on expert testimony and how to handle expert testimony. If you do get an instruction. basically it will say how you treat experts, experts are treated like any other witness except that they're allowed to give opinions. But whether you believe the witness in all, in total, or in part or whether you disbelieve the person, is based upon the same rules you would use for any other witness, and that is, does what they're telling you make sense, does it agree with what the other witnesses say.

My point is you can treat experts -- you can believe what they say or not believe what they say, but can you listen to, quote unquote, testimony, whether it's presented by the Defendant or the State?

MS. BARKER: I think I could listen objectively.

MR. UDELL: If you hear an opinion from an expert, will agree an expert's opinion is only good upon the basis upon which he gives an opinion. Anybody can give you an opinion. The bottom line is how did he reach that result, what's the factual data or scientific analysis upon which they're telling you their opinion. Any problem with that?

MS. BARKER: No problem.

MR. UDELL: You may hear in this case from a psychiatrist, psychologist, a neuropharmacologist and a neuroradiologist. We don't know exactly who's going to testify and who's not. We'll see. Can you listen to their testimony?

MS. BARKER: Yes, I could.

MR. UDELL: Now, in connection with the psychiatric or psychological testimony that you may hear, do you believe that there is some science to the mental health field or is it all psycho babble?

MS. BARKER: Oh, no, I believe there is a science to it.

MR. UDELL: You understand a lot of people say psychiatric testimony, mental health testimony, it's all hogwash?

MS. BARKER: Oh, no, I think it would weigh a lot in a case like this.

MR. UDELL: Okay. Anything that we haven't asked that you, five years from now we're going to say, gee, we wish we had known that?

MS. BARKER: Nothing I can think of.

MR. UDELL: Kind of case I know you don't want to sit on, I'm sure you got more important things with Christmas coming up, I don't know

> if you've done your shopping. Any reason you can't spend the next week with us?
>
> MS. BARKER: None.
>
> MR. UDELL: Any reason that you can't be fair to the State and to Mr. Kearse?
>
> MS. BARKER: I don't think I would be unfair in either way.
>
> MR. UDELL: Think you'd be a good juror?
>
> MS. BARKER: I think I would be.

(T XVII 887-92).

Defense counsel challenged Mrs. Barker for cause on two grounds: her husband was a retired police officer and she wanted assurances that Kearse would never get out of prison. (T XVIII 1098-99). The State objected, noting that she specifically told defense counsel that her husband's status as a police officer would not affect her ability to be fair and impartial. (T XVIII 1099-1100). The trial court denied his challenge. (T XVIII 1100). Defense counsel thereafter struck her peremptorily. (T XVIII 1100).

On appeal, Kearse challenges only her comments regarding the conjugal visits as grounds for excusal: "It was error to deny Appellant's cause challenge to Barker where she could not vote for life unless she was assured there would be no conjugal visits." **Brief of Appellant** at 72. At trial, however, counsel did not raise this as a ground for excusal. He raised only her husband's status as a retired police officer and her concerns that Kearse might be granted parole. He may not raise a new ground on appeal. Tillman

v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Regardless, Mrs. Barker adamantly maintained that she could be fair and impartial, and follow the law, despite her concerns. She was questioned at length about her husband's law enforcement status, but she consistently stated that it would have no effect on her. As with juror Foxwell, when read in toto, the trial record supports the trial court's determination that Mrs. Barker could put aside any biases and follow the law as required. Because the trial court was in a better position to assess her demeanor and sincerity, this Court should defer to its determination. Cf. Mendoza v. State, 700 So. 2d at 675.

C. Harmless error

As noted previously, Kearse does not challenge on appeal any of the jurors who actually served on the jury. Rather, he challenges only two jurors whom he excused peremptorily. In Ross v. Oklahoma, 487 U.S. 81 (1988), the United States Supreme Court noted that defendants do not have a constitutional right to peremptory challenges, they have a right to an impartial jury. Thus, any claim that the jury was not impartial must focus not on the jurors who were ultimately excused, but those who actually served. Id. at 85-86. "So long as the jury that sits is

impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id. at 88. That the jury might have been different had Foxwell and Barker been excused for cause cannot, by itself, mandate reversal. See id. at 87.

