

IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES ,

Appellant,

vs.

Case No. SC04-891

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL  
CIRCUIT JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY

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**PRELIMINARY STATEMENT**

Appellant, WILLIAM REAVES, was the defendant in the trial court below and will be referred to herein as either "Reaves" and/or "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 evidentiary hearing proceedings below will be by the symbol "R" for the record and "T" for the transcripts of the hearing; to the 1992 re-trial as "DA"; the first 3.850 appeal as "PCR"; and to Appellant's Initial Brief as "IB"; all followed by the appropriate page number(s). Any supplemental record will be referred to as SR, ST, SDA or SPCR.

**STATEMENT OF THE CASE AND FACTS**

William Reaves was convicted and sentenced to death on September 2, 1987. On appeal, this Court reversed the conviction and sentence because the prosecutor, State Attorney Bruce Colton, had represented Reaves as an Assistant Public Defender in a prior unrelated case. Reaves v. State, 574 So.2d 105 (Fla. 1991).

On remand before the Honorable James Balsiger, Reaves was again convicted of first degree murder and sentenced to death on February 25, 1992. In aggravation, Judge Balsiger found that Reaves had three prior violent felony convictions, had committed

the murder to avoid arrest, and that the murder was especially heinous, atrocious, or cruel ("HAC"). Reaves v. State, 639 So.2d 1, 3 n.2 (Fla. 1994). In mitigation, Judge Balsiger found Reaves had been honorably discharged from the military, had a good reputation in his community until he was fifteen or sixteen years of age, and was a good son and brother. Reaves, 639 So.2d at 3 n.3.

This Court found the following facts:

The victim, Deputy Sheriff Richard Raczkoski, at or about 3 a.m. on September 23, 1986, responded to a 911 call from a phone booth outside a Zippy Mart near Vero Beach. The deputy acknowledged his arrival at the Zippy Mart and inquired about outstanding warrants on William Reaves. Within minutes of the call, the deputy was found near the phone booth with four gunshot wounds from which he died later that morning. A piece of paper inside the deputy's vehicle had written on it: William Reaves, black male, 4336 38th Avenue, date of birth 12/30/48.

Witness Whitaker, who discovered the deputy, testified that he saw a black man wearing red shorts and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton was ruled unavailable to testify, [pursuant to] section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record. According to Hinton, Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment after the shooting and said: "I done ... up. I just shot a cop, I just shot a police." Hinton testified that Reaves quoted the deputy as saying, "Don't shoot me. Don't

shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties. Witness Fredell testified that Reaves was wearing red shorts and a white T-shirt on the afternoon prior to the early-morning murder and did not appear to be under the influence of alcohol or drugs.

Detective Pisani quoted Reaves as stating that while he and the deputy were conversing, a gun fell out of Reaves' shorts. The deputy put his knee on the weapon, Reaves pushed the knee back, picked up the gun, refused to surrender it, and in a panic and "wired on cocaine" shot the deputy as he was running away. Reaves admitted that he emptied the seven-round clip of his .38 when he fired. A firearms expert testified that Reaves' gun was a type that required a pull of the trigger each time it was fired; it was not an automatic.

Reaves v. State, 639 So.2d 1, 3 (1994).

On appeal, this Court affirmed the conviction and sentence of death after finding that it was harmless error to have precluded the defense from presenting an unavailable witness' inconsistent statements and struck the HAC aggravator. *Id.*, at 6. Following the affirmance, Reaves' petition for writ of certiorari to the United States Supreme Court was denied. Reaves v. Florida, 513 U.S. 990 (1994).

Subsequently, Reaves filed his final amended 3.850 motion, which he verified on February 22, 1999. (PCR 543) The State

responded on May 13, 1999 (PCR 629). Relief was summarily denied (PCR 1086). On appeal, this Court affirmed all but one of the summary denials, remanding for an evidentiary hearing on whether trial counsel was ineffective for not presenting a voluntary intoxication defense. Reaves v. State, 826 So.2d 932 (Fla. 2002). That claim is found in paragraphs 16-31 of the Amended Post-Conviction Motion, which alleges that trial counsel "failed to properly present Reaves' mental condition to the jury to negate the specific intent element of premeditated first-degree murder." (PCR 24-40). Specifically, it faults trial counsel for failing to investigate and discover significant evidence of Reaves' drug use history, his drug/alcohol use on the day of the murder, and his mental impairments, namely, his post-traumatic stress disorder. Further, it alleges that trial counsel should have used Reaves' mental condition and substance abuse, through a voluntary intoxication defense, to rebut the intent element of first-degree murder.

Regarding the voluntary intoxication claim, this Court found:

In Reaves' first sub-claim, he asserts that he is entitled to an evidentiary hearing regarding whether trial counsel was ineffective in failing to present a voluntary intoxication defense. The record shows that during the guilt phase, the State introduced Reaves' confession--evidence which could have supported a voluntary intoxication defense

since Reaves claimed to be "coked up" when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which supported voluntary intoxication despite the fact that there was other evidence which could have supported this theory. During the jury charge conference, the trial judge noted that during Reaves' first trial, the jury was informed as to this defense, and it was decided that such a jury instruction should be given again. Notwithstanding this fact, Reaves' counsel never mentioned voluntary intoxication during closing arguments, and never discussed how the evidence could have supported this theory or how cocaine affects the user. During the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional testimony that Reaves was on drugs at the time of the crime. Moreover, numerous witnesses testified that Reaves had a history of serious drug abuse dating back to the Vietnam War, that he became involved in "heavy drugs" towards the end of his service in Vietnam, and that his prior convictions were drug-related.

. . .

The postconviction court denied Reaves' allegation without an evidentiary hearing despite evidence that his counsel had evidence supporting this defense which he did not present. Specifically, the judge found that voluntary intoxication was not an available defense since the defendant's expert witness testified during a proffer that Reaves was not so intoxicated that he did not know right from wrong. This reasoning obscures the difference between an insanity defense and a voluntary intoxication defense. Insanity is a complete defense if, at the time of the crime, the defendant was incapable of distinguishing between right and wrong as a result of a mental disease or defect. Voluntary intoxication is a separate theory and is available to negate specific

intent, such as the element of premeditation essential in first-degree murder. In order to successfully assert the defense of voluntary intoxication, "the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged." Rivera v. State, 717 So.2d 477, 485 n. 12 (Fla.1998) (quoting Linehan v. State, 476 So.2d 1262, 1264 (Fla.1985)). Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense. As Reaves' claim of ineffective assistance was legally sufficient and was not refuted by the record, it was error not to afford him an evidentiary hearing on this issue. In a related subissue, Reaves argues that his attorney was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects. Reaves also asserts that his counsel was ineffective during voir dire for failing to question jurors about their reaction to the defense of voluntary intoxication, substance abuse, and mental defects. The voluntary intoxication defense was not advanced at trial, so counsel was not ineffective in failing to question the jurors relative to a defense which he never utilized.

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For the reasons expressed above, we remand this case to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the related sub-claims as addressed above. We affirm the trial court's denial of Reaves' post-conviction motion in all other aspects.

Reaves v. State, 826 So.2d at 937-44.

Upon remand, an evidentiary hearing was held before the Honorable Robert A. Hawley on March 4-6, 2003. A discussion ensued, at the beginning of the hearing, regarding whether the evidentiary hearing was to include the failure to present the combined effects of Reaves' mental condition and intoxication, through a voluntary intoxication defense, to negate the specific intent element of first-degree murder (T 6-10). It was noted that the body of this Court's opinion states only that this related sub-claim was raised, but contained no further analysis and no statement that an evidentiary hearing was required; however, the Conclusion portion of the opinion states that it is remanding for an evidentiary hearing on "the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the **related subclaims** as addressed above." Id at 944. In an abundance of caution, the trial court set the evidentiary hearing on the claim of whether trial counsel was ineffective for failing to present a voluntary intoxication defense, **including the combined effects of Reaves' mental condition and intoxication**, to negate the specific intent element of first-degree murder. However, it is clear, as will be fully discussed under Point I, that in 1992, when this re-trial was held, Florida did not allow expert testimony on the combined effects of a mental defect and intoxicants, even in support of a

voluntary intoxication defense. Thus, trial counsel could not be deficient for not presenting such evidence.

Turning to the testimony presented at the evidentiary hearing, Reaves' trial counsel, Jonathan Jay Kirschner testified that he began his legal career as an Assistant Public Defender and after four (4) years, went into private practice (T 38-39). Kirschner had tried about 20-30 felony cases at the Public Defender's Office and continued to try cases (about one-half dozen more) in his private practice, which was 90% criminal (T 38-40). Thus, by the time Kirschner was appointed, in 1992, as Reaves' counsel on **re-trial**, he had handled many criminal cases (T 14, 17, 39-40). Kirschner explained that his primary defense was excusable homicide (based upon the circumstances of the crime and the Vietnam Veterans' syndrome), but that he used voluntary intoxication as a "fall back" defense, an option for the jury if it did not believe the excusable homicide defense (T 61-62). As such, it is clear that voluntary intoxication was not **excluded** from the trial (T 16, 61-62). Kirschner became aware of Reaves cocaine usage and his history of drug abuse almost immediately because there were references to it in the transcript of the first trial and in the discovery materials he obtained from former defense counsel (T 16-17).<sup>1</sup> Kirschner was sure that he

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had discussed Reaves' cocaine usage with him, but couldn't remember the specifics of their conversation (T 17). He also knew that he had discussed available defenses with Reaves but couldn't recall whether he discussed voluntary intoxication with Reaves (T 16).

Kirschner explained that evidence of Reaves' intoxication was presented to the jury and that it was instructed on voluntary intoxication (T 61-62). Kirschner did not want to present a variety of defenses because, he warned, it could make you look disingenuous to the fact-finder; he explained that sometimes you have to let the jurors reach the conclusion through their own logic (T 61-62, 64).<sup>2</sup> Kirschner agreed that you can't use the defense of voluntary intoxication just because someone is a drug addict (T 55). Instead, Reaves had to be under the influence of drugs/alcohol to such an extent that he could not form the specific intent to commit the murder. Kirschner agreed that in evaluating whether to pursue the voluntary intoxication defense in this case he looked at the facts of the crime, the lab

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The State asks this Court to take judicial notice of the fact that trial counsel from the first trial, Clifford Barnes, also did not present any other corroborative evidence of intoxication. Reaves v. State, 574 So. 2d 105, 106 (Fla. 1991). Kirschner recalled discussing strategy with the first set of counsel (T 75).

<sup>2</sup> Kirschner noted that it was emphasized to him at the death penalty seminars he took to take as much credibility as possible into the penalty phase (T 73, 15).

reports, toxicology reports and lay observations of the defendant's behavior (T 55-56). However, as Kirschner noted, even though Reaves mentioned that he was high on cocaine at least 16 times in his confession,<sup>3</sup> there are many other statements throughout his confession showing that he knew what he was doing and what was happening at the time of the murder, which cuts against a voluntary intoxication defense. For instance, Reaves knew to flee immediately after the shooting and did so in a crouched position, hiding (T 69). He was able to avoid a police perimeter of dogs and helicopters and to make the 7 mile trek to Hinton's house, where he gave him a detailed account of how the crime occurred (T 69-71). Additionally, 1 ½ days after the murder, Reaves was able to give a complete, detailed account of how the murder occurred to the police. He was able to draw a diagram of the parking lot, including where everyone was standing (T 72). Kirschner also noted that he did not have expert

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<sup>3</sup> The confession was presented at the 1992 trial. In it, Reaves explained that he walked to the Zippy Mart and called a cab twice because he was all coked out. He got a little impatient because he was all coked out, and dialed 911, but hung up before it rang (DA 1360, D1 2). He was going to have the operator call him a cab because he didn't have any more money (D1 3). Deputy Raczkoski pulled up three minutes later and Reaves asked "how the officer was doing?" (D1 3). The officer responded "fine" and asked Reaves for his name, which Reaves gave to him (D1 3). The officer ran a check on Reaves and it came back clean (D1 3). Reaves was "all wired out" but talked with the officer and noted that he had never met a finer officer in his life (D1 3).

testimony supporting a voluntary intoxication defense because his expert, Dr. William Weitz, a clinical psychologist, had found that Reaves was thinking and knew what he was doing at the time of the crime (T 45, 67, 95, 99). Kirschner had requested the appointment of Dr. Weitz as a confidential mental health expert to evaluate Reaves' competency and sanity because Weitz had evaluated Reaves during the first trial and had "done substantial work on the case." (DA 2413-15).<sup>4</sup> Weitz diagnosed Reaves with Vietnam Veterans' Syndrome, cocaine dependency disorder and anti-social personality disorder (T 18, 42). Kirschner came up with the excusable homicide defense after discussing Dr. Weitz's findings with him. Weitz agreed at the evidentiary hearing that he had discussions with Kirschner regarding the defense and that Kirschner developed his legal strategy based upon Weitz's input, findings and his "psychological perception" of what took place that night (T 99). Weitz discussed with Kirschner why the murder was excusable based upon the defendant's military background, which he felt clearly affected his behavior that night (T 100).

Kirschner argued that the killing was excusable homicide because it resulted from a coalescence of bad events—the gun

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Dr. Weitz noted at the evidentiary hearing that he did not testify at the first trial (the 1987) because he found Reaves competent and sane (T 98).

falling down, going off, Reaves panicking and reverting to survivor behavior--and that there was no premeditation (T 51). At the same time, Kirschner did not object to evidence that Reaves possessed 4 1/4 ounces of cocaine at time of arrest (T 51-52) and that he was skinny at time of arrest (consistent with a crack head) because that evidence supported the voluntary intoxication defense (T 52). He agreed that the State felt it necessary to use a large portion of its closing argument to address the voluntary intoxication defense (R 54). Kirschner agreed that excusable homicide was a complete defense to the crime whereas voluntary intoxication was only a defense to first-degree murder, reducing Reaves' crime to second-degree. Further, Kirschner noted that people perceive substance abuse problems/addictions differently now than they did at the time of re-trial (1992); it would be accepted as a defense more easily now than it would have at the time of Reaves re-trial (T 65).

