IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-840

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Reaves request for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"Supp. R" -- supplemental record on direct appeal;

"PCR" -- record on postconviction appeal;

"Supp. PCR" -- supplemental record on postconviction appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Reaves has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the states at issue. Mr. Reaves, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF FONT

Mr. Reaves' Initial Brief is written in Courier font, size 12.

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STATEMENT OF THE CASE

The Circuit Court of the Nineteenth Judicial Circuit, Indian River County, entered the judgments of conviction and the sentences of death.

On October 8, 1986, an Indian River County grand jury returned an indictment charging Mr. Reaves with one count of first-degree murder (Count I), one count of possession of a firearm by a convicted felon (Count II), and one count of trafficking in cocaine (Count III) (R. 2051-2055). Thereafter, the State dismissed Counts II and III of the indictment (R. 2429, 2532).

Mr. Reaves' trial commenced in August, 1987 in Sarasota County on a change of venue from Indian River County due to excessive pre-trial publicity. A jury returned a verdict of guilty. Mr. Reaves appealed his conviction and sentence to the Florida Supreme Court. On January 15, 1991, Mr. Reaves conviction was reversed because his former defense counsel had subsequently become the state attorney who ultimately prosecuted him. The mandate issued on April 1, 1991. Reaves v. State, 574 So. 2d 105 (Fla. 1991).

Mr. Reaves again proceeded to trial in February, 1992. This time, his case was tried in Marion County on a change of venue from Indian River County due to excessive pre-trial publicity. He was found guilty of first-degree murder and the jury recommended death by a vote of 10 to 2 (R. 1811, 2320).

Thereafter, the trial court sentenced Mr. Reaves to death (R. 2328-2334).

Mr. Reaves' death sentence was upheld on direct appeal from the second trial. Reaves v. State, 639 So. 2d 1 (Fla. 1994).

The United States Supreme Court denied certiorari on November 7, 1994. Reaves v. State, 115 S. Ct. 488 (1994).

Because Mr. Reaves' conviction and sentence became final after January 1, 1994, he was required to file his motion for post-conviction relief within one (1) year pursuant to the newly enacted Rule 3.851. Based on the overwhelming caseload experience by the Office of the Capital Collateral Representative (CCR), this Court granted Mr. Reaves an extension of time in which to file the instant motion, ordering that Mr. Reaves file by February 15, 1996. Pending a response, an initial incomplete Motion to Vacate was filed on February 15, 1996.

On October 5, 1998, during a status conference, the trial court ordered that a final 3.850 motion be filed by February 3, 1998. On January 29, 1999, the trial court issued an order based on undersigned counsel's unopposed motion for a two week extension, and Mr. Reaves motion was filed on February 17, 1999.

A hearing pursuant to Huff v. State, 622 So. 2d 922 (Fla. 1993), was held before the trial court on May 28, 1999. The trial court entered an order summarily denying the motion for post-conviction relief without an evidentiary hearing on February 9, 2000. Mr. Reaves motion for rehearing was denied on March 14, 2000, and this appeal followed.

SUMMARY OF ARGUMENT

1. Mr. Reaves is entitled to a full evidentiary hearing on all the claims raised in his Rule 3.850 motion. Mr. Reaves pleaded specific detailed claims for relief, including claims of ineffective assistance of counsel at the pre-trial, guilt and penalty phases of the trial, Ake, and Brady claims which are legally sufficient and are not refuted by the record.

2. The prosecutor engaged in inflammatory and improper comments and argument including violation of the "Golden Rule", references to Mr. Reaves' dangerousness in the future, and improper argument of facts not in evidence.

3. Mr. Reaves has been denied access to files and records in the possession of certain state agencies which pertain to his case.

4. Mr. Reaves is innocent of first degree murder and innocent of the death penalty and was denied adversarial testing.

5. Mr. Reaves' trial counsel unreasonably failed to act in Mr. Reaves' best interest after learning of juror misconduct from two female jurors after the trial and post-conviction counsel is prevented from investigating the allegations due to the trial court's failure to allow juror interviews.

6. Mr. Reaves was never afforded true cross-examination of witness Eugene Hinton because of the trial court's erroneous ruling that Hinton's testimony from Mr. Reaves' first trial could be read into the record because Hinton was unavailable.

7. Constitutional error occurred during the jury instructions and trial counsel was ineffective for failing to object.

8. The State's decision to seek the death penalty in Mr. Reaves' case was based upon racial considerations.

9. There were excessive security measures at Mr. Reaves' trial that call into question the fairness of his trial.

10. Florida's Capital sentencing statute is unconstitutional.

11. Mr. Reaves should receive a new trial due to the impact of cumulative error.

12. Mr. Reaves was denied an adversarial testing due to the presence of judicial bias.

13. The jury in Mr. Reaves' trial was not a fair cross-section of the community.

14. Mr. Reaves is insane to be executed.

ARGUMENT I

MR. REAVES IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS RULE 3.850 CLAIMS

A. ERRONEOUS SUMMARY DENIAL

Mr. Reaves' final Rule 3.850 motion was filed on February 17, 1999. He pleaded detailed issues and demonstrated his entitlement to an evidentiary hearing. However, on February 9, 2000, the lower court summarily denied Mr. Reaves' Rule 3.850 motion without granting a hearing on any portion of it. The lower court erred. The law strongly favors full evidentiary

hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing...our review is limited to determining whether the motion conclusively shows whether [Mr. Reaves] is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla; 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after and evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3 (Fla. 1987). "Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla 1989).

Mr. Reaves has pleaded substantial factual allegations including ineffective assistance of counsel, Brady v. Maryland, 373 U.S. 83 (1967), and Ake v. Oklahoma, 105 S. Ct. 1087 (1985) violations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows [Mr. Reaves] is

entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, (Fla. 1982).

Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Reaves has alleged facts, which, if proven, would entitle him to relief. Mr. Reaves plead with greater specificity than was required by the case law, and appended the pleading with witness affidavits to bolster the guilt phase and penalty phase claims connected to substance abuse, although such is not a requirement under the law. Valle v. State, 705 So.2d 1331 (Fla. 1997). The files and records in this case do not conclusively show that he is entitled to no relief.