Although defense counsel identified Timothy Walker and Claire Matthews as objectionable jurors, Kearse has not challenged on appeal their qualifications to serve. In fact, Kearse has not alleged, in any respect, that his jury was unfair. Thus, even if Harry Foxwell and Josephine Barker should have been excused for cause, any error was harmless where Kearse has failed to show any prejudice by the jury that actually served. See Ross, 487 U.S. at 91; Penn v. State, 574 So. 2d 1079, 1081 (Fla. 1991).

ISSUE XVII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE JURY AN INSTRUCTION ON VICTIM IMPACT EVIDENCE (Restated).

During the charge conference, the State presented the proposed jury instructions that it had prepared. Included in the proposed instructions was a special instruction drafted by the State pertaining to victim impact evidence. (T XXVIII 2525-27). The State argued that such an instruction was necessary to define the parameters of victim impact evidence and to inform the jury that

such evidence did not constitute aggravation or mitigation, but was nevertheless open for consideration. It further explained that it took the language of the instruction from the statute and from Bonifay v. State, 680 So. 2d 413, 419-20 (Fla. 1996). (T XXVIII 2534-36). Defense counsel objected to the entire instruction, believing it was not a subject for which an instruction was appropriate: "It may be one thing that it's the law that you can put evidence on, but I don't believe it's the law that you're supposed to give in this instruction." (T XXVIII 2532, 2537). The trial court overruled defense counsel's objection to the instruction (T XXVIII 2537) and later instructed the jury as follows:

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

(T XXIX 2691-92).

In this appeal, Kearse articulates several objections to the instruction. First, he claims it was vague, because it failed to tell the jury how to use the evidence. **Brief of Appellant** at 84-85. Second, he claims "the instruction gives undue importance to

victim impact evidence by highlighting it to the jury." Id. at 85. However, defense counsel made neither of these objections to the trial court, and thus Kearse cannot make them for the first time on appeal. See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if defense counsel's meaningless trial objection could encompass the claims made on appeal, the claims are without merit. As this Court reaffirmed in Kearse's original appeal, "the standard jury instructions should be used to the extent applicable in the judgment of the trial court. However, the trial judge still has the responsibility to '"properly and correctly . . . charge the jury in each case,"' and the judge's decision regarding the charge to the jury 'has historically had the presumption of correctness on appeal.'" Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995) (quoted sources omitted).

Here, the State introduced victim-impact evidence, the substance of which Kearse does not challenge, but the jury was completely unguided in its use of such evidence. If left to its own devices, the jury could have decided it related in some way to aggravation, or it could have decided it related to neither aggravation or mitigation and totally ignored it. The State sought to define the parameters of such evidence and explain its relevance

and use. As it did with the premeditation instruction in Kearse's original trial, the State drafted an instruction based on language from the victim-impact statute and this Court's decision in Bonifay. While defense counsel objected to the instruction on principal, he did not assert that the instruction was a misstatement of the law, nor did he propose alternative language.

The instruction was, in fact, a correct statement of the law, and it did not improperly highlight the evidence. It merely defined its relevancy to the proceedings and properly channeled the jury's consideration of such evidence. Under the circumstances, the trial court did not abuse its discretion in giving the instruction to the jury. Therefore, this Court should affirm Kearse's death sentence for the murder of Officer Parrish.

ISSUE XVIII

WHETHER THE TRIAL COURT GAVE INSUFFICIENT WEIGHT TO APPELLANT'S AGE AS A MITIGATING FACTOR (Restated).