Dr. William Weitz, the clinical psychologist who examined Reaves, also testified at the evidentiary hearing. He is an expert in military psychology and the effects of war and trauma on veterans (T 67, 95, 99). Kirschner requested the appointment of Weitz as a confidential mental health expert to evaluate Reaves' competency and sanity because Weitz had evaluated Reaves during the first trial and had "done substantial work on the

case." (PCR 2413-15).<sup>5</sup> When asked why the court should appoint this particular doctor, Kirschner told Judge Balsiger that "he's the best known and most knowledgeable [post traumatic stress disorder] expert available at the time." (DA 155). In appointing Weitz, the court specifically ordered him to assess, among other things, "[w]hether the Defendant possesses sufficient mental faculties to formulate the intent necessary for the offense charged." (DA 431-34). Additionally, Weitz admitted that original defense counsel, Clifford Barnes, asked him to consider whether Reaves was able to form a specific intent (T 129).

Kirschner developed his legal strategy and defense based upon Weitz's input, findings and his "psychological perception" of what took place that night (T 99). Weitz discussed with Kirschner why the murder was excusable based upon the defendant's military background, which he felt clearly effected his behavior that night (T 100). Weitz testified, in his pre-trial deposition, that he focused on post-traumatic stress disorder (hereinafter referred to as PTSD) given Reaves' military history (PCR 1216). However, none of his "clinical psychometric data" supported a diagnosis of PTSD (PCR 1442). According to Weitz, Reaves did not have PTSD, only symptoms of it (PCR 1381-82).

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<sup>5</sup> Dr. Weitz noted at the evidentiary hearing that he did not testify at the first trial (in 1987) because he found Reaves competent and sane (R 98).

Reaves denied having flashbacks and bad dreams, which are two diagnostic criteria for PTSD (PCR 1294, 1381-82). Reaves was also able to talk easily about a friend dying in his arms in Vietnam and did not demonstrate any affect when talking about it (PCR 1238; T 131-32). At the evidentiary hearing, Kirschner agreed it was his understanding that Weitz did not find Reaves to have PTSD (T 42).

Weitz diagnosed Reaves as having anti-social personality disorder and cocaine poly-substance abuse (T 42, 98, PCR 1394). Reaves admitted his history of drug abuse to Weitz, including the use of heroin prior to his military service in Vietnam (D 50). Weitz considered Reaves' cocaine and alcohol consumption in forming his opinions. (PCR 1241). Weitz found the results of Reaves' MMPI personality test to be highly suggestive of malingering (PCR 1261). Regarding the murder, Reaves told Weitz, during the initial interview on January 24, 1987, that he went to his girlfriend's house sometime during the day of September 22, 1986. His girlfriend later borrowed his car to go shopping, leaving Reaves without transportation. Reaves watched "Monday Night Football," then fell asleep. Sometime during that day and evening, Reaves ingested one and three-fourths grams of cocaine, by snorting and smoking it, and an unspecified amount of beer. (PCR 1243; T 129-30). Reaves reported seeing bright lights and a

flash, similar to being in a fire fight (PCR 1261). In Reaves' statement to the police, which Dr. Weitz reviewed, Reaves told the detectives that he ran out of cocaine during the evening and decided to walk to the Zippy Mart to call a cab, because his girlfriend never came home with his car. (PCR 1246). Reaves told Weitz that it was not a mistake to call 911, because he needed help getting transportation (PCR 1266, 1423). According to Reaves, there was fear in the officer's eyes when Reaves wrested the gun from him (PCR 1269; T 112-15). Reaves felt the officer was reaching for his gun (PCR 1262). Weitz concluded that at the time Reaves shot the officer, he knew what he was doing, knew the consequences of what he was doing and that it was wrong, was aware of what had occurred, and was clearly making an attempt to avoid being apprehended (PCR 1209, 1379, 1393, 1438; T 134). Weitz agreed Reaves was eliminating a threat to his life when he killed the officer (PCR 1289; T 133).

Following Dr. Weitz' deposition, the State moved to preclude any testimony regarding a "diminished capacity" defense; that is, any testimony relating to an abnormal mental condition which did not constitute legal insanity (DA 210-13, 2577-2605). Kirschner agreed that under Chestnut v. State, 538 So.2d 820 (Fla. 1989), evidence of abnormal mental condition not rising to insanity would not be admissible to show that the defendant did not have

the requisite specific intent to commit first degree murder. The defense did not object to excluding Chestnut kinds of evidence but did object to excluding the psychologist for **any** purpose at trial (DA 210). The State noted that "the only other recognized defense... for this would be voluntary intoxication," but argued that it wasn't a defense here because Dr. Weitz had already found that the intoxication did not rise to the level of voluntary intoxication. The court ultimately granted the State's motion, ruling that Dr. Weitz's testimony was inadmissible to support a "diminished capacity" defense, but not excluding psychological testimony for any reason (DA 211-13).<sup>6</sup>

Kirschner later proffered Weitz's testimony at trial, arguing that it was relevant to support his excusable homicide defense (DA 1469-71). In his proffer, Dr. Weitz testified that Reaves did not meet the criteria for PTSD because he did not report flashbacks or a re-experiencing of trauma, but did meet

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<sup>6</sup> Reaves' reliance upon testimony from Kirschner and Weitz that the excusable homicide defense was "gutted" by the disallowance of Weitz's testimony is misplaced (T 83, 101-02). First, Kirschner explained that the defense was based upon the circumstances of the shooting as well as on the Vietnam syndrome. Kirschner argued that a tragic series of events led to an accidental shooting and that Reaves had reverted back to his survival mentality, learned in Vietnam. Kirschner explained at the evidentiary hearing that it was his duty to put forth the best defense for Reaves and even Weitz admitted on cross-examination that he would not have altered the excusable homicide defense after the court disallowed his testimony (T 119).

the criteria for "Vietnam" syndrome (DA 1492, 1494). Weitz explained that "Vietnam" syndrome is not listed in the DSM as a recognized disorder, but it is less than PTSD, a set of personality traits that might evolve into PTSD (DA 1492). In Weitz's opinion, "Vietnam" syndrome helps explain what happened in this case. Weitz described the symptoms of "Vietnam" syndrome as including a rage-type reaction, isolation from the environment, hyper-vigilant alertness, "startle response," depression and increased alcohol-drug use (DA 1492). Individuals suffering from it revert back to a learned survivor behavior and have a "loss of control". "Vietnam" syndrome produces higher rage, lower impulse control. Reaves perceived the officer's actions as provocation.

Dr. Weitz further stated during his proffer that Reaves told him he had smoked cocaine and drank some beer during the day and night prior to the murder (DA 1517). Weitz found Reaves to have cocaine abuse-polysubstance abuse and found the use of cocaine also explained what happened here. Weitz again concluded that Reaves knew what he was doing at the time of the murder and was able to take evasive action. Significantly, he found that Reaves' behavior did not meet the requirements for voluntary intoxication:

Q [BY THE STATE] Did it ever -- the  
Defendant never told you --in either the

January 24th '87 case interview or the October 4th, 1991 interview, he never claimed that the shooting was an accident or mistake?

A BY DR. WEITZ] He didn't use those terms, correct.

Q The Defendant advised you that he was on cocaine and had smoked a great deal of cocaine and had even drunk some beer during the day and prior to the incident on each of those occasions; correct?

A That is correct.

Q But you also reached the opinion, did you not, that a defense for a voluntary intoxication would not be a proper psychological condition in this case; he wasn't that intoxicated during these incidents?

A I simply indicated the behavior. It's not my intent or purpose to come up with a particular defense strategy.

Q Your opinion based on what the Defendant told you, in addition to reading all of these reports, the Defendant was never that intoxicated to not be able to know right from wrong?

A I clearly stated that he knew right from wrong.

Q And the reason that we know that the cocaine was not sufficient or the beer that he was drinking sufficient to raise [sic] to a level of intoxication so great as to prevent the Defendant from knowing right from wrong is because the Defendant immediately knew to flee the area; correct?

A That's correct.

Q The Defendant knew to hide in the words [sic]; correct?

A That is correct.

Q The Defendant told you that he purposely stayed off the roadways because the police were looking for him and he didn't want to get caught?

A **I never suggested it and I said clearly in my reports that he was able to take evasive action and that he knew what he [was] doing. That is correct.**

(DA 1517-18).<sup>7</sup> Kirschner then called Weitz during the penalty phase and elicited for the jury that Reaves has Vietnam Syndrome.

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<sup>7</sup> The exclusion of Dr. Weitz's testimony from the guilt-phase was upheld by the Florida Supreme Court on direct appeal:

Reaves argues that the trial judge erred when he refused to admit evidence of "Vietnam Syndrome" in the guilt phase of the trial to support his "excusable homicide" defense. We find no error. We said in Bunney v. State, 603 So.2d 1270, 1273 & n. 1 (Fla.1992), that "evidence of certain commonly understood conditions that are beyond one's control ... should also be admissible" in the guilt phase of the trial; but "evidence relating to a general mental impairment or other esoteric condition" is not. There is no evidence in this record to support Reaves' assertion that "Vietnam Syndrome" is a commonly understood condition; it therefore was properly excluded in the guilt phase. We find, moreover, that even if this evidence's exclusion was error, it was harmless. There is no reasonable possibility that it would have affected the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Reaves, 639 So.2d at 4-5.

Weitz's testimony was similar to his proffer during guilt-phase. He stated that Reaves has "Vietnam" syndrome which makes him revert to survivor behavior and react instinctively in a kill or be killed thought process, as he was trained to do in Vietnam. (DA 2027-2082).<sup>8</sup> Dr. Weitz claimed at the evidentiary hearing that he would have testified in 1992 that Reaves was unable to form the requisite specific intent (T 102-03, 107, 109-10).

In addition to Weitz, Reaves presented expert testimony from Dr. Richard Dudley, Dr. Barry Crown, Dr. Debra Mash, Dr. Irving Parsons, and Dr. Thomas Hyde at the evidentiary hearing in support of his contention that Kirschner was ineffective for failing to present a voluntary intoxication defense. Dr. Dudley, a psychiatrist, diagnosed Reaves as having PTSD, poly-substance abuse, and opined that he was acutely intoxicated on the night of the murder. Dudley found no evidence of a thought disorder or organic brain damage and found Reaves to have an average intellectual capacity (T 204). In Dudley's opinion, the **combined effect** of Reaves' acute cocaine intoxication and his other

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Kirschner testified at the evidentiary hearing that he also called mitigation witnesses to testify that Reaves came back from Vietnam a changed man, using heroin and other drugs (T 58). Weitz testified to the existence of two statutory mitigators: under extreme mental and emotional stress and could not conform his behavior to the requirements of the law, but the judge rejected them and the Florida Supreme Court affirmed ruling (T 58-61).

psychiatric difficulties prevented Reaves from being able to form the specific intent necessary to kill. According to Dudley, the cocaine and PTSD made Reaves paranoid and hyper-vigilant, which made him incapable of deciding to kill the officer (T 191-92, 208-09). He found Reaves' actions were a reflexive response, not a thoughtful decision (T 191-92, 209).

On cross-examination, Dudley agreed that Reaves knew he was shooting a deputy but claimed he was incapable of deciding to shoot (T 209-10). Dudley denied that Reaves' confession, which described the murder in exquisite detail, was inconsistent with his opinion (T 210-18). According to Dudley, the escalated hyper-vigilance Reaves was suffering from made him incredibly observant and he has a good memory (T 218). However, when asked whether Reaves' ability to perceive events was diminished by the cocaine, he replied that cocaine can cause tactile hallucinations (make you feel like something is crawling on you or touching you) (T 206).

Dudley disagreed with Weitz's finding of anti-social personality disorder because he did not view Reaves early offenses (under 17 years of age) as sufficient to support the diagnosis (T 165-66, 182). He also disagreed with Weitz's reading of the MMPI results (T 187). However, on cross-examination, Dudley agreed that Reaves has done anti-social

things as an adult, including the 10-15 files the State had of crimes Reaves committed as an adult, which include armed robbery, theft, aggravated battery and being court-marshaled in Vietnam (T 194). Dudley also acknowledged that while Reaves told him that he had trouble sleeping after Vietnam, he denied having nightmares to Weitz (T 201-02). As Weitz testified in his proffer, having flashbacks, nightmares or bad dreams is a diagnostic criteria for PTSD. Reaves also told Dudley he didn't really know about drugs before Vietnam, but admitted to Weitz that he used drugs before Vietnam, including heroin (T 199-200).

Dr. Barry Crown, a neuropsychologist, diagnosed Reaves as having organic brain damage to the left frontal lobe based solely on neuropsychological testing (T 242-43). No MRI or PET scan was given (T 250-51). Crown admitted that he did not know when the brain damage occurred or how it occurred (T 258-59). He admitted that it could have been caused by a head injury<sup>9</sup> or drugs and that defused forms of brain damage, like that caused by drugs or alcohol, would not show up on an MRI or PET scan (T 259, 266). Crown disagreed that the two best neuropsychological tests to detect brain damage were the Halstead Reitan test and the Luria Nebraska test (T 252). According to Crown, those were developed

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<sup>9</sup> Reaves sustained a head injury **at the time of arrest, after the murder.**

to identify brain lesions (T 252). He also disagreed that with the studies suggesting that neuropsychological testing misdiagnosed 41 out of 100 people with brain damage (T 252-56).

Crown stated that because of Reaves' brain damage, smaller amounts of drugs or alcohol would have a greater impact on him (T 244). Cocaine would cause him to be impulsive (T 246-47) and if Reaves were in a heightened situation, he would have difficulty concentrating, understanding the long-term consequences of behavior and would react impulsively, rather than forming intent (T 245). In Crown's opinion, Reaves was not able to form the specific intent necessary to commit first-degree murder because of the **combined effect** of his brain damage and substance abuse, his brain damage is in an area that relates to understanding the long-term consequences of immediate behavior, which would be further aggravated by the substance abuse causing him to behave impulsively (T 249-50).

However, on cross-examination, Crown agreed that cocaine disrupts short-term memory and that the disruption would be exacerbated here by the brain damage (T 261). But when asked whether it would therefore be inconsistent for Reaves to recall vividly details of the murder, Crown denied that it would be, stating that the relationship between the brain function and behavior is like a "lamp with a faulty switch," sometimes it goes

on or off (T 261-62).