The trial court's denial of Mr. Reaves' Rule 3.850 motion flies in the fact of the clear requirements of the law. Its use of the record or files in this case do not show conclusively that Mr. Reaves is not entitled to relief. It thus ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule.

This Court has "no choice but to reverse the order under review and remand" Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990), and order a full and complete evidentiary hearing on Mr. Reaves' Rule 3.850 motion.

B. INEFFECTIVENESS DURING PENALTY PHASE

In Mr. Reaves' capital penalty phase proceedings, substantial mitigating evidence, both statutory and non statutory was undiscovered, and never reached either the jury or the trial court. Mr. Reaves was thus sentenced to death by a jury and judge who knew very little about him. The unreliable death sentence is the resulting prejudice. As confidence in the result is undermined, relief is warranted., Strickland v. Washington, 466 U.S. 668 (1984); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995).

In Strickland, to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice. Id. at 687. Recently, the United States Supreme Court in Williams v. Taylor, 120 S.Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated what the standards are with respect to capital cases and how they are to be properly applied.[1] The Supreme Court makes it clear that Mr. Reaves "had a right--indeed a constitutionally protected

[1]The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated by the record of Mr. Reaves' postconviction proceedings. Mr. Reaves' case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams, 120 S.Ct. at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524. See also id at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id.

It is abundantly clear that trial counsel, who was also appellate counsel, failed to conduct the "requisite, diligent" investigation into Mr. Reaves' background to unearth available and plentiful mitigation. Williams, 120 S.Ct. An evidentiary hearing, followed by relief, is warranted.

1. The mental health experts

Trial counsel never sought the assistance of experts in addictionology, psychopharmacology, neuropsychology, psychiatry, or an expert who personally had the unique experience of an African-American Vietnam Veteran. He was therefore unable to explain to the trial court or the jury the complexities of Mr. Reaves' psychological condition before and at the time of the

offense and how it played a role in putting Mr. Reaves on trial for his life. Experts in all of these areas were retained by post-conviction counsel and would have been available to testify at an evidentiary hearing. They also would have been available at the time of Mr. Reaves' trial in 1992.

The trial attorney's closing argument at the penalty phase failed to specifically address mitigating circumstances. (R. 2299-2312). The jury was later instructed on mitigating circumstances F.S. 921.141(6)(b), (6)(f) and (7)(h). (R. 2315). Trial counsel only alluded to the fact that Mr. Reaves' drug abuse was somehow tangentially related to his combat experience in Vietnam. Trial counsel failed to elucidate how Mr. Reaves' polysubstance abuse in conjunction with his war trauma related post-traumatic stress disorder was integrally related to the alleged capital offense. Had counsel presented the critical psycho-social history evidence at the penalty phase through competent experts who had access to proper background materials, Mr. Reaves' childhood struggles with abject poverty and racism, and his valiant heroism as an African-American fighting for his country in a brutal and unpopular war, he would have convinced the jury and the judge to find statutory and non-statutory mitigation and to impose a life sentence.

Judge Balsiger's 1992 sentencing order failed to find any statutory mitigating factors. (R. 3009-36). Specifically, in regard to Dr. Weitz's testimony finding that Mr. Reaves was under the influence of extreme mental or emotional distress at the time

of the offense, he rejected Dr. Weitz's theory that Mr. Reaves was suffering from Vietnam Syndrome, citing Dr. Weitz's testimony that "the Vietnam Syndrome was not a disorder recognized within the Diagnostic and Statistical Manual III-R, the authoritative manual used throughout the medical and psychological communities." (R. 3017). In regard to the mitigating factor concerning the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, Judge Balsiger limited his findings to evidence involving Mr. Reaves use of cocaine. He found that "as a matter of law and fact that this mitigating circumstance has not been reasonably established." (R. 3019-21).

The order summarily denying an evidentiary hearing finds that "the fact that collateral relief counsel now has experts who will testify that the Defendant suffers from post-traumatic stress disorder, brain damage, and drug addiction, does not establish that the original evaluation was deficient." (PCR. 1095). As the lower court observed later in the same order, Dr. Weitz testified that Mr. Reaves suffered from poly-substance abuse, anti-social personality disorder, and "Vietnam Syndrome" at the time of the murder, and further, that he ultimately testified at the penalty phase that Mr. Reaves committed the murder while he was under the influence of an extreme mental or emotional disturbance, and that Mr. Reaves' ability to conform his conduct to the requirements of the law was impaired. (PCR. 1099). However, Judge Balsiger made credibility findings against

the testimony of defense expert Weitz and found no statutory mitigation to be present.

Dr. Weitz testified at the 1992 trial about the DSM-III-R, the Diagnostic and Statistical Manual of Mental Disorders, agreeing that it was the "authoritative source" used by psychologists and psychiatrists across the United States to diagnose people with mental disorders. (R. 2075)(emphasis added). He further testified that he never diagnosed Mr. Reaves with the psychiatric disorder post traumatic stress disorder (PTSD), an Axis I anxiety disorder in the DSM-III-R criteria, but only with "Vietnam Syndrome" a lesser condition **not** listed in the DSM-III-R. (PCR. 2020). Neither the State nor the trial counsel ever asked Dr. Weitz what DSM-III-R criteria he believed were missing for a diagnosis of PTSD. This was a telling omission because Judge Balsiger's sentencing order focused precisely on the absence of a DSM-III-R diagnosis of PTSD as the reason for his rejection of Dr. Weitz's testimony that "Vietnam Syndrome" was an important component of Weitz's opinion that Mr. Reaves was under the influence of extreme mental or emotional disturbance at the time of the offense. (R. 3017).