In its written sentencing order, the trial court made the following comments regarding Kearse's age as a mitigating circumstance:

> **c. The age of the defendant at the time of the crime.**
>
> Since there is no magic cutoff age under this factor, the Court must find that it has been established by the greater weight of the

> evidence. However, the evidence shows that defendant had already been through many stages of the criminal justice system including state prison time. Although eighteen years of age at the time, defendant exhibited sophistication rather than naivete. The obvious intent of this statutory mitigator is to give consideration to a youth who acts from immaturity. This is just not the case here and the mitigator is entitled to some but not much weight.

(R V 708).

In this appeal, Kearse claims that the trial court gave this mitigator insufficient weight.[9] **Brief of Appellant** at 87-89. This Court recently reaffirmed that "the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (cited in Blanco). "Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991).

Appellant simply disagrees with the weight accorded to this mitigating circumstance. Such a disagreement, however, does not

---

[9] The State would note that this Court affirmed the total rejection of age as a mitigator in Kearse's original trial. Kearse v. State, 662 So. 2d 677, 681 & n.3 (Fla. 1995).

authorize this Court to go behind the trial court's judgment and reweigh the circumstance. This Court has long held that "the fact that a defendant is youthful, 'without more, is not significant.' Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, 'it must be linked with some other characteristic of the defendant or the crime such as immaturity.'" Mahn v. State, 23 Fla. L. Weekly S219, 222 (Fla. April 16, 1998) (quoted sources omitted). Moreover, "[w]here the defendant is not a minor, no per se rule exists which pinpoints a particular age as an automatic factor in mitigation. Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing." Shellito v. State, 701 So. 2d 837, 843-44 (Fla. 1997).

Kearse was not a minor. He was three months beyond his eighteenth birthday when he shot Officer Parrish to death. As indicated by the trial court in its sentencing order, while Kearse may have had learning disabilities, a low I.Q., memory impairments, etc., his actions at the time of the offense weakened the weight and effect of those factors. For example, Kearse knew that his failure to pay money under the conditions of his probation would subject him to re-incarceration. Thus, he decided to give Officer Parrish false names and dates of birth to conceal his identity in

case his probation officer had filed an affidavit of violation. (T XXII 1572-73). After shooting Officer Parrish, Kearse had the presence of mind to know that his fingerprints were on the gun and to take the gun with him, to pull the car he was driving around to the back of Derrick Pendleton's house and back it up to the house to conceal the license plate, and to flatten a tire on the car to make it look as if the car had not been moved. (T XXI 1472, 1475-76; XXII 1566-67). He was clever enough to tell the police he threw the gun off a bridge when he had it hidden in Pendleton's backyard. (T XXI 1415, 1419, 1422; XXII 1566-67). And he was clever enough to weave a story consistent with self-defense rather than premeditated murder. (T XXI 1421-22, 1471-72, 1478).

"Because the trial judge was in the best position to judge [Kearse's] emotional and maturity level, on this record [this Court should] not second-guess his decision to accept [Kearse's] age in mitigation but assign it only slight weight." Shellito, 701 So. 2d at 844. See also Moore v. State, 701 So. 2d 545, 551 (Fla. 1997) (affirming death sentence where trial court gave only slight weight to defendant's age of nineteen because defendant "was first treated as an adult before the court at the age of fifteen"). Rather, this Court should affirm the trial court's finding and Kearse's sentence of death for the murder of Officer Parrish.

ISSUE XIX

> WHETHER THE TRIAL COURT SHOULD HAVE MERGED THE "FELONY MURDER" AGGRAVATING FACTOR WITH THE "AVOID ARREST/HINDER LAW ENFORCEMENT/MURDER OF A LAW ENFORCEMENT OFFICER" AGGRAVATORS (Restated).