Dr. Debra Mash, a professor of neurology and molecular cellular pharmacology, opined that Reaves was a chronic drug abuser who was suffering from cocaine psychosis at the time of the murder, which she described as a paranoid and fully delusional state (T 276-80, 286, 309). On cross-examination, Mash was asked "if [Reaves] is delusional, he doesn't know the difference between right and wrong, does he?" (T 310). Mash responded that "he is in an altered state of awareness." (T 309). She was then asked to answer the question "yes" or "no"- how could he know the difference between right and wrong if he is delusional (T 310). Mash responded "he can't perceive the severity of the situation, correct." (T 310). Mash agreed that you need your frontal lobes to know right from wrong, which is different from intent and further agreed that her opinion regarding Reaves' ability to know right from wrong is very different from Weitz's testimony that Reaves' knew right from wrong (T 310).

Mash described Reaves as being in a markedly altered state due to the intoxication, a state of full cocaine paranoia, "fully wired" (T 282-84, 286). He was not able to think, form an intent or rationally react to what was going on because of the intoxication (T 286). She believes that Reaves was hallucinating

(T 315-16). According to Mash drug abuse hijacks your frontal lobe (the reasoning part of your brain that delays reaction time) and puts you in limbic state, where the reptilian part of the brain takes over, this is the fight or flight part of the brain. You then operate in a limbic state, just react, you cannot perceive and adequately judge the nature of the threat (T 290-91). Cocaine also makes people hyper-vigilant, meaning that everything in the environment is coming in and impacting them, they do not have the ability to delay reaction time, they react immediately (T 286-89). Based upon the cocaine psychosis, Mash opines that Reaves was in a state of voluntary intoxication and would not have been able to form the intent necessary to commit murder (T 293).

Significantly, Mash agreed, on cross-examination, that in forming her opinions, it was important for her to know how much cocaine was ingested on the day of the murder (T 313). Reaves told her he had ingested **10 grams** of cocaine on the day of the crime, but he told Weitz he had only used **1 3/4 grams** on the day and night of the murder (T 313-14). He also told Mash that he had smoked cocaine mixed with marijuana, but never mentioned marijuana to Weitz (T 314). Mash was also asked about the **combined effects** of PTSD or Vietnam syndrome on someone using this amount of cocaine (meaning the 10 grams amount). According

to Mash, the frontal lobes are high-jacked because PTSD over-activates the amygdala and then the cocaine acts on the over-activated amygdala. It is a time bomb (T 301-02). She stated that PTSD is very prevalent in the drug abusing population and their drug of choice is usually opiates or alcohol. Cocaine makes the symptoms of PTSD worse (T 296-97). On cross-examination, Mash explained that her testimony regarding the **combined effects** of cocaine and PTSD, is based upon an assumption that Reaves had PTSD. She is aware that Weitz did not find PTSD (T 312).

Mash agreed that short-term memory is barred in someone who is hallucinating and she believes Reaves was hallucinating (T 315-16). When asked how someone who is suffering from cocaine psychosis combined with PTSD could give such a detailed confession, Mash responded that her reading of Reaves' confession led her to conclude he can remember things before and after the murder, but has amnesia about the shooting itself, she uses that term because she doesn't know what other term to use. She sees a disconnect, a disassociative state from reading the statement. (T 315-16). She referred to an incident when she was mugged, how she was able to remember enough details to help the police apprehend her assailant; however, the State pointed out that she does not have PTSD and was not high on cocaine. at the time (T

317-18). Reviewing the vivid details in the confession, Mash claimed that when you're on cocaine, you're alert, very alert but doesn't mean you are in a normal state of mind (T 318-20). She also thinks that Reaves was piecing together what happened because he knows that something bad happened (T 321).

When asked whether the part of Reaves' confession where he states that he didn't want to give up the gun because he is an ex-felon and would be looking at a three year minimum mandatory prison sentence for carrying it, showed that he was able to perceive the threat to himself very clearly (T 322-23), Mash responded that she reads it a little differently. She doesn't believe you shoot an officer who was kind to you just because you are facing a 3 year sentence, particularly because he had been to prison before, it was not unfamiliar to him (T 324). As the State noted, we are all not the same, just because it doesn't make sense to her doesn't mean he didn't intend to do it. Based upon his drug addiction, Dr. Mash concluded that Reaves was not a sociopath, did not suffer from anti-social personality disorder (T 324-27).

Dr. Erwin Parsons, a clinical psychologist, who also specializes in PTSD and treating veterans, diagnosed Reaves as having PTSD (contrary to Dr. Weitz), chronic substance abuse, depression, high anxiety, hostility and paranoid thinking.

Further contrary to Weitz, his MMPI test found that Reaves did not have anti-social personality disorder (T 366). In Parson's opinion, Reaves was "disassociated" at the time of the murder (T 377), and the **combined effects** of PTSD, substance abuse, disassociation and the numbing effect combined to prevent Reaves from being able to form the specific intent necessary to kill the officer (T 388-89).

On cross-examination, Parsons acknowledged that Reaves reported flashbacks and re-experiencing of the trauma, when he evaluated him in 1998, which are important criteria for having PTSD, but denied having nightmares to Weitz (T 395-96). He further acknowledged that Weitz's MMPI could be read as having malingering and that he was not aware that the Eugene Hinton affidavit, upon which he relied, was created after trial, sometime in the 1990's (T 393, 391). Parsons also agreed Reaves gave exquisite detail in his confession but he didn't find that to be inconsistent with a voluntary intoxication defense in this case because while the cocaine and PTSD would make his memory extremely sharp, that didn't mean he had the ability to form specific intent (T 399-400). Parsons doesn't believe Reaves had a motive and purpose when he shot (T 399-400).

Parsons disagreed with Weitz's finding of anti-social personality disorder (T 401). He agrees that Reaves has

exhibited anti-social behavior, but does not believe that he has the disorder (T 402). He disagrees that the statement about not wanting to serve a three year mandatory minimum sentence shows intent, but agrees that the act of killing a police officer because you didn't want to do a three year prison term fits within an anti-social personality disorder (T 401-02).

The last defense expert, Dr. Thomas Hyde, a behavioral neurologist, performed a neurological examination on Reaves (no neuropsychological testing) and found the following neurological problems: (1) Reaves reported a significant closed head injury from a beating at the time of his arrest; (2) he found poly-substance abuse, including alcohol and cocaine, which can have deleterious effects on the central nervous system both transient and permanent; (3) hearing loss; and (4) compromised motor sequencing in the hands and mirror movements on one hand while doing motor function on the contra-lateral side (T 461-62, 471). The complex motor sequencing deficit and the mirror movement are indicative of brain damage, to the left frontal lobe, which would compromise an individual's reasoning, judgment, and impulse control. (T 465). Hyde noted that these problems could be developmental or could be caused by either poly-substance abuse or his closed-head injury. (T 461-62).

He admitted on cross-examination that he cannot discern

which of the possibilities caused the brain damage and doesn't know when it occurred (T 468). Hyde could not make a determination whether the brain damage was present before the murder because he didn't examine Reaves before the murder (T 467). Hyde further noted that Reaves had not reported any head injuries before the arrest; therefore, if the brain damage was due to drugs, Reaves had it before the murder, but if it was due to the head injury, he had it after (T 464, 469).

Hyde diagnosed Reaves as having major recurring depression, poly-substance abuse, cocaine dependence, alcohol dependence, PTSD, and a post-concussive brain injury (T 464-65). Hyde noted that Reaves reported strong symptoms of PTSD, having flashbacks, and feeling as if he were in a fire fight in Vietnam, which feeling could be triggered by sudden loud noises, like the back-firing of a car, seeing people in uniform or seeing guns (T 467). He agrees that the reason Weitz found no PTSD was because Reaves did not report flashbacks or re-experiencing trauma and agrees that his testimony is in conflict with Weitz's (T 475).

Significantly, Hyde did not reach an opinion about Reaves' mental state at the time of the crime (T 475). However, he did opine about Reaves' mental ability at the time he gave his confession. Reaves reported "fairly dense" amnesia for 24 hours after the beating (T 463). According to Hyde, the brain

concussion would compromise Reaves cognitive function, leave him confused, and would make the validity of any statements made in the several days afterward suspect (T 463). Reaves confession was given just 8-10 hours after the beating (T 463). Further, the fact that Reaves "was coming down off cocaine" at the time would also impact his confession (T 463-64). Hyde opined that cocaine abuse, both in the acute intoxication phase and during withdrawal has a profound effect upon behavior, including impulse control, judgment, reasoning, memory, paranoid hallucinations (T 463-64)T 463-64-. Hyde agreed that people with amnesia forget some things, but not others, it's mixed, and they often confabulate (make things up or agree to things that didn't happen) (T 469).

Regarding Reaves' confession, Hyde agrees that the details in it are exquisite, but claims that Reaves may have filled in details that he could not remember, that were bad for him, because of the head injury (T 470). He did not compare what Reaves said with the known facts, but agrees that if what Reaves said in his confession matches up with what is known objectively, for example, when calls were made to the police station, how long they were, codes that were used, a witness who arrived on the scene, that would make it more likely that he was not confabulating (T 470-71). Hyde is familiar with the Halstead

Reitan and Luria Nebraska battery of neuropsychological testing and says both tests are well-known (T 473). Reaves was not given either test and Hyde doesn't know about the reliability of the specific tests performed on Reaves (T 472-73). He also agreed that there is scientific evidence showing that prisoners attempt to malingering (T 474-75).

On March 10, 2004, Judge Hawley issued an Opinion and Order Denying Amended Motion for Postconviction Relief after Evidentiary Hearing and the successive motion on March 10, 2004.(R 301-310, 297-300). Final order(s) were signed denying both on April 20, 2003 (R 330-335). This appeal followed.

## SUMMARY OF ARGUMENT

**Issue I** - The trial court's finding, after an evidentiary hearing, that Reaves' defense counsel was not ineffective for failing to present a voluntary intoxication defense is supported by competent, substantial evidence. Defense counsel testified that voluntary intoxication was not ignored. Rather, it was used as a "fall-back" defense to the primary defense of excusable homicide, which was clearly the best defense in light of the facts of the case and Reaves' damaging confessions. Counsel is not ineffective for failing to present contradictory experts regarding his client's lack of ability to formulate specific intent due to intoxication and an underlying mental disorder since the law at the time of re-trial, 1992, did not allow such experts.

**Issue II** - The trial court did not abuse its discretion in denying Reaves request for a Writ of Habeas Corpus Ad Testificandum seeking the testimony of Eugene Hinton, when Hinton made himself unavailable as a witness at the 1992 trial; his affidavit was nothing more than a recantation and offered nothing material to the extent of Reaves intoxication at the time of the murder. The denial of forensic testing of items for drug metabolites was not an abuse of discretion.

**ARGUMENT**

**ISSUE I**

**THE LOWER COURT PROPERLY DENIED THE CLAIMS OF  
INEFFECTIVE ASSISTANCE OF COUNSEL (restated)**

Reaves argues that the trial court erred by denying his post-conviction motion alleging that counsel was ineffective for failing to present a voluntary intoxication defense at the 1992 re-trial, including the combined effects of Reaves' mental condition and intoxication, to negate the specific intent element of first-degree murder. This Court will find that there is substantial, competent evidence supporting the trial court's factual findings after an evidentiary hearing on the issue. Further, the court's legal conclusion that ineffective assistance was not established comports with the dictates of Strickland v. Washington, 466 U.S. 668 (1984). The standard of review for ineffective assistance of counsel claims following an evidentiary hearing is that "the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003). See Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel, but recognizing and honoring "trial court's superior vantage

point in assessing credibility of witnesses and in making findings of fact"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000) (announcing appellate court's "review the prongs of ... ineffective assistance of counsel as questions of mixed law and fact."); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter at 923. Accord Armstrong v. State, 862 So. 2d 705 (Fla. 2003) (Standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: the appellate court must defer to the trial court's findings on factual issues, but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.) However, the court's "ultimate conclusions on the deficiency and prejudice prongs [are reviewed] de novo." Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). The "performance and prejudice prongs are mixed questions of law and

fact subject to a de novo review standard." Porter v. State, 788 So.2d 917, 923 (Fla. 2001).

In order to prove ineffective assistance of counsel, Reaves must demonstrate the following:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). At all times, Reaves bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness; Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998); Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982), but also that he suffered actual, substantial prejudice as a result of the deficient performance. Strickland, 466 U.S. at 688-94.

In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The standard for evaluating "counsel's performance is 'reasonableness under prevailing professional norms.'" Chandler v. U.S., 218 F.3d 1305, 1313 (quoting Strickland, 466 U.S. at 688). However, "[t]he test for

ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995) (citations omitted). See Burger v. Kemp, 483 U.S. 776, 789 (1987).

Further, under Strickland, "[j]udicial scrutiny of counsel's performance must be highly deferential." See Mills v. Singletary, 161 F.3d 1273, 1286 (11th Cir. 1998), citing Baldwin v. Johnson, 152 F.3d 1304, 1311 (11th Cir. 1998); Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). The fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel. Chandler, 218 F.3d at 1314. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" Chandler, 218 F.3d at 1314 (quoting Darden v. Wainwright, 477 U.S. 168 (1986)). As the Strickland court noted:

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000)(same). The Eleventh Circuit Court of Appeals has explained its definition of "strategy" as follows:

trial counsel's course of conduct, ... was neither directly prohibited by law nor directly required by law, for obtaining a favorable result for his client. For example, calling some witnesses and not others is 'the epitome of a strategic decision.' [Waters, 46 F.3d at 1512] (en banc); see also *id.* at 1518-19 (en banc); *Felker v. Thomas*, 52 F.3d 907, 912 (11th Cir.

1995) (whether to pursue residual doubt or another defense is strategy left to counsel, which court must not second-guess); *Stanley v. Zant*, 697 F.2d 955, 964 (11th Cir. 1983) (stating that reliance on line of defense to exclusion of others is matter of strategy).