Dr. Weitz confirmed that he had never personally served in combat. (R. 2101). Dr. Weitz testified that in 1987 he diagnosed Reaves with an DSM-III-R Axis I diagnosis of cocaine abuse and an Axis II diagnosis of anti-social personality disorder after performing a psychological test, the Minnesota Multiphasic Personality Inventory (MMPI), and conducting a

clinical interview. (R. 2040-42). He added that after seeing Reaves again in 1991 and re-administering the MMPI, he modified his diagnosis to Poly-drug abuse on Axis I, but still considered his Axis II diagnosis of anti-social personality disorder to be accurate. (R. 2043). He described the Axis II diagnosis of anti-social personality disorder as his principal diagnosis. (R. 2043).

Dr. Weitz then provided a description of what the diagnosis of anti-social personality meant:

> "Anti-social personality" describes a series of characteristics and behaviors, **essentially their criteria which has to be met in order to utilize the diagnosis**. Typically, anti-social personalities involve individuals who are engaged in a variety of anti-social activities. They do not conform to society rules and regulations. They have be highly manipulative of other individuals and use other people for their own purposes. They typically do not have very strong or intimate relationships in terms of emotional closeness with people. Oftentimes they get involved with a series of criminal behaviors. Their range of behaviors could be described as destructive in terms of the community. Typically, however, they seem to come out of it oftentimes with little learning from their own previous activities. That is, they don't seem to learn from the consequences of their behavior.

(R. 2042)(emphasis added).

Dr. Weitz's testimony about Mr. Reaves' alleged personality disorder was contradicted by testimony from the State's expert psychiatrist, Dr. Cheshire, who indicated that he did not agree with the anti-social personality disorder diagnosis of Dr. Weitz. Dr. Cheshire testified that his opinion was that Mr. Reaves was

not suffering from any psychiatric illness, including DSM-III-R Axis II anti-social personality disorder, but rather was exhibiting adult anti-social behavior. (R. 2231). Adult Antisocial Behavior is referenced in DSM-III-R as:

> ...in the category Conditions Not Attributable to a Mental Disorder, should be considered when criminal or other aggressive or antisocial behavior occurs in people who do not meet the full criteria for Antisocial Personality Disorder and whose antisocial behavior cannot be attributed to any other mental disorder.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (THIRD EDITION REVISED) American Psychiatric Association, 1987, at 344.

Mr. Reaves pleaded in his Rule 3.850 motion that he had retained the services of a neuropsychologist, a black Vietnam veteran psychologist specializing in post traumatic stress disorder, a substance abuse expert, and that those experts would testify as to the presence of both statutory and non statutory mitigating circumstances. (PCR. 338-39, 498-99, 491-92). Counsel also pointed out in the pleading and in a proffer at the Huff hearing that the expert psychologist retained by postconviction counsel would refute the diagnosis of anti-social personality disorder found by Dr. Weitz:

> Claim five is really what's called an Ake claim, A-K-E, and it discusses whether Dr. Weitz performed a competent mental health evaluation of Mr. Reaves and the Ake claim also includes whether counsel provided adequate mental health evaluation at all. So it's not just Dr. Weitz, but it's also not having a neuropsychologist, and not having an expert, an addictionologist along with Dr. Weitz specifically, deficiencies in that he

> failed to conduct certain tests to discover that Mr. Reaves was P.T.S.D. at the time and those tests were available at the time and he did not do those tests that were available and that our expert who has used and has determined that Mr. Reaves actually has post-traumatic stress disorder. Our expert is also a black male. There are issues surrounding, which I've alleged in my pleading, surrounding antisocial personality and, Your Honor, clearly Mr. Reaves is not antisocial personality disorder. There is lots of evidence out there where experts have confused post-traumatic stress disorder with antisocial personality. There's also an ethnic problem there with diagnosing more black people with antisocial personality disorder and Mr. Reaves' own statement that he gives where he has remorse. He calls the officer one of the finest officers. He doesn't know why he did it. Antisocial personality disorder people do not show remorse. So I think there was a real problem with that diagnosis from Dr. Weitz in the fact that lack of testing, wrong diagnosis, and not performing a full battery of tests that were available to him as well as counsel not having other experts that could have been used at trial, guilt phase and penalty phase.

(R. 306-07). This argument was also developed in the 3.850 pleading. (PCR. 499-501). However the lower court summarily denied the claim because "[t]he Defendant does not identify either expert, or what conclusions and opinions these experts could relate, other than the psychologist will testify that Reaves suffers from post-traumatic stress disorder." (PCR 1093). The fact that the new experts would testify as to the presence of the major anxiety disorder PTSD, an Axis I condition in the DSM-III-R, would confirm the Axis I diagnosis of poly-substance abuse, and find no Axis II personality disorder completely

changes the picture of Mr. Reaves' psychological condition. Ineffective assistance of counsel is therefore not rebutted by the record.

Dr. Weitz's own testimony undermined his diagnosis of antisocial personality disorder. He agreed that one necessary component in his diagnosis as to whether Mr. Reaves fit the diagnostic criteria in DSM-III-R for antisocial personality disorder was reviewing his background "to look at his criminal background even as a young person." (R. 2080). But then, Dr. Weitz went on to testify:

> There are some records of some criminal behavior that occurred prior to Vietnam. However, when I calculated his actual age at that time when those occurred, I was in error. They were not juvenile offenses. They were adult offenses, because he had turned the age of eighteen. So there were a couple of events prior to Vietnam that were adult offenses. They involved, as I recall, throwing rocks at a car, stealing a pack of cigarettes, those type of offenses. There were two or three prior and those were the nature of the crime.

(R. 2080-81). Dr. Weitz's own inconsistent testimony that he actually had no information about "juvenile" crimes prior to the age of eighteen completely undermined his diagnosis of Antisocial personality disorder as defined in DSM-III-R, the "authoritative source" he claimed to have relied on in making his diagnoses. (R. 2075). Trial counsel argued at the end of the penalty phase that if Mr. Reaves had been a juvenile delinquent with anti-social personality traits, that the jury would have heard about them. (R. 2308). Trial counsel said that those traits were not

part of Mr. Reaves history and that until he went to Vietnam in 1968, he was "a nice kid." (R. 2308). The first paragraph of DSM-III-R's section on Antisocial Personality Disorder states unequivocally:

> The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. For this diagnosis to be given, the person must be at least 18 years of age **and have a history of Conduct Disorder before the age of 15**. Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty are typical childhood signs.