The trial court found in aggravation that Kearse committed the murder during the course of a robbery, that he committed the murder to avoid arrest, that he committed the murder to hinder the enforcement of laws, and that he murdered a law enforcement officer during the course of the officer's official duties. (R V 706-07). It merged the latter three aggravating factors, because they were based on the same evidence. (R V 707). Kearse claims that it should have merged the "felony murder" aggravator, as well, because Kearse's robbery of Officer Parrish's weapon "was committed solely for the purpose of committing the other aggravating factors." **Brief of Appellant** at 91-92.

In its written sentencing order, the trial court made the following findings regarding the "felony murder" aggravator:[10]

> The evidence shows that Defendant forcibly took Officer Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desire to avoid arrest when

---

[10] Kearse excised in his argument on this point crucial parts of the trial court's findings. **Brief of Appellant** at 91.

> he took the gun, the incident still constituted a robbery under the definition of that offense. The taking was not incidental to the killing. The Supreme Court so ruled in the prior appeal and also found that this circumstance did not constitute doubling. The Court finds that this aggravator has been proven beyond a reasonable doubt. It's [sic] weight, however, is diminished somewhat as stealing the officer's pistol was not a planned activity such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then kept it to conceal the fingerprints and other evidentiary matters it presented.

(R V 706) (emphasis added).

As the trial court noted, this Court rejected Kearse's doubling claim on appeal from his original trial:

> The "commission during a robbery" aggravating circumstance was properly found in this case and did not constitute doubling. This was not a situation where the taking of the officer's weapon was only incidental to the killing. Kearse forcibly took Officer Parrish's service pistol, then turned that weapon on the officer and killed him. Even though Kearse may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery because it involved "the taking of . . . property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." Under section 812.13, the force, violence, or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of force, violence, or intimidation and the

> taking constitute a continuous series of acts or events.

Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995) (citations omitted; emphasis added).

Although resentencings proceed under the “clean slate” rule, in that a resentencing is a completely new proceeding and the trial court can generally accept or reject aggravating and mitigating factors regardless of the prior court’s findings, the issue of doubling was a question of law. Under the “law of the case” doctrine, “all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice." Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994), cert. denied, 516 U.S. 830 (1995). See also Preston v. State, 444 So. 2d 939, 942 (Fla. 1984). Here, there were no material changes in the evidence, nor has Kearse revealed any exceptional circumstances to warrant reconsideration of this issue. Therefore, this Court should affirm the trial court’s independent consideration of this aggravating factor and Kearse’s sentence of death for the murder of Officer Parrish.

ISSUE XX

> WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

As discussed in the preceding issue, the trial court found the existence of the "felony murder" aggravating factor, noting this Court's prior affirmance of the finding of this factor:

> The evidence shows that Defendant forcibly took Officer Parish's service pistol, turned that weapon on the officer and killed him. Even though the Defendant may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery under the definition of that offense. The taking was not incidental to the killing. The Supreme Court so ruled in the prior appeal and also found that this circumstance did not constitute doubling. The Court finds that this aggravator has been proven beyond a reasonable doubt.

(R V 706).

In assessing the weight of this aggravating factor, the trial court made the following additional comments:

> It's [sic] weight, however, is diminished somewhat as stealing the officer's pistol was not a planned activity such as occurs in a purse snatching or a holdup. While technically defendant's actions constituted robbery, the reality is that defendant took the weapon to effect the killing and then dept it to conceal the fingerprints and other evidentiary matters it presented.

(R V 706).

Kearse seizes on these latter comments in claiming that "the robbery was not a planned activity[, and thus] the robbery

aggravator does not apply at bar." **Brief of Appellant** at 93-94. While this proceeding was a "clean slate" for purposes of finding and weighing aggravating and mitigating factors, the facts to support this aggravating factor were the same as in the original trial. In affirming the finding of this factor in Kearse's original appeal, this Court held the following:

> The "commission during a robbery" aggravating circumstance was properly found in this case and did not constitute doubling. This was not a situation where the taking of the officer's weapon was only incidental to the killing. Kearse forcibly took Officer Parrish's service pistol, then turned that weapon on the officer and killed him. Even though Kearse may have been motivated by his desire to avoid arrest when he took the gun, the incident still constituted a robbery because it involved "the taking of . . . property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." Under section 812.13, the force, violence, or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of force, violence, or intimidation and the taking constitute a continuous series of acts or events.

Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995) (citations omitted; emphasis added).

This analysis applies equally to the findings of the resentencing court. The fact that the trial court lessened the weight of this aggravating factor because Kearse's motivation in

killing Officer Parrish was to avoid arrest, rather than to steal his service weapon, does not in any way negate the existence of this factor. The evidence clearly reflects that Kearse took Officer Parrish's weapon with force, during which he shot and killed the officer with that weapon. These facts support the "felony murder" aggravating factor in this case. Cf. Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988) (affirming "felony murder" aggravator where defendant, in order to avoid arrest, beat wildlife officer with her flashlight, gained control over her gun, shot her to death, then fled with the gun). This Court should affirm the trial court's finding and Kearse's sentence of death for the murder of Officer Parrish.

Assuming for argument's sake, however, that the record does not support this aggravating factor, there is no reasonable possibility that the sentence would have been different. The murder of a law enforcement officer is an especially weighty aggravator. In contrast, Kearse had minimal mitigation that the trial court found neither "individually or in toto substantial or sufficient to outweigh the aggravating circumstances." (R V 709). Therefore, even if the trial court had not considered the "felony murder" aggravating factor, there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.

2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 so.2d. 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE XXI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE VICTIM (Restated).

During the State's case-in-chief, defense counsel objected to the testimony of the medical examiner, Dr. Hobin, claiming that his testimony relating to Officer Parrish's injuries was irrelevant to the resentencing, since the State was not seeking to establish the CCP or HAC aggravating factors. (T XXII 1668-69). The State responded that the testimony was relevant to place the events in context and to establish that the murder occurred during the commission of a robbery, i.e., that there was the forceful taking of property. It was also relevant to disprove any claim by the defense that the murder was not premeditated, i.e., that it was only a felony murder. (T XXII 1669-74). The trial court ultimately decided that the State could present the witness' testimony, but admonished the State to limit the testimony to the essentials, because it did not believe that the State was required or entitled to prove the elements of robbery or to admit every piece of evidence that was admitted at the original trial. As for the photographs that defense counsel tried to make a standing objection to, the trial court instructed defense counsel to proffer them individually for its review, "because [he] may limit those, too." (T XXII 1672, 1674).

Thereafter, Dr. Hobin testified that he performed an autopsy on Officer Parrish and took photographs during the autopsy as "a useful way of recording the actual objects." Dr. Hobin also testified that those photographs would assist him in explaining to the jury the nature and extent of the injuries to the victim. (T XXII 1677-79). He then identified five photographs depicting different injuries to the victim (State's exhibits 74, 76, 77, 78, 84). (T XXII 1679-80). When the State sought to introduce them into evidence, it explained that the court had admitted these photographs in the original trial, that each photograph depicted a different injury, and that it was seeking admission of the fewest number of photographs necessary. (T XXII 1680). Once again, the defense objected that the photographs were not relevant to prove any aggravating factor, including that the murder occurred during a robbery. (T XXII 1681). The trial court overruled defense counsel's objection and admitted the photographs. (T XXII 1682).

In this appeal, Kearse claims that the trial court abused its discretion in admitting Dr. Hobin's testimony as a whole and in admitting State's exhibit 78, which depicted a surgical scar resulting from resuscitation efforts made at the hospital. Specifically, he complains that Dr. Hobin's testimony and the

photograph of the surgical scar were not relevant and were more prejudicial than probative. **Brief of Appellant** at 95.