Chandler, 218 F.3d at 1314 n.14. See United States v. Fortson, 194 F.3d 730, 736 (6th Cir. 1999) (denying relief on ineffectiveness claim because reviewing court "[could] conceive of numerous reasonable strategic motions" for counsel's trial actions even though the district court did not make factual findings or grant an evidentiary hearing). A reviewing court will not second-guess strategic decisions; instead, counsel's performance is evaluated in light of all the circumstances as they existed at the time of the conduct, and is presumed to have been adequate. Strickland, 466 U.S. at 689-90. Counsel's strategic choices, made after thorough investigation of the law and facts relevant to plausible options, virtually are unchallengeable. Strickland, at 690-91. "Counsel's competence ... is presumed, and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 386 (1986) (citations omitted). "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption.

Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" Chandler, F.3d at 1314 n. 15 (quoting, Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)).

Because there is a presumption of reasonableness, in order to establish that counsel's conduct was unreasonable, the petitioner must prove "that no competent counsel would have taken the action that his counsel did take." Chandler, 218 F.3d at 1315. See Waters, 46 F.3d at 1512 (stating "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice"). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "[N]o

absolute duty exists to investigate particular facts or a certain line of defense." Chandler, 218 F.3d at 1317.

A defendant is also required to demonstrate prejudice before he is entitled to relief. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In denying Reaves' claim that Kirschner was ineffective for failing to present a voluntary intoxication defense<sup>10</sup> the trial court made the following factual findings:

Mr. Kirshner<sup>11</sup> testified at the evidentiary hearing that his primary theory of defense at the re-trial was excusable homicide. He had read the first trial transcript, received the discovery from Mr. Cliff Barnes and talked to Mr. Barnes at length about his trial strategy during the first trial.<sup>12</sup> He had discussed

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<sup>10</sup> As sub-claims, Reaves 3.850 motion also alleged that trial counsel was ineffective for failing to investigate and discover evidence of Reaves' drug use history and his drug/alcohol use on the day of the murder. The motion also contends that trial counsel was ineffective for failing to present expert testimony on the combined effects of Reaves' mental condition and substance abuse, in support of a voluntary intoxication defense.

<sup>11</sup> The trial court misspelled Mr. Kirschner's name as "Kirshner" in his order.

<sup>12</sup> The court also stated in a footnote "trial counsel during the first trial argued for second degree murder based upon the argument that there was insufficient time for the Defendant to reflect on the consequences of the shooting. (1987 Trial Transcript at 869-870). Trial counsel did not argue the voluntary intoxication defense. (1987 Trial Transcript at 1678-79)." (R 305)

with the Defendant his use of cocaine around the time of the incident, but did not specifically recall discussing the option of voluntary intoxication as a defense. He understood his duty to represent the Defendant zealously and to present the best defense possible. All of his strategic decisions were made with this consideration in mind. He believed that excusable homicide was "the right fit for the defense in this case" and that it should be presented to the jury.

Additionally, Mr. Kirshner testified that he did not completely ignore the defense of voluntary intoxication. It was a fall-back position. There was evidence introduced at the re-trial as to the Defendant's cocaine use, and the voluntary intoxication instruction was given to the jury. Mr. Kirshner did not directly suggest voluntary intoxication to the jury, but assumed that his thought process at the time was to allow the jury to reach its own conclusion based upon the evidence presented. He believed that although the two defenses, excusable homicide and voluntary intoxication, were not necessarily inconsistent, there could be tension between the two defenses and an attorney must take care in presenting a variety of defenses or he could be perceived as being disingenuous by the fact finder. Mr. Kirshner believes that at the time of the re-trial jurors were less accepting of the idea that voluntary intoxication excuses criminal conduct.

...

Based upon the facts presented at the evidentiary hearing, the Court determines that Mr. Kirshner's decision to use the defense of voluntary intoxication as only a fall-back position and not to directly suggest voluntary intoxication to the jury, but to allow the jury to draw on its own conclusion based upon evidence presented was

a reasonable trial strategy. As such, the Court finds that trial counsel, Jay Kirshner, was acting competently.

(R 305-07).

Here, there is substantial, competent evidence supporting the trial court's conclusion that Reaves has not met his burden of proving ineffective assistance of counsel for failing to present a voluntary intoxication defense. To begin with, a review of the evidence presented at trial and at the evidentiary hearing shows that, contrary to Reaves' assertions, the voluntary intoxication defense was not excluded or completely ignored at trial. Rather, it was relied upon by defense counsel as a "fall-back" defense, raised for the jury in case it did not agree with the primary defense of excusable homicide. Further, Reaves failed to present any additional testimony at the evidentiary hearing, other than what was presented at trial, regarding his level of intoxication at the crucial time, the time of the murder. While Reaves presented expert opinions concerning his intoxication and inability to form specific intent, those opinions cannot be relied upon because, as will be fully explained below, they would not have been admissible at the time of trial. Thus, the only evidence of intoxication in this case was Reaves' self-serving statements that he was high at the time

of the crime, testimony which a jury would have good reason to reject.

At the evidentiary hearing, Kirschner, explained that the primary defense in this case was excusable homicide (based upon the circumstances of the crime and the Vietnam syndrome), but that voluntary intoxication was not **excluded** from the trial (T 16, 61-62). Testimony regarding Reaves' intoxication was presented to the jury and the jury was instructed on voluntary intoxication (T 61-62). Kirschner explained that he used voluntary intoxication as a "fall back" defense, an option for the jury if it did not believe the excusable homicide defense (T 61-62). Kirschner warned that you have to be careful to not directly argue a variety of defenses to the jury, so that you are not perceived as disingenuous by the fact-finder (T 61-62, 64).<sup>13</sup> He explained that sometimes you have to let the jurors reach the conclusion through their own logic (T 61-62). Kirschner testified that he became aware of Reaves' history of cocaine and other drug use almost immediately, after reviewing the discovery and other materials from the first trial (T 16-17).<sup>14</sup> r the specifics of

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<sup>13</sup> Kirschner noted that it was emphasized to him at the death penalty seminars he took to take as much credibility as possible into the penalty phase (T 73, 15).

<sup>14</sup> Trial counsel from the first trial, Clifford Barnes, also did not present any other corroborative evidence of intoxication. Reaves v. State, 574 So. 2d 105, 106 (Fla. 1991).

their conversation (T 17). Kirschner stated that you can't use the defense of voluntary intoxication just because someone is a drug addict (T 55). Instead, Reaves had to be under the influence of drugs/alcohol to such an extent that the he could not form the specific intent to commit the murder. Kirschner agreed that in evaluating whether to pursue the defense in this case he looked at the facts of the crime and as a general rule, "he looks at lab reports, lay observations of how the defendant behaved and toxicology reports" (T 55-56)(emphasis added).

To properly evaluate Kirschner's actions, it is axiomatic that "to assert a voluntary intoxication defense, a defendant must present evidence of intoxication **at the time of the offense** that would establish the defendant's inability to form the requisite specific intent." Rivera v. State, 717 So.2d 477, 485 (Fla. 1998). In Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985), the Florida Supreme Court explained that a defendant must come forward with evidence of intoxication, not just the use of intoxicants, at the time of the offense sufficient to establish an inability to form the intent necessary to commit the crime charged. The Standard Jury Instruction on voluntary intoxication

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Kirschner recalled discussing strategy with the first set of counsel (T 75).

makes clear that the mere use of drugs does not automatically establish the defense:

"...[U]se of drugs to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act. However, where a certain mental state is an essential element of a crime and a person was so intoxicated that he was incapable of forming the mental state, the mental state would not exist and, therefore, the crime could not be committed..."

Fla. Std. Jury Instr (Crim.) 3.6(d)

Here, while there was ample evidence that Reaves was a chronic drug abuser and that he used drugs both before and after the crime, there was no direct evidence, other than Reaves' self-serving assertions, regarding his level or state of intoxication **at the time of the murder**. The only direct evidence of Reaves' level of intoxication at the time of the crime was his self-serving statements in his confession. The confession, given one and one-half days after the murder, contained at least 16 references to Reaves' being "high on coke" "coked up", and was presented at the 1992 trial.<sup>15</sup> However, as Kirschner noted at

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In his statement, Reaves explained he walked to the Zippy Mart and called a cab twice because he was all coked out. Impatient, he dialed 911, but hung up. (PCR 985). Going to have the operator call him a cab because he didn't have any more money, Deputy Raczkoski pulled up three minutes later and Reaves asked "how the officer was doing?" (PCR 986). Responding "fine", he asked

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Reaves for his name and a check on Reaves came back clean. Reaves was "all wired out" but talked with the officer and noted that he had never met a finer officer in his life (PCR 986). When the officer first approached, he asked how much money Reaves had, Reaves asked that he call 911. Reaves remembered the officer saying a code, 39 or 29 (PCR 993).

Reaves .380 fell from his waistband and Reaves tried to pick it up, but the officer stepped on his hand. According to Reaves he was "all coked out" and both of them panicked. The officer turned and ran to the other side of the car.(PCR 986)Reaves remembers only that he started shooting and then turned and started running. He thought he heard two or three shots and then a shotgun being fired. The officer fired at him once, hitting the dumpster.(PCR 987) According to Reaves, he was standing at the back of the car when he shot the officer, who was 12-15 feet away and had his gun out (PCR 990). The officer was not shooting at him at the time he shot him "I aint gonna lie on the man, that damn cocaine." "I shot because of cocaine, I panicked...paranoid! I thought he was going to shoot me because I'm an ex-felon and that's a hot gun." (PCR 991). He heard the gun hit the ground (PCR 993). Reaves drew a diagram for the police, showing the location of the Zippy mart store, the three telephones attached to it, where the squad car pulled up (right in front of the payphone), where Reaves was standing, which car door was open, where the officer was standing, where the gun dropped to the floor, where the deputy put his foot on the gun, and where Reaves was standing when he was shooting. After doing so he said "goddamn cocaine".(PCR 988-89) Reaves noted the officer did not try to pick up the gun when he stepped on it. Instead, he said, "give me the gun," and Reaves replied "sir, I don't think that right, me give you the gun, you know, call, I'm clean,"; "all I want to do is just get out of here, you done called, I'm clean, you can search me." Reaves recalled that the officer had his back turned when he shot him.(PCR 994) When Reaves refused to give up his gun, the officer began reaching for his (PCR 989). The officer responded if "you aint gonna give it to me, I get it," and started reaching for his gun and running to the other side of the car (PCR 990).

Reaves was standing up over the trunk when he shot. He fired when he turned to run and the officer was running toward 82 Ave. (PCR 995). Reaves ran. He doesn't know if it was 5, 6, or 7 shots but he emptied the clip.(PCR 996) Reaves stated he smoked cocaine about thirty minutes before the shooting, was all wired

the evidentiary hearing, despite the 16 references to being high on cocaine, there are plenty of other statements throughout Reaves' confession showing that he knew what was going on and what he was doing at the time of the murder, which cuts against a voluntary intoxication defense (T 69). For instance, Reaves knew to flee immediately after the shooting and did so in a crouched position, hiding (T 69). He was able to avoid a police perimeter of dogs and helicopters, able to make the 7 mile trek to Hinton's house and then was able to give a detailed account of how the

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up and hyper (PCR 997). Reaves remembered that prior to the officer showing up, he spoke with a hitch-hiker, and recalled the very specific details of the conversation-- the person was from Cocoa Beach, he stated that he had let someone take his car and then he called for a cab(PCR 998-99). Reaves then related how he escaped. He went through the woods up to Mueller Center. He saw a police car there, so he went around it, through Dodger Pines golf course to Gifford. He crossed the light and came out by the new jailhouse. He called his niece, Evelyn, from a telephone booth, but she wouldn't come get him(PCR 1000). He went to Eugene Hinton's house, telling him "man I think I shot an officer," and waited there for Jerry to pick him up (PCR 1001). He took a shower and put on dry clothes. He told Hinton what happened and didn't really know that he had shot an officer until five o'clock.(PCR 1001)He sent Jerry to get his cocaine when he saw the news that a cop had been shot 3 times in the back (PCR 1002). Jerry took him to the Colonial motel in exchange for cocaine (PCR 1004). He spent most of the day smoking cocaine in the room (PCR 1007-08).

Retelling the story, he had the officer around the throat and told him "all I want to do is go home." He couldn't let the officer get the gun, because he was an ex-felon and knew he would get three years imprisonment for the gun (PCR 1020-22). Reaves knew the officer had already fallen down when he fired back (PCR 1025).

crime occurred to Hinton (T 69-71). Additionally, 1 ½ days after the murder Reaves was able to give a complete, detailed account of how the murder occurred. **He was able to draw a diagram of the parking lot, including where everyone was standing** (T 72).

Reaves' ability to recall and describe in exquisite detail the entire encounter between he and Officer Raczkoski, including the shooting and the reason why he shot seriously undermines a voluntary intoxication defense. Reaves was able to recall and describe in vivid detail: (1) what the officer said to him initially when he first approached, including the code the officer called in; (2) what his responses were; (2) how the officer reacted once the gun fell, what the officer said and did at that point; (3) where he was standing when he shot the officer, how far he was from the deputy; (4) that when he shot the officer the officer was not shooting at him even though he had his gun out; (4) the direction in which the officer was running when he shot at him; (5) how the officer reacted when shot, how he rolled over; (6) that the officer fired a shot at him but it missed and hit the dipsey dumpster; (7) that he had a conversation with a hitchhiker before the officer came and the details of that conversation; (8) that he saw someone come to the officer's aid before he ran off and the direction from which they came; (9) that he was able to elude police and travel for miles

through the woods to get to his friend Eugene Hinton's house and recalls how he did it; and (10) that he knew the reason he shot was to avoid going to jail for possession of a weapon by a convicted felon.