(DSM-III-R, Third Edition, 1987, at 342)(emphasis added). There is no indication in Dr. Weitz's testimony that he had evidence of conduct disorder prior to age 15. The diagnostic criteria section for 301.70 Antisocial Personality Disorder requires evidence of conduct disorder with onset before the age of 15, indicated by a history of three or more specific behaviors:

(1) was often truant
(2) ran away from home overnight at least twice while living in parental or parental surrogate home (or once without returning)
(3) often initiated physical fights
(4) used a weapon in more than one fight
(5) forced someone into sexual activity with him or her
(6) was physically cruel to animals
(7) was physically cruel to other people
(8) deliberately destroyed others' property (other than by fire setting)
(9) deliberately engaged in fire setting
(10) often lied (other than to avoid physical or sexual abuse)
(11) has stolen without confrontation of a victim on more than one occasion (including forgery)

(12) has stolen with confrontation of a victim (e.g., mugging, purse-snatching, extortion, armed robbery)

(DSM-III-R at 344-45). Based on his testimony, Dr. Weitz had no evidence or background materials concerning conduct disorder prior to the age of 15 by Mr. Reaves. (R. 2080-81). His diagnosis of Antisocial personality disorder was unfounded in fact, and inconsistent with the "authoritative" DSM-III-R criteria. This fundamental diagnostic mistake does establish that Dr. Weitz's evaluation of Mr. Reaves was deficient, as Mr. Reaves is prepared to establish at an evidentiary hearing.

Even the trial court's sentencing order supports the position that there was a diagnostic mistake. Judge Balsiger finds that Mr. Reaves' life "up until the age of 15 or 16" was deserving of some weight as a non-statutory mitigating circumstance. (R. 3022-23). Trial counsel deficiently failed to review the criteria for Antisocial Personality Disorder and failed to impeach his own expert's harmful testimony that Mr. Reaves had antisocial personality disorder. He then contradicted the testimony of his own expert, calling his credibility into question, by arguing at the penalty phase that Mr. Reaves was not antisocial prior to Vietnam. (R. 2308).

The lower court's analysis in the summary denial order is thus both legally and factually erroneous. Firstly, the lower court's order flies in the face of this Court's holding in Gaskin v. State, 737 So.2d 509, n.10 (Fla. 1999), in which case this Court set forth the standard of pleading in a Rule 3.850 motion

necessary in order to obtain an evidentiary hearing. In Gaskin, as in Mr. Reaves' case, the trial court had summarily denied Mr. Gaskin's claims of ineffective assistance of counsel in part because Mr. Gaskin had not named his witnesses in his Rule 3.850 motion:

> Contrary to the trial court's finding however, there is no requirement under rule 3.850 that a movant must allege the names and identities of witnesses in addition to the nature of their testimony in a postconviction motion. Rather, rule 3.850 merely requires.....a brief statement of the facts relied upon in support of the motion. See Fla. R. Crim. P. 3.850(c).

Gaskin v. State, 737 So.2d 509 n.10 (Fla. 1999)(emphasis added). As explained in Gaskin, Mr. Reaves should be permitted to present the facts alleged in the motion to the trial court during an evidentiary hearing.

Furthermore, the lower court's order denying a hearing is factually inaccurate and misleading. At the Huff hearing, counsel for Mr. Reaves expanded upon the pleadings by both providing additional detail about the background of the new experts retained by postconviction counsel and explaining what the findings of the new experts were. Counsel pointed out to the trial court that the experts retained by post-conviction counsel were prepared to testify that the both statutory mental health related mitigating circumstances were present along with significant non-statutory mitigating circumstances:

> ...a very qualified psychologist who has a national reputation who is an African American who has diagnosed the client with

> post-traumatic stress disorder and is willing to testify as to statutory mitigators as well as a host of non-statutory mitigators and provide specific testing results with five different tests that have to do with indication of PTSD that were available, if not in the current form, in an earlier addition back in 1991.

(PCR. 338-39). In summary, the three experts retained by postconviction counsel were prepared at an evidentiary hearing: (1) to refute Dr. Weitz's antisocial personality disorder diagnosis, an opinion that was erroneous on its face at the time of the 1992 trial, but which the state argued as non-statutory aggravation (R. 2277); (2) to establish the presence of a psychiatric disorder, PTSD, listed in DSM-III-R as an Axis I anxiety disorder (the absence of which was relied on by the sentencing court to find that no statutory mitigation was present) and to explain how the necessary DSM-III-R criteria for PTSD are met and what the relevance of the PTSD diagnosis is for guilt phase intoxication defense purposes and penalty phase statutory mitigation purposes; (3) to present testimony from a forensic substance abuse expert to support the intoxication defense at guilt phase and the presence of statutory and non-statutory mitigation; and, (4) to present testimony from a neuropsychologist based on objective testing showing the presence of brain damage and to provide an explanation of how that finding connects to the presence of PTSD and substance abuse disorder and the presence of mitigation.

2. Failure to investigate family background

In its summary denial order, the trial court found that evidence of Mr. Reaves' social history was presented to the jury and that the claim that trial counsel was ineffective for failure to present "additional" evidence was conclusively refuted by the record. (PCR. 1099-1100). The pages cited by the trial court in support of this proposition include the testimony of witnesses Fran Ross, Reverend Leon Young, Will Otis Cobb., Sr., Charlie Jones, and Ann Covington. Only one of these witnesses was related to Reaves, his sister, Ann Covington. She testified that she had lived in California since at least 1972. (R. 1947). Counsel for Mr. Reaves attached three affidavits to his 3.850 pleading. (PCR. 611-21). The affidavits were from Eugene Hinton, who grew up with and sold drugs with Mr. Reaves, from the Reverend Leon Young, who testified at the 1992 penalty phase, and from Mr. Reaves' brother Byron Reaves. These affidavits were one of the many sources of the social history included in the motion that was based on CCRC investigation into Mr. Reaves' background. (PCR. 612-14). Neither Hinton nor Byron Reaves testified in 1992. Trial counsel unreasonably failed to present evidence in support of a plethora of non statutory mitigating factors, which not only would have supported the statutory and non statutory mental health mitigation, but also have provided valuable and compelling mitigation in its own right.