Initially, the State submits that Kearse is making different arguments on appeal than he made before the trial court. Kearse did not object specifically to State's exhibit 78; he made a general objection to the photographs as a whole. In his general objection, he did not object to the depiction of the surgical scar as irrelevant. Nor was his general objection based on the prejudicial nature of the photographs. Rather, it was based solely on the relevance of them in proving aggravation. Similarly, Kearse did not object to Dr. Hobin's testimony as more prejudicial than probative. Rather, he objected solely on the basis of relevancy. Thus, he cannot for the first time on appeal object to the admission of State's exhibit 78 because it depicted a surgical scar. Nor can he argue for the first time that the admission of the photograph and Dr. Hobin's testimony was more prejudicial than probative. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if his general objection somehow encompassed these additional arguments, however, they are wholly without merit. State's exhibit 78 depicted much more than a surgical scar. According to Dr. Hobin, this photograph depicted nine separate wounds where bullets

impacted, entered, or exited the victim's body. Some of these wounds produced "massive internal bleeding" and others severed the spinal chord. (T XXII 1688-90). Thus, while this photograph depicted a resuscitative surgical scar, it also depicted the fatal injuries to the victim.

As for the relevance of Dr. Hobin's testimony and State's exhibit 78, this Court has repeatedly reaffirmed that "[t]he basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment. This can be accomplished only by allowing a resentencing to proceed in every respect as an entirely new proceeding." Wike v. State, 698 So. 2d 817, 821 (Fla. 1997) (citation omitted). As in Wike, Dr. Hobin's testimony was not used to relitigate the issue of Kearse's guilt, but was used to familiarize the jury with the underlying facts of the case. Had this jury been the same panel that originally determined Kearse's guilt, it would have been allowed to hear this evidence. "Under section 921.141(1), Florida Statutes (1993), in a capital sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime. Thus, the test for admission of the evidence is relevancy as to the

‘nature of the crime’ and not just as to whether the evidence was admissible to prove any aggravating or mitigating factor.” Wike, 696 So. 2d at 821 (affirming admission of evidence in resentencing of injuries to surviving victim where interrelated with murder of victim); see also Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), cert denied, 465 U.S. 1074 (1987); Preston v. State, 607 So. 2d 404, 410 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (finding no abuse of discretion in allowing state “to retry its entire case as to guilt”), cert. denied, 502 U.S. 986 (1992); King v. State, 514 So. 2d 354, 357-58 (Fla. 1987) (no abuse of discretion in allowing several witnesses to testify “as to the circumstances of the crimes and the injuries to the victims” (emphasis added)), cert. denied, 487 U.S. 1241 (1988).

As for the prejudicial nature of the evidence, “[t]he fact that photographs are gruesome does not render their admission an abuse of discretion." Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). Moreover, Dr. Hobin’s testimony was neither graphic nor gruesome. He merely explained the location of the injuries and their effect on the victim’s health. Such testimony was relatively brief and did not become a “feature” of the trial, such that its probative value was outweighed by its prejudicial effect.

Even were the testimony and/or photographs admitted in error, however, such error was harmless beyond a reasonable doubt. As explained more fully in Issue IV, supra, the permissible evidence upon which the jury could have relied to recommend death revealed little mitigation that paled in comparison to the weight of the two aggravating factors. Thus, there is no reasonable possibility that the admission of Dr. Hobin's testimony and/or State's exhibit 78 affected the recommendation or ultimate sentence in this case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As a result, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

ISSUE XXII

WHETHER ELECTROCUTION IS CRUEL AND UNUSUAL (Restated).

Kearse claims on appeal that electrocution is cruel and unusual punishment, in violation of both the state and federal constitutions. **Brief of Appellant** at 98-99. He did not make such a claim in the trial court, however, and has thus failed to preserve the issue for appeal. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Regardless, this Court has recently and repeatedly rejected this claim. E.g., Jones v. State, 701 So. 2d 76, 80 (Fla. 1997) ("We hold that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment."). Therefore, this Court should affirm Kearse's sentence of death for the murder of Officer Parrish.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

____

SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this ____ day of August, 1998.

____

SARA D. BAGGETT
Assistant Attorney General