Thus, it is clear that Kirschner not only considered a voluntary intoxication defense, but actually used it as a "fall-back" defense. To suggest counsel did not present a voluntary intoxication defense flies in the face of the record and the evidentiary hearing testimony. Further it is immaterial whether it was the court or Kirschner who first raised the issue of giving a jury instruction on voluntary intoxication (because it had been given at the first trial). The important fact is that the instruction was given to the jury.<sup>16</sup>

Reaves confession reveals that he knew exactly what he was doing when he shot Officer Raczkoski eradicating any voluntary intoxication defense. See Pace v. State, 854 So.2d 167 (Fla. 2003) (finding no ineffective assistance of counsel in guilt phase for not presenting a voluntary intoxication defense where the defendant's confession indicated a clear recollection of the

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<sup>16</sup> Reaves argues that voluntary intoxication must have been a viable, primary defense because the State spent much of their closing argument refuting it (IB 73,87). However, that argument ignores the fact that Kirschner did not have the fact Reaves could not provide, any independent evidence of his intoxication the night of the murder. Thus, it could not have been his primary defense.

facts of the offense and involved deliberate behavior, such as secreting the body and taxi as well as driving the taxi; Davis v. State, 875 So. 2d 359 (Fla. 2003) (finding that trial counsel did not render deficient performance for failure to present intoxication defense where defendant gave two detailed confessions about the crime) Damren v. State, 838 So.2d 512, 516-17 (Fla. 2003) (noting that a clear memory of the events on the night of the crime compromises a voluntary intoxication defense); Stewart v. State, 801 So.2d 59 (Fla. 2001) (holding defense counsel was not ineffective for failing to present a voluntary intoxication defense given the defendant's detailed account of the crime); Occichone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (finding attorney's decision not to present voluntary intoxication at penalty phase reasonable in light of defendant's statement which clearly demonstrated intent); Kokal v. State, 718 So. 2d 138, 141 n.12 (Fla. 1998)(rejecting validity of voluntary intoxication defense given defendant's statement which indicate that he had a clear memory of the events along with mental health professional's refusal to corroborate such a defense).

In addition to the foregoing, Kirschner was not able to use voluntary intoxication as the primary defense because Reaves had also confessed to Eugene Hinton, after the crime. As will be discussed under Point II, Eugene Hinton testified at the first

trial, in 1987, that Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment several hours after the shooting and said: "I done ... up. I just shot a cop, I just shot a police." Reaves quoted the deputy as saying, "Don't shoot me. Don't shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties. Reaves, 639 So.2d 1, 3 (Fla. 1994). Hinton refused to testify at the re-trial, in 1992, was ruled unavailable, pursuant to section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record (DA 1163-1212). On appeal, the Supreme Court affirmed the unavailability ruling. Reaves, 639 So. 2d 1 (Fla. 1994). Reaves conceded that Hinton was unavailable on direct appeal,<sup>17</sup> but then challenged the admissibility of his testimony for the first time on 3.850. This Court summarily denied the claim as procedurally barred and the

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<sup>17</sup> Reaves did argue on direct appeal that it was reversible error not to admit several of Hinton's prior inconsistent statements, made prior to the 1987 trial. The Florida Supreme Court agreed that Hinton's prior inconsistent testimony should have been admitted, but found the trial court's exclusion of the testimony was harmless error since Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony. Reaves, 639 So. 2d 1, 3-4 (Fla. 1994).

summary denial was affirmed on appeal. See Reaves, 826 So.2d 932 (Fla. 2002).

In addition to Reaves' confessions to the police and Hinton which cut against a voluntary intoxication defense, Kirschner also **did not have any expert testimony supporting voluntary intoxication** because his expert, Dr. William Weitz, had found that Reaves was thinking and knew what he was doing at the time of the crime (T 67, 95, 99). Thus, Kirschner's own expert would not support a voluntary intoxication defense.<sup>18</sup> However, in

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<sup>18</sup> Weitz's psychological report on Reaves and his 1991 pre-trial deposition support Kirschner's belief that he did not have any expert testimony supporting voluntary intoxication. Weitz noted in his report only that if it was established that Reaves used cocaine the day of the murder then "one might reasonably expect an impairment in judgement, perception and reasoning." (PCR 2589). That is similar to the phraseology in the Florida Standard Jury Instruction which says that "use of drugs to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act." Fla. Std. Jury Instr (Crim.) 3.6(d)(emphasis added). Further, Weitz's report found a lack of premeditation, but never indicated that the lack of premeditation was from voluntary intoxication. In fact, the language used implies that Reaves had the specific intent to kill, "while it is not my belief that there was any premeditation as to the subject's taking the life of the police officer, survivor behavior such as that exhibit by the subject in this situation, had the intention of reducing the threat to the individual in question." (PCR 2589)(emphasis added).

Weitz's 1991 deposition also supports Kirschner's belief. Weitz stated that he did not know whether Reaves was intoxicated in the legal sense, did not know Reaves' level of intoxication and was not qualified to offer such an expert opinion. (PCR 1351-55, 1375). The prosecutor who deposed Weitz also believed that Weitz had rejected the voluntary intoxication defense (T 67).

remanding this case for an evidentiary hearing, this Court held that Weitz said only that Reaves was not so intoxicated that he did not know right from wrong, which is the insanity standard, not the voluntary intoxication standard. Reaves, 826 So.2d at 937-44.

On remand, Dr. Weitz changed his opinion, agreeing with this Court that he was referring to the M'Naughton "right from wrong" standard, not the voluntary intoxication standard. He claimed at the post-conviction evidentiary hearing that he would have testified in 1992 that Reaves was unable to form the requisite specific intent (T 102-03, 107, 109-10). Based on Weitz's "changed" opinion, Reaves contends that Kirschner was ineffective for not questioning Weitz, in 1992, about whether Reaves could have formed the specific intent to commit the murder to support a voluntary intoxication defense.

The State's first argument is that Reaves' claim that Kirschner was ineffective for failing to question Dr. Weitz about whether Reaves could have formed the specific intent to commit the murder is not preserved for appellate review because it is being raised for the first time on appeal. This case was remanded for a limited evidentiary hearing on the issue of whether Kirschner was ineffective for failing to present a voluntary intoxication defense, not for his

questioning/preparation of experts. Thus, Reaves' claim that Kirschner was ineffective for failing to question Weitz about Reaves' ability to form specific intent is outside the scope of the limited evidentiary hearing and not preserved for appellate review. As such, he cannot raise the argument for the first time on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Further, even if this Court decides to address the issue, it is clear that Kirschner was aware of Weitz's opinion on Reaves' ability to form specific intent in 1992. To begin with, the trial court, in appointing Weitz, specifically ordered him to assess, among other things, "[w]hether the Defendant possesses sufficient mental faculties to formulate the intent necessary for the offense charged." (DA 431-34). Weitz also admitted that original defense counsel, Clifford Barnes, asked him to consider whether Reaves was able to form a specific intent (T 129). Second, it was undisputed at the evidentiary hearing that Kirschner decided to use the "excusable homicide" defense **only after** discussing the matter with Weitz. Weitz and Kirschner agreed that they conversed about Weitz's findings, what defense to employ and actually formulated the defense together.<sup>19</sup> Thus,

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<sup>19</sup> Weitz agreed at the evidentiary hearing that he had discussions with Kirschner regarding the defense and that Kirschner developed his legal strategy based upon Weitz's input, findings and his "psychological perception" of what took place that night (T 99). Weitz discussed with Kirschner why the murder

it is reasonable to conclude that Kirschner was privy to what Weitz believed in 1992 regarding Reaves ability to form specific intent and would have used a voluntary intoxication defense if it had been supported by Weitz. Third, Weitz's opinion, in 1992, on Reaves' ability to form specific intent is revealed in his 1991 pre-trial deposition, wherein he stated that he did not know whether Reaves was intoxicated in the legal sense, did not know Reaves' level of intoxication and was not qualified to offer such an expert opinion.<sup>20</sup> (PCR 1351-55, 1375). Weitz did not explain at the 2003 evidentiary hearing how he was now able to opine on such matters. Also, he offered no new, independent evidence that he had uncovered since 1992 regarding Reaves' intoxication. Weitz further admitted that Reaves never told him that the cocaine or the beer was the cause of his shooting Officer Raczkoski (PCR 1364).

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was excusable based upon the defendant's military background, which he felt clearly affected his behavior that night (T 100).

<sup>20</sup> The relevant portions of the deposition states: "Again I would be real careful to separate the legal concept of intoxication, that is not what I said. I'm talking about the psychological concept of perception and judgment. And one does not have to be legally intoxicated to have impaired judgment and perception. I'm not suggesting he was intoxicated or not, that I don't know. What I am suggesting is that the possibility of judgment and perception being impaired which is psychological phenomena and not legal, certainly are possible in this situation, given the extent to which he over responded." (PCR 1351-55, 1375).

Reading Weitz's deposition testimony as a whole, it is clear that he concluded that Reaves was able to form the specific intent to kill at the time of the shooting. Weitz made findings that at the time of the shooting Reaves knew what he was doing, knew the consequences of what he was doing and that it was wrong, was aware of what had occurred, and was clearly making an attempt to avoid being apprehended. Logic dictates that the same cognitive ability that allowed Reaves to "know what he was doing" "to know the consequences of what he was doing" "to be aware of what had occurred" and "to be able to avoid being apprehended," enabled Reaves to form the specific intent to kill. The intent to kill may be formed in an instant and does not require a high level of cognitive ability. Moreover, the very defense Weitz formulated with Kirschner, excusable homicide due to the Vietnam syndrome, contradicts arguing lack of specific intent to kill. Weitz alleged that Reaves has "Vietnam" syndrome which makes him revert to survivor behavior and react instinctively in a kill or be killed thought process, as he was trained to do in Vietnam. (T 64). Acting in a "kill or be killed" thought mode is the epitome of having the requisite intent to kill.

Thus, Kirschner could not have been ineffective because he was aware of Weitz's opinion about Reaves' ability to form specific intent in 1992 and it was not what was stated at the

2003 evidentiary hearing. Further, it is not clear that Weitz actually "changed" his opinion at the 2003 evidentiary hearing. A review of his testimony at the evidentiary hearing shows that he incorrectly based his opinion on Reaves' **overall** addiction to cocaine as negating his ability to form specific intent; he was not relying upon evidence of Reaves' actual intoxication on the night of the murder. Thus, Weitz's "changed" opinion is really nothing more than an opinion on "diminished capacity." Weitz's answers regarding inquiries about intoxication and intent are noteworthy:

Q: (Ms. Donohue): So let me be clear about this for the record. The testimony would have been that he had a severe cocaine problem that would have impaired his ability to form specific intent?

A: Correct.

(T 107)(emphasis added)

Based upon the above, Weitz's recent change of view must be viewed with skepticism. See Hodges v. State, 885 So.2d 338 (Fla. 2004) (noting that the presentation of changed opinions in a post-conviction proceedings does not establish ineffective assistance of counsel); Pace v. State, 854 So.2d 167 (Fla. 2003) (holding that changed diagnosis from two mental health experts in post-conviction did not make counsel was ineffective); Bruno v. State, 807 So.2d 55 (Fla. 2001); Johnson v. State, 769 So.2d 990

(Fla. 2000); Brown v. State, 755 So.2d 616 (Fla. 2000). Weitz's changed opinion does not render Kirschner ineffective for not presenting a voluntary intoxication defense and there is competent, substantial evidence supporting Kirschner's reasonable trial strategy to proceed with an excusable homicide defense, with voluntary intoxication as a "fall-back" position.

Finally, as Kirschner noted at the evidentiary hearing, even if he had found an expert to say that Reaves could not form the requisite specific intent in 1992, the State had Dr. Cheshire available to rebut that (T 68). Dr. Cheshire testified at trial (rebuttal portion of penalty phase) that Reaves was a drug addict who executed the officer to avoid going to jail. Dr. Cheshire found that Reaves knew exactly what he was doing, that it was self-motivated behavior and that it fit within Reaves' anti-social personality type (T 58-59). Kirschner explained that it was his duty to present the best possible defense for Reaves and he believed that excusable homicide, which is a complete defense if the jury agrees that the killing was accidental, was the best defense given the circumstances of this crime (T 75, 66). Unlike excusable homicide, voluntary intoxication is an incomplete defense because it only lessens the murder to second-degree. Kirschner acknowledged that there could be a tension between his primary defense of excusable homicide, which claimed the murder

was an accident and the voluntary intoxication defense, which claimed that Reaves was so impaired he had no idea what he was doing (T 64-65). When asked whether he could have asserted the voluntary intoxication defense more aggressively and not have it conflict with the primary defense of excusable homicide, Kirschner noted that in 1991-92, when this case was re-tried, people were less accepting of the idea that voluntary intoxication could excuse criminal conduct (T 65-66).<sup>21</sup> He noted that today, people are more accepting of a voluntary intoxication defense because almost everyone knows someone with a substance abuse problem (T 65).<sup>22</sup>

Given the complete lack of direct evidence, other than Reaves' self-serving statements that he was high on cocaine at the time of the crime, coupled with the lack of expert testimony and the paltriness of the other testimony supporting the

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<sup>21</sup> Kirschner indicated that he felt "excusable homicide was the right fit for the defense in this case" (T 56) and that at the time of the trial "jurors were less accepting of the idea that voluntary intoxication excuses criminal conduct"(T 66). This is sound trial strategy, particularly in light of the facts of this case. This Court has held that decisions about intoxication defenses based on perceptions about juries acceptance of them are not unreasonable strategic decisions. Johnson v. State, 769 So. 2d 990, 1001-02 (Fla. 2000); See Odom v. Florida, 782 So.2d 510,512 (Fla. 2002).

<sup>22</sup> The State notes that today a voluntary intoxication defense cannot be raised. Effective, October 1, 1999, voluntary intoxication was eliminated as a defense in Florida. § 775.051, Fla. Stat. (1999).

voluntary intoxication defense in 1992, Kirschner's decision to focus on excusable homicide and leave voluntary intoxication as a "fall-back" defense was a perfectly reasonable trial strategy. This is particularly true when you factor in Reaves' damaging confessions which severely compromised any intoxication defense. The Florida Supreme Court has held that it will not second-guess counsel's strategic decisions about whether to pursue an intoxication defense. See Jones v. State, 855 So.2d 611, 616-17 (Fla. 2003) (finding no ineffective assistance of counsel in guilt phase for not presenting a voluntary intoxication defense because it was a reasonable strategy decision based on: fact that toxicology report indicated that the defendant's blood contained only trace indications of the presence of cocaine; counsel's experience that juries do not accept voluntary intoxication as a defense or mitigating factor, especially when the charge is murder; fact that not one of the defendant's lay witnesses was found to be credible; and fact the testimony of two psychologists that defendant was intoxicated at the time of the murders was based on hearsay interviews with the defendant's family members, none of whom could say they saw appellant on the day of--or even the evening before--the murders); Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) (holding that "strategic decisions do not constitute ineffective assistance of counsel if alternative

courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"); Johnson v. State, 769 So.2d 990, 1001-02 (Fla. 2000); Penn v. State, 825 So.2d 456 (Fla. 2d DCA 2002).