The experts retained by post-conviction counsel were provided access to the social history information as part of the background material provided in conjunction with their

evaluations of Mr. Reaves. The trial court was aware of Mr. Reaves' position on what needed to be plead from attorney proffer at the Huff hearing:

> ...our contention is the defendant's not required by the statutes or the caselaw to plead with specificity. There's no need for us to name every witness, every family member that's the source of, for example, the social history that appears in this claim. In fact, the source of the social history is frequently through our investigator that we hired to interview numerous individual family members and witnesses and who puts together the social history with our assistance to put into the claim. All those people are valuable. We have the contact information. If we get an evidentiary hearing then the State will get a witness list if they ask for it. That's what discovery and depositions and an evidentiary hearing are for. To be able to prove up the allegations that we've made in the State's post-conviction motion.

(PCR. 340-41). Due to trial counsel's failure to investigate, a full picture of Mr. Reaves' background was never presented to the sentencing jury. As the discussion found in the 3.850 pleading establishes, there is wealth of mitigation in Mr. Reaves' background that should have been presented. (PCR. 555-67).

The direct examination of state witness Joseph Cinqunio, who testified that he was a platoon leader of Reaves' unit in the Central Highlands area of Vietnam from Summer 1969 through December 1969, provides a good example of how the testimony of professional soldiers and retired soldier/FBI agents was used by the State to negate the mitigating nature of defendant's military history. (R. 2185-86). Recall that Reaves himself did not arrive in Vietnam until November 1969. Cinquino described the

period when Reaves was in Vietnam as a period of a "lull" in combat (R. 2186). He also testified that in all his years of military service he had never "seen anyone" suffering from Post Traumatic Stress Disorder (PTSD) (R. 2197). Beyond the fact that the witness was not qualified as an expert in this area, this testimony simply does not comport with the most basic historical review of the incidence of PTSD in the Vietnam Era.[2] The other retired military officer who testified, Henry A. Norring, was with Reaves' company for parts of only two months, November-December 1969 (R. 2221). He also testified that 1969 "marked the winding down of the war" (R. 2212). Retired FBI agent Robert K. Ressler, based in Northern Virginia, who testified for the State as an expert on military records, despite his lack of qualification for doing so, confirmed that Reaves served in Cambodia, although he could not explain why Reaves' unit was in Cambodia (R. 2181). The State hired Ressler as a private consultant (he had retired from the FBI serial killer/sex crimes unit) as a private consultant, at $250 an hour, and Ressler

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[2] See STANLEY KARNOW, VIETNAM: A HISTORY 25 (1983). The author points out that Veterans Administration sources estimate that 700,000 Vietnam vets suffer from forms of "post-traumatic stress disorder," and that Vietnam caused many more cases of this condition than did World War I or World War II. The author also states that the symptoms of P.T.S.D. can occur ten to fifteen years after the initiating event and can range from panic and rage to anxiety, depression, and emotional paralysis. "Crime, suicide, alcoholism, narcotics addiction, divorce, and unemployment among Vietnam veterans far outstrip the norm. A massive study published in 1981 by the Center for Policy Research and the City University of New York concluded that those who served in Vietnam "are plagued by significantly more problems than their peers."

initially billed the State for more than $13,000 for his testimony. (R. 3152-53, 3157-68). This is particularly troubling considering the negative attitude of the trial court in regards to trial counsel retaining Dr. Weitz from faraway Boca Raton. (R. 155-157). It should be noted that **none** of the State witnesses were able to testify from direct experience about any of Reaves' combat experiences after December 1969, bare weeks after his arrival "in country". The failure of trial counsel to impeach the testimony of these witnesses was disastrous to Mr. Reaves' case in mitigation. Postconviction counsel argued about why that was so at the Huff hearing:

> There were grave differences between the experiences of officers in that combat setting and the grunt line soldiers. And our [black Vietnam veteran clinical psychologist] expert would be prepared to testify from personal experience about what some of those differences were and how diagnostically they would make an incredible difference as to the officers' observation about what kind of level of combat was happening as to the line soldiers, particularly, when for a considerable time, all of 1970, they're not really any reports in the record about what Reaves' personal experiences were; and, for example, what sort of level of combat they saw in Cambodia where the record clearly reveals, even the experts by the State said there weren't any records about that since it was an illegal incursion under international law. And beyond that, the black/white issue, the officers, the line soldiers, there was a grave racial divide, and our expert would testify about those same sort of issues. That would be the kind of impeachment that would have been useful for counsel at trial to have been prepared to cross-examine those [State] experts about, about their findings about Mr. Reaves and his level of combat experience. (PCR. 372-73).

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> You can't look at this in isolation from everything else. The impeachment of these experts, the provision of experts that should have been hired, should have been prepared to testify about psychological issues including post-traumatic stress disorder and substance abuse or cocaine addiction, the neuropsychologists, the substance abuse expert, the people we've talked about before all of this accumulatively needs to be considered as to the weight it would have... (PCR. 374).

The evidence concerning William Reaves impoverished background would have made a difference between life and death in this case. See Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) ; Brown v. State, 526 So. 2d 903 (Fla. 1988).

> As noted by the Supreme Court: the graphic description of [Mr. Reaves'] childhood, filled with abuse and privation....might well have influenced the jury's appraisal of his moral culpability.

Williams v. Taylor, 120 S.Ct. at 1515). An evidentiary hearing, followed by relief, is warranted.

3. Failure to object to prejudicial testimony

Trial counsel was ineffective in failing to exclude prejudicial testimony and confusing references to Mr. Reaves' first trial. Realizing that introduction of this type of evidence would significantly damage the defense case, counsel filed a Motion in Limine to Preclude the State of Florida from Introducing or Attempting to Introduce any Evidence that the Defendant was Previously Tried in this Cause. The defense argued

that introduction of evidence of Mr. Reaves' prior trial had no probative value:

> Further, assuming arguendo that the fact of his prior trial did have probative value any probativeness would be severely outweighed by the danger of prejudice and confusion to the jury . . . . Denying this motion and permitting the State of Florida to introduce evidence of the prior trial in this cause would deprive William Reaves of his right to a fair trial under Article I, Sections 9, 16, 17, 21 and 22 of the Constitution of the State of Florida and Amendments 5, 6, 8 and 14 of the Constitution of the United States.

(R. 2868-2869). The Court granted the motion. Despite his obvious understanding of the disastrous consequences that would ensue should evidence of Mr. Reaves' prior conviction and sentence of death come before the jury, trial counsel inexplicably failed to object to repeated references to this damaging evidence (R. 1864 - 1871, 2037, 2039, 2078, 2085 - 2086, 2090, 2094, 2096, 2105, 2112, 2156, 2162, 2233). Counsel's failure to object was not due to trial tactics or to reasoned strategy. Introduction of testimony that Mr. Reaves had been previously tried, convicted, and sentenced to death on this charge was prejudicial.

Furthermore, trial counsel conceded several issues without argument. These included propensity for violence (R. 2307 - 2309), resistance to rehabilitation (R. 2312), and future dangerousness (R. 1873, 1914, 1925, 2078 - 2079, 2134, 2263 - 2265, 2277 - 2279, 2288 - 2291, 2293 - 2294, 2297). Counsel's concessions allowed the court and jury to conclude that William should be sentenced to death. By conceding the elements, trial

counsel bolstered the State's case. The jury had no choice but to find that William Reaves, was deserving of death. Counsel essentially conceded that death was the appropriate punishment.

Counsel was also ineffective regarding: failure to object to the introduction of the 1973 Stuart conviction for conspiracy to commit robbery as being too removed in time (R. 1830 - 1831, 1838 - 1853, 2251 - 2252, 2275 - 2276, 2279, 2288); failure to object to the ambiguity of the aggravating factor of prior violent felony (R. 1829 - 1832, 2251 - 2252, 2275 - 2276, 2279, 2288, 2300 - 2301, 2313, 2331); eliciting victim impact testimony and sympathy of victim of prior violent felony (R. 1851 - 1853, 2060, 2077, 2276); failure to object to the introduction of the 1973 Vero Beach conviction for grand larceny as being too removed in time (R. 1864 - 1871, 2251 - 2252, 2275 - 2276, 2279, 2288); failure to present/explain that the cause of death of the victim of the Vero Beach Holiday Inn robbery was unrelated to the robbery itself (R. 1868); failure to object to prejudicial testimony of Carl Lewis regarding occupational hazards of being a correctional officer (R. 1873 - 1874); failure to object, and then eliciting further testimony, to Detective Pisani's estimate of the number of persons living at the Ranchland Mobile Home Park, as beyond the scope of the witness' knowledge and in support of the aggravator of great risk of death (R. 1883(A), 1884 - 1885, 2253); failure to object to question requiring an opinion as to an ultimate issue -- i.e. aggravating factor of great risk of death to many persons (R. 1883(B), 2253); failure

to prepare for the penalty phase (R. 1887 - 1894); failure to file a demand for Penalty Phase Discovery (R. 1890, 1893); failure to explain to the Court the mitigating significance of Fran Ross' testimony regarding the community in which Reaves was raised (R. 1903 - 1904, 1906); failure to explain that although Ross may be testifying as a character witness, she is also testifying to Reaves' childhood and development (R. 1912 - 1913); failure to circumscribe Ross' testimony to a certain period of time (R. 1912 - 1913); failure to object to the Court chastising defense witnesses and undermining their testimony and credibility before the jury (R. 1912, 1967, 1983 - 1985, 1989 - 1990, 1992, 1997 - 1998, 2017 - 2018, 2027, 2032, 2102 - 2103, 2107, 2129); failure to object to State's characterization of Reaves as a "robber" (R. 1915); presenting the testimony of Dr. William Allen Weitz (R. 2042); failure to provide Reaves' in-depth taped interview to the police upon his arrest in Georgia on September 25, 1986 to Dr. Weitz (R. 2090-91); failure to provide Dr. Weitz with statements from other soldiers that served with Reaves in the military (R. 2124, 2127); failure to provide Dr. Weitz with records from Washington, D.C. (R. 2127); failure to provide Dr. Weitz with Veterans' Administration records (R. 2132); failure to object to qualification of retired FBI agent Robert K. Ressler as an expert in military records (R. 2155, 2171); failure to object to Court rushing proceedings and denial of due process (R. 2173); failure to object to the introduction of prejudicial and inflammatory testimony (R. 2231, 2239, 2241, 2243); failure to

object to the verdict form identifying the victim as "Deputy Sheriff Richard Raczkoski" as improperly establishing the aggravating factor that the victim was a law enforcement officer (R. 2267, 2273, 2317 - 2318, 2320); failure to object to improper prosecutorial closing argument (R. 2278 - 2297); failure to request jury instructions on non-statutory mitigating factors (R. 2315).

"Counsel's ineffectiveness caused actual and substantial disadvantage to the conduct of [the defendant's] defense." Francis v. Spraggins,720 F2d 1190, 1195 (11th Cir. 1983), citing in part Washington v. Strickland, 693 F.2d 1243 at 1250. Furthermore, in U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991) the Court held that defense counsel's concession during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute, constituted ineffective assistance and was prejudicial per se. Mr. Reaves was effectively deprived of an adversarial testing at the penalty phase by similar concessions.

C. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRETRIAL AND GUILT PHASE

The United States Supreme Court has explained:

> [A] fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Strickland, 466 U.S. at 685. Here, even trial counsel himself was aware that the task of representing Mr. Reaves in his capital case was beyond his abilities. During cross examination by the State in a pre-trial hearing, trial counsel Jonathan J. Kirschner conceded that without the appointment of a second lawyer on Mr. Reaves' case, he was going to be ineffective (R. 126-127). Furthermore, the lower court rendered counsel ineffective by failing to appoint co-counsel or another assistance for trial counsel.

The ABA Guidelines for Selection and Performance of Appointed Counsel in Death Cases unequivocally insist that capital defendants should be represented by two attorneys qualified to practice in capital litigation. Mr. Reaves was afforded less than this level of assistance having only one licensed attorney. Moreover, counsel worked night after night without the assistance of other personnel -- he had no paralegals and no additional office personnel. To the extent the trial court interfered with counsel's ability to effectively argue for additional funds to provide adequate representation for Mr. Reaves, he was ineffective. Because of counsel's impossible situation, no adversarial testing was possible.

1. Ineffectiveness during jury selection

The trial record itself reflects that counsel was ineffective during jury selection. Prospective Jurors Shirley Brennan, Michael Moore, Mary Bilbrey and John Ujvarosi all served as jurors. Trial counsel used all his peremptory challenges

during voir dire and then moved for additional peremptory challenges from the trial court, which denied his motion "unless you need them" (R. 640). Trial counsel then stated to the court that "additional peremptory challenges would be used to excuse Jurors Shirley Brennan, Michael Moore, Mary Bilbrey and John Ujvarosi, plus any additional members that may be coming in subsequent to now" (R. 640). The trial court's response was only, "[A]ll right. You're noted on the record. Please bring the jury in" (R. 640-41).

The trial court earlier had refused to grant defense counsel's challenge for cause as to jurors Allan Dudley and Curtis Hambelton, and counsel was then forced to use two of his ten peremptory challenges to remove these prejudiced jurors (R. 513, 514). No other defense challenge for cause was attempted by trial counsel or allowed by the trial court after the attempted defense challenge for cause of Dudley and Hambelton. This Court reviewed the record and held that "Hambleton and Dudley were properly rehabilitated and we find no abuse of discretion in the trial judge's denial of Reaves' challenge for cause relative to these jurors." Reaves v. State, 639 So.2d 1, 2 (Fla. 1994).

The record reflects that trial counsel did question the four jurors; Shirley Brennan, Michael Moore, Mary Bilbrey and John Ujvarosi and that he later requested additional peremptories to remove them. (R. 631-634, 500, 567-572, 470-471). However, his questions were formalistic and routine, simply read from a laundry list questionnaire that he used throughout voir dire. In

the few instances that he asked questions that arguably might have revealed prejudice or bias, he simply failed to follow up. For example, when he asked the panel about the racial implications that were implicit in the shooting of a white deputy by a black man, Juror Moore replied, "it's terrible," but counsel failed to follow up (R. 500). During questioning by the State, Juror Bilbrey stated "I believe in capital punishment," and indicated that she was eager to serve on a capital jury. The State and the trial court attempted to bolster her in advance by soliciting a series of short parroted answers in agreement with their version of burden of proof and reasonable doubt (R. 552-556, 559). Defense counsel responded by telling Ms. Bilbrey that he wanted to "go through like I have with the previous jurors and fill out my little background questionnaire, if you don't mind" (R. 567). He did finally inquire why she said "with some degree of conviction that you wanted to serve on this jury," and she responded that "I think it would be a very interesting and enlightening experience" (R. 571). That was the extent of his substantive examination. Juror Brennan revealed during the State's examination that she was married to a Vietnam-era Air Force veteran who was then working as a service-trained psychologist with persons with head injuries (R. 614-616). Defense counsel never followed up. Juror Brennan also revealed in response to the State's questioning that she had been held up at gun point (R. 618). Again, defense counsel failed to follow-up, and went through his voir dire routine of non-specific

questions (R. 631-634). Finally, defense counsel failed to follow-up other than with his questionnaire with Juror John Ujvarosi, despite answers in response to the State by Ujvarosi, who identified himself as an immigrant from Hungary by way of Rumania, that indicated some uncertainty about whether he considered the American system of justice a better system than what he "fled" from (R. 372=373, 470-471).

Trial counsel was ineffective for failing to satisfy all of the requirements to preserve this issue for appeal as set down by Hill v. State, 477 So.2d 553 (Fla.1985) and Thomas v. State, 403 So.2d 371 (Fla. 1981); See also Floyd v. State, 569 So. 2d 1225 (Fla. 1990). Trial counsel had moved to strike two jurors for cause; the trial court denied each request; trial counsel was forced to expend peremptory challenges on the two jurors at issue; subsequently, trial counsel exhausted his eight additional defense peremptory challenges; trial counsel asked for, but was not given, additional peremptory challenges. Counsel then noted for the record that he would have used any additional peremptory challenges he was allowed to remove eventual jurors Shirley Brennan, Michael Moore, Mary Bilbrey and John Ujvarosi (R. 640). Defense counsel failed to articulate what the basis for his challenge of these jurors was and further failed to make a specific challenge for cause of any of them. Counsel's failure to exercise that challenge resulted in unacceptable jurors remaining on Mr. Reaves' jury panel. Trial counsel knew that objectionable jurors remained on Mr. Reaves' jury panel and that

it was necessary to exercise all peremptory challenges in order to preserve this issue for appeal, and he did so and then twice objected to the trial court's denial of his request for additional peremptory challenges (R. 640, 642). Counsel inexplicably failed to make an adequate record while questioning these four jurors during voir dire despite his discomfort with the likelihood of them serving. Because he failed to make an adequate record, he failed to follow-up by making specific challenges for cause on any of these four jurors. Trial counsel had no strategic reason for failing to make an adequate record. Trial counsel's performance was constitutionally deficient in that regard. Mr. Reaves was prejudiced thereby.

Prejudice is manifest. Quite simply, Mr. Reaves would have been entitled to a new trial had counsel preserved the claim by challenging the four jurors for cause. He failed to do so due to negligence. An evidentiary hearing is warranted and thereafter relief will be required.