Reaves failed to present any additional evidence at the evidentiary hearing demonstrating that a voluntary intoxication defense was available in 1992. At the evidentiary hearing, in addition to Weitz, Reaves presented expert testimony from Dr. Richard Dudley ("Dudley"), Dr. Barry Crown ("Crown"), Dr. Debra Mash ("Mash"), Dr. Irving Parsons ("Parsons"), and Dr. Thomas Hyde ("Hyde") in support of his contention that Kirschner was ineffective for failing to present a voluntary intoxication defense. However, the experts' testimony cannot be relied upon because it is conflicting. While Dudley found no organic brain damage, Crown found that there was organic brain damage, but admitted that it could have been caused by the head injury Reaves sustained **after** the murder at the time of arrest. Mash disagreed with Weitz's finding that Reaves was legally sane at the time of the murder; concluding that Reaves was in a psychotic state, delusional at the time of the crime due to cocaine intoxication. However, her opinion was based on Reaves' claim that he had taken in excess of 10 grams of cocaine that day, which conflicts with

what Reaves told Weitz, that he had only taken 1 3/4 grams on the day and night before the murder.

Further, none of the experts found their opinions to be inconsistent with the total recall Reaves had of the murder and his ability to describe exactly what happened in exquisite detail. Hyde and Mash opined that Reaves would have been suffering from amnesia and might have made up or filled in the details he didn't remember; however, Hyde admitted that if the details coincided with known facts, it was less likely they were made up. Incredulously, all of the experts agreed that Reaves could simultaneously be unable to form the specific intent to kill, yet be highly alert and able to remember every detail of what he was doing. All of the experts opined that Reaves was unable to form the requisite specific intent due to the **combined effects** of cocaine/alcohol and PTSD/Vietnam syndrome/organic brain damage.

The State's first argument is that simply because Reaves has found new doctors who disagree with Weitz's 1992 diagnoses does not mean that Reaves is entitled to relief. One of the differences between the new experts and Weitz is that they found PTSD, based upon Reaves reporting of nightmares or bad dreams. However, Reaves denied flashbacks or bad dreams to Weitz and those are two diagnostic criteria for PTSD. Several of the new

experts also found organic brain damage, but admit it could have been caused by the head injury Reaves sustained **after** the murder. Finally, several of the experts disagree with Weitz's diagnosis of anti-social personality disorder. However, Weitz's finding is supported by the State's expert, Dr. Cheshire, who testified at the evidentiary hearing that Reaves' actions were consistent with his anti-social personality disorder (T 487). Reaves was thinking only of himself, and was willing to go against society's rules by killing a person to avoid going to jail (T 487). Reaves traded the officer's life in order to avoid spending three years in prison. Cf. Johnson v. State, 769 So.2d 990 (Fla. 2000) (refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage). See Rose v. State, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); Engle v. Dugger, 576 So.2d 696 (Fla. 1991) (affirming summary denial of similar claim where conclusion by two new mental health experts that defendant has serious mental problems did not demonstrate that original three experts conducted unprofessional examinations); Provenzano, 561 So.2d 541, 546 (Fla. 1990) ("The mere fact that Provenzano

has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief."); Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990) ("The fact that Correll has now obtained psychiatric opinions which seriously question his mental capacity does not mean that he is entitled to a new penalty hearing."); Asay v. State, 769 So.2d 974 (Fla. 2000) (finding that trial counsel's investigation was not deficient given that most facts now advanced by collateral counsel were known to prior mental health professional).

Moreover, Kirschner cannot be deemed deficient for not presenting expert testimony regarding the combined effects of Reaves' Vietnam Syndrome and drug/alcohol use, to support of a voluntary intoxication defense, because the law in effect in 1991-92, the years this case was re-tried, clearly did not allow for the admission of such testimony to negate the specific intent element of first-degree murder. The trial court addressed this issue and its consequences in its order denying relief stating as follows:

As to the Defendant's sub-issue of trial counsel's failure to retain experts to testify on the combined effect of the Defendant's cocaine use and mental defect, the Defendant presented six expert witnesses that testified that the combined effect of cocaine and some mental defect of the Defendant...The Court in Chestnut held that **an abnormal mental condition not constituting legal insanity was inadmissible**

for the purpose of proving that an accused did not or could not form the specific intent to commit an offense. Id. at 820.

The ability to offer evidence of the combined effect of intoxication and a mental defect was not fully articulated or established in law until State v. Bias, 653 So.2d 380 (Fla. 1995). This was three years after the Defendant's retrial. In Bias, the Court stated that it was synthesizing its decisions in Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), Bunney v. State, 603 So.2d 1270 (Fla. 1992), Chestnut v. State, 538 So.2d 820 (Fla. 1989), and Gurganus v. State, 451 So.2d 817 (Fla. 1984). However, both the Dillbeck and Bunney decisions, which permitted the testimony concerning epilepsy and fetal alcohol syndrome, were also not decided until after the Defendant's retrial. Trial counsel should not be deemed ineffective for failing to anticipate the change or development in the law. See Stevens v. State, 552 So.2d 1082 (Fla. 1989); Nelms v. State, 596 So.2d 441 (Fla. 1992).

Moreover even if trial counsel was expected to predict the Bias decision, trial counsel had made a strategic decision not to actively pursue the defense of voluntary intoxication. Therefore, the Court finds that trial counsel cannot be ineffective for failing to retain experts to testify regarding a defense he chose not to utilize.

(R 307-09)

The trial court correctly concluded that Kirschner could not be deemed ineffective because the new experts' opinions could not have been introduced in 1992. The only authority cited by Reaves in support of his contention that Kirschner was ineffective for

failing to present such testimony, was a case that was decided in 1995, three years after his re-trial. In State v. Bias, 653 So.2d 380 (Fla. 1995), the defendant raised voluntary intoxication as a defense, alleging that he had consumed 11 beers before the crimes. He also wanted to introduce expert psychiatric testimony that he suffered from schizophrenia and that the combined effect of his mental condition and the alcohol rendered him incapable of forming the specific intent necessary to commit the murder or robbery. The Supreme Court held that such expert testimony is admissible

if the mental disease or defect is a diagnosis recognized by authorities generally accepted in medicine, psychiatry, or psychology. Further, the trial court should allow an opinion regarding the level of intoxication resulting from the combination of a given quantity of intoxicants and a recognized mental disease or defect if authorities, studies, and experiences which have general acceptance in medicine, psychiatry, psychology or toxicology to support the testimony that intoxicants and the mental disease or defect do combine to cause intoxication.

Id. at 383.

However, the Supreme Court established the following limitations on the admission of such mental health evidence as a part of a voluntary intoxication defense:

First, the focus of the expert's testimony must be upon the defendant's intoxication, and the mental disease or mental defect must

not be the feature of the testimony. The testimony must be limited to whether a given quantity of intoxicants, combined with the mental disease or defect diagnosed in the defendant, rendered the defendant intoxicated to the level that the defendant could not form the required specific intent at the time of the crime. Second, the court must determine that the mental disease or mental defect is a diagnosis recognized by authorities generally accepted in medicine, psychiatry, or psychology. Third, the court must determine that the offered expert opinion as to the intoxication from the combination of the given quantity of intoxicants and the mental disease or defect is based upon authorities, studies, and experience which have general acceptance in medicine, psychiatry, psychology, or toxicology.

Id. at 382.

Re-iterating its rejection of any "diminished capacity" defense in Florida, the Supreme Court explained the limitations were intended to ensure that voluntary intoxication did not become a label for what was really a "diminished capacity" defense:

We continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea. It is for this reason that we have set forth these limitations regarding the admissibility of evidence of mental disease within the defense of voluntary intoxication. We want to ensure that the defense of voluntary intoxication is not utilized as a label for what in reality is a defense based upon the doctrine of diminished capacity.

Bias at 382. Bias was not the state of the law in 1991-92 when Mr. Kirschner tried this case. Further, although the Supreme Court stated in Bias that it was "synthesizing" its prior decisions in Gurganus v. State, 451 So.2d 817, 821 (Fla. 1984), Chestnut v. State, 538 So.2d 820 (Fla. 1989), Bunney v. State, 603 So.2d 1270 (Fla. 1992), and Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), it is clear that none of those cases allow the admission of expert testimony on the combined effect of a mental condition and intoxicants in support of a voluntary intoxication defense and consequently, Bias constitutes a change in the law which Mr. Kirschner cannot be deemed ineffective for failing to anticipate. Cf. Provenzano v. Dugger, 561 So.2d 541, 545 (Fla. 1990) (affirming summary denial of ineffectiveness claim that counsel failed to object to insanity instruction later found erroneous, because "[t]he fact that a lawyer in another case raised an objection to this instruction and ultimately succeeded in having it set aside does not mean that Provenzano's counsel was ineffective for not also attacking the instruction").

Further, Reaves' reliance upon Gurganus v. State, 451 So.2d 817, 821 (Fla. 1984) in support of his contention that such testimony was admissible in 1991-92, is misplaced. In Gurganus, the defendant raised "insanity" as a defense to his first-degree murder charge, and also raised voluntary intoxication as a

defense to his ability to form the specific intent necessary to commit first-degree murder. The defendant's physician testified that the defendant was taking Fiorinal, a barbiturate compound, for severe headaches. It was shown that the depressant effect of Fiorinal was multiplied if taken in conjunction with alcohol and that use of the two could lead to violent behavior. There was evidence suggesting that the defendant had taken 29 pills between the day before and the day of the shootings and that he had also been drinking immediately prior to the shootings.

The defendant wanted to introduce expert testimony from two psychologists who had examined him after his arrest concerning the actions of an individual who ingested 29 Fiorinal capsules in a twenty-four hour period along with alcohol. The Supreme Court allowed the expert testimony for the purpose of proving that the defendant could not have formed the specific intent necessary to commit first-degree murder. In so holding, the Gurganus court noted, "[w]hen specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent is relevant. As such, it is proper for an expert to testify 'as to the effect of a given quantity of intoxicants' on the accused's mind when there is sufficient

evidence in the record to show or support an inference of consumption of intoxicants." Id. at 822-823 (citation omitted).

Gurganus offers no support to Reaves because the experts in that case were not testifying as to the combined effects of a mental condition and intoxicants, but rather, were testifying as to the combined effects of two intoxicants, Fiorinal and alcohol. Further, the Supreme Court quickly rejected that portion of Gurganus which states that **"evidence of any condition relating to the accused's ability to perform a specific intent"** is relevant. In Chestnut,<sup>23</sup> decided in 1989, five years after Gurganus, the Supreme Court found that the only departure from the long line of authority in Florida **soundly refusing to adopt the "diminished capacity"** doctrine was that portion of Gurganus noting that "evidence of any condition relating to the accused's ability to perform a specific intent" is relevant. The Supreme Court found its statement in Gurganus to be mere *obiter dictum*, and concluded that all Gurganus really did was "reaffirm[ ] the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent." Chestnut at 822.

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<sup>23</sup> Chestnut did not raise a voluntary intoxication defense or an "insanity" defense but nonetheless, wanted to present expert testimony that he did not have the mental state required for premeditated first-degree murder due to low intelligence, brain damage, seizures, diminished mental capacity and passive personality. The Supreme Court **adhered to its rejection of the "diminished capacity"** defense in Florida. Id. at 825.

Finally, contrary to Reaves' assertions, Bias does not quote Gurganus as allowing the admission of expert testimony on the combined effects of a mental disorder and intoxicants to support a voluntary intoxication defense. Based upon the foregoing, it is clear that the law in Florida in 1991-92 did not allow for the admission.

Moreover, even if Kirschner should have anticipated the development, the experts' testimony and Weitz's changed opinion do not entitle Reaves to relief. First, as the State has previously argued, the credibility of Weitz's "changed" opinion is in doubt considering the totality of the circumstances. Second, Cheshire's testimony conflicts with the other experts on this point. He testified that Reaves knew what he was doing at the time of the crime, knew right from wrong, and fully understood the responsibility of what he was doing (T 485). In Cheshire's opinion, Reaves made a conscious decision to kill the officer. He found Reaves' statements indicative of the fact that he was thinking, calculating, considering the facts of the matter, the circumstances and the outcome of his behavior. (T 485-86).

Additionally, the experts' testimony that Reaves' was unable to form specific intent to kill is incredulous given the facts of this case. All of the experts claim that Reaves could not form

the intent to kill because he had reverted back to his learned behavior in Vietnam, "kill or be killed," and was reacting or acting instinctively, with the reptilian part of his brain, without thinking through his actions. However, the requisite specific intent can be formed in seconds and does not have to be a reasoned, deliberate, rational decision as they suggest. Rather, the intent can be fueled by anger, hatred, spite or any other emotion. The fact that it is does not make it any less of an intended action. Indeed, the very defense offered by Reaves is essentially an admission that he had the requisite intent to kill. Reaves alleges that he was acting in a kill or be killed mode, as he was trained to do in Vietnam. (T 64). As already noted, acting in a "kill or be killed" mode is the epitome of having the requisite intent to kill.

Finally, the focus of a voluntary intoxication defense must always remain on the crucial issue of Reaves' intoxication at the time of the crime. Here, Reaves has failed to present any evidence, other than his own self-serving statements that he was high on cocaine at the time of the murder. The corroborative evidence Reaves tried to offer does not support the defense, as will be further discussed, *infra*. Further the Jackie Green

tape<sup>24</sup> does not provide any evidence establishing Reaves' level or state of intoxication at the time of the crime, nor would the items seized from her house.<sup>25</sup>

Kirschner's decision to not more actively pursue an intoxication defense was a reasonable, strategic one. See Pietri v. State, 885 So.2d 245, 253 (Fla. 2004)(upholding counsel's decision to not pursue a voluntary intoxication defense where the defendant presented no evidence at the post-conviction evidentiary hearing that he was actually intoxicated at the time of the offense, but instead, presented evidence only that he had a history of drug abuse suffered from "metabolic intoxication"- a mental defect. Because he could not show he was actually intoxicated at the time of the crime "i.e., that had he been given a blood test it would have registered any level of cocaine

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<sup>24</sup> Reaves alleges that the Jackie Green tape is important because it "impeaches" Hinton's statement that Green was at a poolroom with Reaves the night before the murder. Where Jackie Green was is a detail that does not repudiate the significant aspects of Hinton's testimony. This is similar to what the Florida Supreme Court found on direct appeal regarding the exclusion of Hinton's prior inconsistent statements, made prior to the 1987 trial. The Florida Supreme Court found the exclusion harmless since the differences pertained to only details.

<sup>25</sup> To the extent that Reaves is relying upon the Hinton affidavit, Jackie Green tape and the items seized from Jackie Green's house in support of his argument that counsel was ineffective for not investigating and discovering this evidence, that argument fails because none of the evidence would have supported a voluntary intoxication defense in 1992 or today. None of it establishes the level of Reaves' intoxication at the time of the crime.

in his bloodstream", counsel was not deemed ineffective); Dufour v. State, 905 So.2d 42, 53 (Fla. 2005)(holding counsel was not ineffective for failing to present a voluntary intoxication defense where defendant claimed that due to the long-lasting effects of chronic drug and alcohol abuse, he was under the effects of those substances at the time of the crime; the court noting these facts were more in the vain of a diminished capacity defense, particularly where no evidence was presented that he was actually intoxicated at the time of the offense); Henry v. State, 862 So.2d 679 (Fla. 2003); Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (holding that counsel was not ineffective for failing to employ a voluntary intoxication defense where, at an evidentiary hearing, defense counsel testified that he considered an intoxication defense but determined that it was not a viable defense based on the facts of the case); Van Poyck v. State, 694 So. 2d 686, 697 (Fla. 1997)(affirming counsel's strategic decision not to pursue voluntary intoxication defense since investigation of same proved futile); Johnson v. Dugger, 583 So. 2d 657, 661 (Fla. 1991)(affirming denial of claim of ineffective assistance of counsel since new defense presented in collateral proceeding was contradicted by evidence as trial); Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000) (upholding trial court's rejection of mitigation of lack of intent based on evidence that

demonstrated defendant's purposeful actions). Simply because the excusable homicide defense proved unsuccessful, does not translate into ineffective assistance of counsel. Johnston v. State, 769 So. 2d 990, 1001 (Fla. 2000)(rejecting claim of ineffective assistance of counsel simply because defense presented was unsuccessful). Finally, Reaves has failed completely to prove the requisite prejudice. Given the evidence outlined above and the fact that the jury was instructed on the voluntary intoxication defense, there is no chance that the result of the proceeding would have been different.

Reaves' reliance upon Wiggins v. State, 539 U.S. 510 (2003) and Orme v. State, 896 so.2d 725 (2005) is misplaced. This is not a case where counsel failed to discover significant mitigation evidence. On the contrary, the record reveals that Kirschner conducted an extensive meaningful investigation and presented substantial mitigation on Reaves' behalf. When assessing the constitutional adequacy of an attorney's performance, the law requires the courts to consider the surrounding circumstances such as statements by the defendant; strength and significance of the inculpatory evidence; strength and significance of the exculpatory evidence. In Wiggins, the Court explained:

In light of these standards, our principal concern in deciding whether Schlaich and

Nethercott exercised "reasonable professional judgment," id., at 691, 80 L Ed 2d 674, 104 S Ct 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. Ibid. Cf. Williams v. Taylor, supra, at 415, 146 L Ed 2d 389, 120 S Ct 1495 (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," Strickland, 466 U.S., at 688, 80 L Ed 2d 674, 104 S Ct 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689, 80 L Ed 2d 674, 104 S Ct 2052 ("Every effort [must] be made to eliminate the distorting effects of hindsight").

Wiggins v. Smith, 539 U.S. 510 at 522-523 (2003)(emphasis added).

Wiggins does not require counsel to "scour the earth" for all mitigating evidence. Such an analysis is decried by Strickland and more recently, Wiggins:

In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. 466

U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." Id., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins, 539 U.S. at 533.

Here, in contrast to Wiggins, counsel was aware of Reaves' history of chronic drug abuse, that he was aware of Reaves' confession stating that he was "high" on cocaine the night of the shooting and, that he had been apprehended in Georgia with cocaine in his possession. There was nothing further Kirschner could discover or pursue for a voluntary intoxication defense at Reaves' 1992 re-trial and Reaves failed to present anything additional at the post-conviction evidentiary hearing. There were no laboratory tests for narcotics nor lay witnesses that Kirschner should have discovered. Even after eleven years from the time of the first trial, Reaves was unable to present any further evidence, testimonial or documentary, to support the crucial issue in a voluntary intoxication defense: the level and state of his intoxication at the time of the offense. Unlike Wiggins, post-conviction counsel here has offered nothing new,

let alone any significant or credible information that had been overlooked regarding a voluntary intoxication defense.

Orme, *supra*, applying Wiggins, held penalty phase counsel ineffective because he could offer no reasonable explanation as to why he did not present a mitigating defense of bipolar disorder. Counsel did not tell his experts of Orme's bipolar disorder and did not present evidence of such because "he had no other information to corroborate it...and did not want his expert to stick his neck out and get his head cut off". Orme, 896 So.2d at 733. In this case, however, Kirschner provided and discussed with Weitz all the information he had in the case, articulated his strategy, presented evidence of Reaves stated intoxication and chronic drug use to the jury and requested the court give a jury instruction on the defense of voluntary intoxication.

Finally, Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985), relied upon by Reaves for the proposition that it is incumbent on trial counsel to pursue a voluntary intoxication defense is unavailing. Bridges is not remotely similar to the instant case. Counsel in Bridges argued against a jury instruction on voluntary intoxication and "there was evidence that defendant had been drinking for several hours, and that he was described by witnesses as being "berserk" "unstable" "half-there" and "a whole lot strung out." Id., at 348. Here, as

already noted, trial counsel conducted a very thorough investigation and provided Weitz with sufficient information necessary to complete a competent evaluation. He also requested a jury instruction on voluntary intoxication. Reaves' good fortune in finding mental health professionals who will now opine that he suffers from post-traumatic stress disorder and that he does not suffer from anti-social personality disorder, does not prove that a competent investigation and subsequent evaluation were not conducted at the time of trial. Jones v. State, 732 So. 2d 313, 319 (Fla. 1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable); Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 541 (Fla.1991)(same); LeCroy v. Dugger, 727 So. 2d 236, 239-240 (Fla. 1998)(upholding summary denial where record demonstrates that prior mental health expert had significant background material upon which to make a competent evaluation).

In sum, Reaves presented no testimony at the evidentiary hearing as to his actual level of intoxication other than his self-serving statements. This lack of corroboration supports the trial court's finding that Kirschner's decision was reasonable

trial strategy. There were no lab reports or drug tests performed on Reaves regarding his level of intoxication at the time of the murder and there were no independent witnesses who could corroborate Reaves' level of intoxication at that crucial time. There is competent, substantial evidence supporting the trial court's factual findings and its finding of no ineffectiveness must be affirmed. Kimbrough v. State, 886 So. 2d 965 (Fla. 2004)(rejecting claim that counsel failed to provided relevant information to mental health experts given the complete absence of what specific records were critical and overlooked); Jones, 855 So.2d at 616-17 (upholding denial of claim that counsel was ineffective where witnesses presented by defendant where not credible nor could they offer any information surrounding defendant's behavior at the time of the crime); Heynard v. State, 883 So. 2d 753 (Fla. 2004)(upholding trial court's conclusion that failure to present evidence of chronic drug use was not the result of counsel's deficient performance but because there was no evidence presented at evidentiary hearing to support the fact that it existed).

## ISSUE II

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
IN REFUSING TO PERMIT HINTON TO TESTIFY AT  
THE HEARING OR IN DENYING FORENSIC TESTING OF**

**TRIAL EVIDENCE FOR DRUG METABOLITES  
(restated)**

Reaves contends the trial court erred in not allowing Hinton to testify at the evidentiary hearing in light of Hinton's prior testimony and deposition. (IB 74, 88-89). He offers several instances of alleged ineffective assistance of counsel related to his attorney's alleged failure to present an intoxication defense. (IB 74-88). As a final sub-issue, Reaves maintains that forensic testing of various pieces of evidence for drug metabolites should have been granted by the trial court. (IB 88-89).

With respect to the allegations of ineffective assistance of counsel offered here, the State points out that two are unpreserved as they are being raised for the first time in this appeal, another is procedurally barred, and three others are repetitious of claims made in Issue I.<sup>26</sup> Because the

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<sup>26</sup> The unpreserved issues are: (1) counsel was ineffective for failing to "provide the Hinton statements to his expert, Dr. Weitz" (IB 74) and (2) counsel failed to attempt to show the relevance of Hinton's "prior inconsistent statements" for an intoxication defense (IB 75-79). The procedurally barred claim is that counsel should have made a better argument to obtain admission of Hinton's alternative statements (IB 87). The repeated claims are: (1) counsel was on notice that further investigation of Reaves' possible intoxication was necessary and should have conducted interviews with Hinton and Jackie Green (IB 79-84); (2) counsel was ineffective in not using Jackie Green to impeach Hinton (IB 85-87); and (3) counsel did not prepare Dr. Weitz properly (IB 87-88).

ineffectiveness claim related to intoxication was addressed in Issue I, the State relies upon and reincorporates its answer to that matter here. The individual sub-claims will not be discussed further in this point, with the exception of a general discussion of how Hinton's proffered testimony would not satisfy the prejudice prong of Strickland.

It is the State's position that the trial court did not abuse its discretion in denying the writ ad testificandum for Hinton's testimony. The limited issue<sup>27</sup> before the trial court was counsel's effectiveness related to his failure to present an intoxication defense. In this litigation, Reaves advised the court that Hinton's testimony would be used to support the prejudice prong of Strickland, however, he failed to show that Hinton's new account would have been relevant to the ineffectiveness claim given the fact Hinton refused to testify at the 1992 proceedings. Further, Hinton's 1999 affidavit does not speak to Reaves' level of intoxication at the time of the crime, the critical period, thereby, rendering added support to the conclusion the testimony was irrelevant. Given the irrelevance of Hinton's proffered account, there was no abuse of discretion in denying the writ.

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<sup>27</sup> This Court remanded the case for an evidentiary hearing on the issue of counsel's decision regarding an intoxication defense. Reaves v. State, 826 So.2d 932, 937-44 (Fla. 2000).

However, even though the writ was denied, the court considered Hinton's affidavit and assumed he would have testified consistently with it. Upon due consideration, the court determined such evidence would not have altered the outcome of the trial, thus, the dictates of Strickland were not met. These findings and legal conclusions are supported by substantial, competent evidence and the law. It is unrefuted that Hinton refused to testify in 1992 and was unavailable, in fact, Reaves so conceded in his initial brief on direct appeal following the retrial. Further, this Court found in the first postconviction appeal that the claim of the denial of the right to confront Hinton in the 1992 was procedurally barred. Now Reaves offers the same testimony, but it does not support an intoxication defense. These facts and procedural account, presented in more detail below, dictate that this Court affirm the denial of postconviction relief.

Also, there was no abuse of discretion in denying postconviction discovery in the form of testing evidence for drug metabolites. Reaves did not establish that the tests would lead to relevant and material evidence. The testing could not give results identifying the exact time and amount of cocaine ingested on the day of the crime. Hence, it was irrelevant to the issue of counsel's effectiveness related to an intoxication defense.

The standard of review applicable to a court's ruling on a motion for a writ of habeas corpus ad testificandum is an abuse of discretion. Bolender v. State, 422 So.2d 833 (Fla. 1982) superseded by statute on other grounds, Merck v. State, 763 So.2d 295, 299 (Fla. 2000); Moody v. State, 418 So.2d 989 (Fla. 1982). The same standard applies to the denial of a motion for discovery in a postconviction case. State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994) (determining it is moving party's burden to show court abused its discretion in denying discovery in postconviction litigation). Under this standard, the appellate court pays substantial deference to the trial court's ruling and will uphold it "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

Initially, it must be noted that other than commenting that the court denied Reaves' request to have Hinton testify, Reaves fails to set forth any argument related to how the court abused its discretion. The claim is not pled sufficiently and should be held waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to

arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Assuming arguendo this Court reaches the merits, the following argument is offered.

Reaves sought a writ of habeas corpus ad testificandum for Hinton. (SR1 600-02). Objecting, the State argued: "because Hinton refused to testify [at the 1992 re-trial], his testimony is completely irrelevant to any alleged ineffectiveness of defense counsel. Further, it is outside the scope of the narrow issue presented in this evidentiary hearing, i.e., whether defense counsel was ineffective for failing to present a voluntary intoxication defense." (R 606-08). At the hearing the following discussion with Reaves' counsel took place:

MR. HENNIS: Briefly, your Honor. Our position is simply that Mr. Hinton's testimony would be relevant to the prejudice prong under Strickland pursuant to the issue the hearing's about, that's failure by trial counsel to investigate and present a voluntary intoxication defense. So that's our position, your Honor. We think the record supports our position and our 3.850 as pled supports that position.

THE COURT: Well, tell me how this testimony, if he didn't testify at trial, what testimony he could give at the hearing that would shed light on ineffective assistance of counsel regarding that, that voluntary intoxication defense?

MR. HENNIS: I believe that's in the record, your Honor.

THE COURT: Can you point me to, to the record?

MR. HENNIS: I can point you to the affidavit that was attached to the 3.850 from Mr. Hinton, your Honor.<sup>28</sup>

(R 699-700).

Hinton refused to testify at the 1992 re-trial, notwithstanding being told there were no grounds to invoke his Fifth Amendment privilege and that he would be held in contempt and given additional prison time if he continued to refuse to testify. (ROA-1 1123-24). Further, on at least ten (10) occasions Hinton emphasized that he did not recall anything. (ROA-1 1126-28). On direct appeal of the retrial, this Court noted Hinton's prior testimony from 1987 was read into the record

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<sup>28</sup> Pertinent sections of the affidavit, procured in 1999 (seven years after the re-trial) stated as follows: "3. Fat [Reaves] and I sold drugs together between Gifford and Tallahassee. On our trips, Fat would shoot up and smoke drugs. We had been to Tallahassee the weekend before this happened. He said he was going to his girlfriend's house to chill out. I believe that meant that he was going to do drugs. 4. Fat, he used drugs sometimes he would start to talk about what happened over there and would take off running. 5. Fat came to my house after the police got shot. He was scared and thought people wanted to kill him. Fat was all strung out. He had been smoking crack and pretty much out of his head. He was real scared. I have never seen Fat violent with anyone but that night, he would run away from a fight if he could. (R. 425-26)

as he was unavailable.<sup>29</sup> Reaves, 639 So.2d at 3. As part of his appellate argument that prior inconsistent statements (1986 police statements and a 1987 deposition) from Hinton should have been admitted into evidence, Reaves conceded in his initial brief from the direct appeal at page 32 that "Hinton's former trial testimony (from 1987) was properly admitted because of his (Hinton's) 'unavailability' to testify within the meaning of chapter 90.804(1)." This Court agreed, but found the refusal to admit such evidence was harmless as the inconsistencies noted between Hinton's statements and 1987 testimony were to details that "did not repudiate the significant aspects of his testimony." Reaves, 639 So.2d at 4.

In spite of his concession and this Court's resolution of the matter, on collateral review, Reaves challenged the

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<sup>29</sup> His testimony was summarized in Reaves v State, 639 So.2d 1, 3 (Fla. 1994):

According to Hinton, Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment after the shooting and said: "I done . . . up. I just shot a cop, I just shot a police." Hinton testified that Reaves quoted the deputy as saying, "Don't shoot me. Don't shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties.

admissibility of Hinton's prior testimony on the ground he was denied his right to confront a witness, namely, Hinton. This Court affirmed the summary denial finding the claim procedurally barred. See Reaves, 826 So.2d at 932. Now, Reaves asserts Hinton should have been allowed to testify to establish prejudice under Strickland and points to the 1999 affidavit as a basis to obtain his testimony.

Hinton's 1999 affidavit (R. 425-26), created seven years after he had refused to testify at the retrial, was significantly different from his 1987 trial testimony. By virtue of the affidavit being created years after the retrial, it was not relevant to counsel's representation in 1992 when Hinton refused to testify. The affidavit did not resolve the questions of when Reaves ingested drugs in relationship to the Officer Raczkoski's murder, the amount of drugs imbibed, and the level of intoxication at the time of the crime.<sup>30</sup> At best the affidavit

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<sup>30</sup> The statement Reaves was "all strung out" was not offered in any of Hinton's three prior police statements or deposition, even though he was questioned extensively about Reaves' demeanor when they met after the shooting. The court observed it did not need further sworn testimony from Hinton, and postconviction counsel admitted the affidavit held the material substance of Hinton's testimony. (R 423, 427). It is noteworthy that postconviction counsel, by her own account, spent at least two hours with Hinton discussing the case, but was unable to tell the Court Hinton would have testified to anything pertinent at the 1992 retrial other than what he stated in his 1999 affidavit. She stated:

is speculative as to Reaves' actions; Hinton offered no first-hand knowledge of the pivotal issues, thereby, making his account irrelevant.

After its review of the 1987 and 1992 trial transcripts along with Hinton's 1999 affidavit, the court denied the motion stating:

THE COURT: Well, I guess the issue I believe that the Defense is raising is that this information set forth in his affidavit was available at some time to Defense counsel and whether Defense counsel pursued that or not, I believe will probably be the anticipated argument that would be raised. The question I had when reading the transcript was I believe the Court asked Mr. Kirschner if he had any questions of Mr. Hinton and he said no after Mr. Hinton refused to answer questions to Mr. Barlow. Then Mr. Kirschner asked permission to go out and speak with Mr. Hinton and it appears the Court gave permission to do that and he came back in and said that he refused to answer any questions. So even had he pursued this information, I don't know that it would have been available

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One being that it's been eluded to that he wouldn't have testified at all, I guess, in 1992 for either side. But then again, my argument would be that the attorney never questioned Hinton about the drugs. We are not sure that he wouldn't have come back and said, I'm not going to testify for the State as far as what happened, but I will tell you we were using these drugs. This is all speculation, but I would like to proffer what he would say in a brief statement, and then see if maybe Your Honor would reconsider getting some kind of a statement from him to add to the record."

(R 421).

at the time of trial due to Mr. Hinton refusing to testify. The fact that the Court allowed Mr. Kirschner to go out and speak with the, with Mr. Hinton, the witness, and Mr. Kirschner coming back saying he refuses to answer any questions, I assume that Mr. Kirschner would have wanted to talk to him about anything that would help him on his case. The fact that he was refusing to testify I think would, would nullify any, any benefit that Mr. Hinton would have served the Defense at that trial because he was refusing to testify. So I think to bring him in here now to then say well, this is what I would have said had they said the proper questions to me that I would have answered at trial, I think, I just don't think that that's going to be pertinent to the issues raised in this case. So I'll grant the states ob- or I'll sustain the State's objection to the writ of habeas corpus to have Mr. Hinton brought here to testify at the 3.850 based on the record that I've reviewed concerning this matter.

(R 706-708).

The issue before the court was whether counsel was ineffective in his handling of the intoxication defense and Hinton was offered to show prejudice under Strickland. His testimony was not relevant as it shed no light on Kirschner's 1992 actions especially given the fact Hinton could not be called as a witness at the retrial because he had made himself "unavailable." Moreover, Hinton's affidavit does not address Reeves' level of intoxication at the time of the crime and Reeves' postconviction counsel admitted the affidavit contained the sum and substance of any testimony which would have been

procured, thus, giving further proof that Hinton's testimony was irrelevant and the denial of the writ was not an abuse of discretion. See Peterka v. State, 890 So.2d 219 (Fla. 2004) (holding court did not abuse it's discretion and had wide latitude in disallowing testimony of defendant's brother regarding National Guard commendation and letting document speak for itself).

Although Reaves was not permitted to call Hinton at the evidentiary hearing, the court allowed his testimony to be proffered. The court's consideration of the proffered testimony undercuts any claim that the denial of Hinton's live testimony was detrimental to Reaves. The proffer was based upon Hinton's 1999 affidavit. The court considered and analyzed it finding:

The Defendant argues that trial counsel should have presented additional evidence of the Defendant's intoxication. The record reflects that the only evidence presented at retrial of the Defendant's intoxication at the time of the offense was his confession to law enforcement taken several days after the incident in which the Defendant makes numerous references to being "high on coke", "wired all out" or "coked up". However, the only argument presented by the Defendant at the evidentiary hearing that there was additional or independent evidence available is the current testimony of Eugene Hinton and the forensic testing of certain evidence for the presence of drugs. Although Mr. Hinton did not testify at the evidentiary hearing, his affidavit was introduced.

In his affidavit, Mr. Hinton states that the

Defendant came to his house after the incident and that the Defendant was "all strung out" because he had been smoking crack. Mr. Hinton, however, refused to testify at the re-trial and was declared unavailable. His testimony from the first trial was read into the record at the re-trial. This testimony did not include any mention that the Defendant was high on cocaine. To the contrary, Mr. Hinton's testimony was that the Defendant appeared normal. (1992 Trial Transcript at 1209). Additionally, Mr. Hinton made three statements to the police and had his deposition taken prior to trial and none of these statements contained any information that the Defendant was intoxicated at the time of the offense. But even if Mr. Hinton would now testify that the Defendant appeared "all strung out", this testimony could not have been introduced at the time of the re-trial because Mr. Hinton made himself unavailable."<sup>31</sup>

(R 306-07).

By allowing Hinton's affidavit to be proffered, and the court analyzing the information in its Order, it is clear the Court considered Hinton's affidavit regarding the issue of the voluntary intoxication defense and found it wanting in terms of both substantive merit and the ineffective assistance claim. The trial court was well-acquainted with this case in that it

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<sup>31</sup> This does not run counter to this Court's finding in Reaves v. State, 639 So.2d 1, 3-4 (Fla. 1994) that Hinton's prior inconsistent statements (police statements and deposition) made before the 1987 trial testimony that was read at the 1992 trial because Hinton would not testify, should have been admitted. Here, the court was considering statements made after the 1992 retrial and their admissibility as well as the potential impact they may have had on the trial.

reviewed the entire record and transcript of the 1992 trial and considered the initial postconviction motion filed in this case. (R 706) In analyzing the substance of Hinton's affidavit, in effect, the court allowed Reaves greater evidentiary consideration than he was entitled. In essence, Hinton was shielded from cross-examination.

Furthermore, Hinton's live testimony, would not have made a difference as it was unreliable recanted testimony. In light of Hinton's original 1987 testimony, his unavailability at the 1992 re-trial and the affidavit attested to some seven years later, the court certainly would have had reasonable grounds for skepticism regarding the substance of Hinton's proffered affidavit. This Court has consistently held that recanted testimony is "inherently unreliable". Lightborne v. State, 841 So.2d 431, 439 (Fla. 2003); Armstrong v. State, 642 So.2d. 730 (Fla. 1994); Bell v. State, 90 So.2d 704 (Fla. 1956). In State v. Spaziano, 692 So.2d 174 (Fla. 1997) this Court observed: "In Armstrong, we addressed the issue of recanted testimony. There we stated that the "[r]ecantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." Armstrong, 642 So.2d at 735. It is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves

a confession of perjury." Bell, 90 So.2d at 705 (quoting Henderson v. State, 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). Further, only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted and the trial court must examine all the circumstances of the case. Armstrong, 642 So.2d at 735. This Court should find no abuse of discretion in precluding Hinton's testimony and affirm the denial of postconviction relief.

Turning to the postconviction discovery sub-issue, Reaves contends the court erred in denying forensic testing for drug metabolites. Reaves' asserted purpose for the testing was to "bolster the claim of intoxication at the time of the offense" so the jury could make findings regarding whether Reaves was so intoxicated he could not formulate the specific intent required for first-degree murder. However, Reaves did not show the additional testing for drug metabolites would develop relevant and material evidence related to whether cocaine was ingested on the day of the murder, or if such was ingested, the quantity used would establish Reaves' level of intoxication at the time of the crime. However, the defense expert agreed that the tests could not establish what Reaves' had hoped, thus, he is unable to show

any abuse of trial court discretion in denying the tests and this Court must affirm.

Reaves filed a motion seeking testing of evidence for drug metabolites. His neuropharmacology expert, Dr. Mash, was the only expert who addressed this issue. She averred that at best the tests could reveal the presence of cocaine or other drugs, but they could not reveal the actual time the drugs were taken or their amount. While the testing covers a 30-day window and could show Reaves was a chronic drug abuser, thereby, giving "a semi-quantitative appraisal" based on hair growth, Dr. Mash was clear, the tests could not determine how much was ingested by Reaves on a particular date. (T 306-07). This is key to the court's decision in that the pivotal issue was how much cocaine Reaves imbibed at or near the time of the murder to support his now offered defense of voluntary intoxication.

Items seized from Green's home, as well such items as hair samples, provide no evidence proving Reaves' level of intoxication at the time of the crime, which would support a voluntary intoxication defense in 1992. At best the tests could produce cumulative evidence of drug abuse, something the State had conceded at trial,<sup>32</sup> but the contention was whether drugs

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<sup>32</sup> The court characterized the State's position as: "...I don't think they are contesting he wasn't an addict. I think it's been shown that they understand he was an addict. It's whether

were used at the time of the murder. On collateral review, it became whether an intoxication defense should have been offered which required showing the level of intoxication during the crime.

The court denied Reaves motion<sup>33</sup> (PCR 620-23) reasoning:

Finally the forensic testing of the Defendant's clothing and evidence obtained at his girlfriend's residence, as the Defendant's own expert witnesses conceded, cannot demonstrate that cocaine was ingested on the date of the incident or the quantity of cocaine that was ingested. Thus, the only evidence that was available to counsel concerning the Defendant's intoxication at the time of the offense was the Defendant's own statements which were introduced.

(R 307).

Although Reaves claims that the outcome of forensic testing "would supplement the sum of evidence available to the defense" (IB 89), it would be nothing more than cumulative to the evidence already adduced at trial. Reaves' confession that he was "coked out," his apprehension with 4.4 grams of cocaine in his possession, and the observations of his appearance as a crack

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he was voluntarily intoxicated at the time of the actual commission of the crime. That's the issue that they're arguing." (T 424) Twice, Reaves postconviction counsel conceded the State was **not denying** that Reaves was a substance abuser and/or addict (T 424, 516), ergo, at best, the requested testing would verify what the State and defense had both agreed, Reaves abused cocaine.

<sup>33</sup> The items were ordered stored for appellate review (PCR 526)

addict, are all matters presented to the jury. Other than his confession, none are relevant regarding the degree of his intoxication at the time of Officer Raczkoski's murder. Reaves has not met his burden that the testing for drug metabolites would add anything new to that issue. Absent verifiable results that Reaves used cocaine at the time of the murder or his level of intoxication as confirmed by the defense expert, any testing would be irrelevant and superfluous. Without question, there was no abuse of discretion in denying requests for testing which would render irrelevant and superfluous results.

From the foregoing, it is clear Reaves failed to show the court abused its discretion in precluding Hinton from testifying or in denying additional testing as neither would produce relevant information to assist the court in resolving the claim of ineffective assistance of counsel for allegedly not presenting an intoxication defense. This Court should affirm.

#### **CONCLUSION**

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by United States Mail to William Hennis, III, Assistant CCRC, Law Office of the Capital Regional Counsel-South, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Florida 33301 on September 9, 2005.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on September 9, 2005.

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DEBRA RESCIGNO