2. Failure to prepare for and cross examine State's witnesses

Trial counsel's further ineffectiveness can be found in his inability to effectively cross-examine the states witnesses and failure to conduct depositions in preparation for trial. Kenneth Hamilton , Lieutenant with Indian River Police, Road Sergeant and Shift supervisor in charge of personnel on the road the night of the incident was apparently never deposed and was cross examined for one page of transcript, (R 1044-1045, 1062-1063). Leonard Walker, M.D. the Medical examiner who testified for almost thirty

transcript pages on direct examination and could have assisted the defense in its theory by discussing the angle of the bullets, was only cross-examined for a minimal three transcript pages and was not asked one question regarding the angle of the bullets or in what position Mr. Reaves shot from. (R 1067-1095, 1095-1098) Cross-examination of other key witnesses such as Howard Whitaker (the first witness to come upon the scene) and Officer Perry Pisani (one of the main investigating officers) was minimal and was not even a minor attempt to support the defenses theory. Mr. Whitaker was never asked simple questions such as, you didn't see the actual incident?, you don't know Mr. Reaves?, you don't know what really happened?, you don't know if Mr. Reaves had any premeditated intent to shot the officer? etc. Additionally, trial counsel could have followed up the witnesses account of Mr. Reaves running from the scene as if a person in a war situation in Vietnam under fire with the witnesses own war experiences. (R 960-967) During cross-examination of Officer Pisani, counsel was questioning him regarding the authenticity of a police tape recording portraying the time line on the night of the incident and it becomes apparent that the authenticity of the tape is called into question a little too late. The tape had already been admitted during direct examination after an inadequate voir dire of the witness by trial counsel. (R. 1009-1015, 983-985). These are a few important examples tending to show the cumulative effect of the ineffectiveness of trial counsel.

Counsel also failed to effectively argue for the suppression of statements made by Mr. Reaves. Additionally, trial counsel also failed to adequately investigate Mr. Reaves' mental health problems, and failed to present evidence of his intoxication at the time of the offense and its effect in conjunction with post-traumatic stress disorder and brain damage. Mr. Reaves' mental impairments, alone or together with the substance abuse he suffered and the affects of post-traumatic stress disorder prevented him from knowingly, intelligently and voluntarily waiving his Fifth and Sixth Amendment right to remain silent and his right to counsel.

3. Failure to investigate voluntary intoxication defense and Ake claims

In addition to the failure to present evidence of mental impairment with respect to the suppression of statements, counsel unreasonably failed to properly present Mr. Reaves' mental condition to the jury to negate the specific intent element of premeditated first-degree murder. The trial court ruled pre-trial that Chestnut v. State, 538 So.2d 820 (Fla. 1989) provided a prophylactic rule against the use of the expert testimony by Dr. Weitz concerning the presence of Post-traumatic Stress Disorder in Mr. Reaves to negate the specific intent required for first-degree murder (R. 211-12, 2577-2605, 2618). In Bunney v. State, 603 So. 2d 1270 (Fla. 1992), the defendant wanted to raise epilepsy as a defense to his ability to form the intent required to commit a first-degree felony murder and kidnapping outside the context of an insanity plea. This Court held that while

"evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of 'intoxication, medication, epilepsy, infancy, or senility' is not." Id. at 1273.

> Although this Court did not expressly rule in Chestnut that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. See Gurganus v. State, 451 So.2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in Chestnut (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this.

Id. at 1273. Here, evidence of Mr. Reaves' mental condition and substance abuse would certainly fall within the class of impairments discussed by this Court in Bunney which negate specific intent.

Defense counsel attempted to use the expertise of Dr. William Weitz, a psychologist who had been appointed as a defense expert at Mr. Reaves first trial, to testify that Mr. Reaves was suffering from a condition he called "Vietnam Syndrome." Counsel's theory of defense, excusable homicide, hinged on the admission of Dr. Weitz's testimony. However, it was clear from the tenor of pre-trial proceedings and the State's objections during opening statements that the doctor's testimony was not going to be admitted for the purpose of proving up excusable

homicide (R. 745-753). Prior to the State's deposition of Dr. Weitz, the trial court held the expert in contempt and sentenced him to ten days in the county jail for failure to respond to a subpoena for documents (R. 195). Defense counsel should have utilized Dr. Weitz's testimony to attempt to negate the specific intent element of premeditated first-degree murder in conjunction with testimony of Mr. Reaves' voluntary intoxication.

Counsel was aware of the multiple possibilities that Dr. Weitz's expertise provided, and during argument concerning his pre-trial motion to appoint Weitz as the defense mental health expert, he revealed that PTSD would be a cornerstone of Mr. Reaves' case at guilt phase and penalty phase. (R. 155).

Dr. Weitz's testimony was relevant to the issue of Mr. Reaves' ability to form specific intent on the night of the crime. His testimony with evidence of voluntary intoxication would have been admissible to rebut the State's case. The prejudice of this omission was that Mr. Reaves was foreclosed from presenting viable and admissible testimony regarding his mental condition at the time of the offense as it related to his ability to form specific intent.

Mr. Reaves' trial counsel failed or was prevented from using plentiful and available evidence of Mr. Reaves' voluntary intoxication at the time of the offense. As noted elsewhere, postconviction counsel retained a substance abuse expert. Mr. Reaves has an extensive history of drug abuse documented in his military and corrections records. Counsel could have effectively

used this evidence in a number of significant ways both at trial and sentencing but did not.

The standard governing a defendant's right to a jury instruction in this regard is also settled: any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner v. State, 480 So. 2d 91 (Fla. 1985); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981). In terms of voluntary intoxication, Florida's courts have consistently acknowledged that such a defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances where trial counsel explains that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985).

In Mr. Reaves' case, the trial record is clear. During the guilt/innocence phase of trial, defense counsel presented no corroborative evidence regarding Mr. Reeves' intoxication despite his reference during opening statements to Mr. Reaves' "narcotics addiction" (R. 753). Defense counsel promised the jury that "the evidence will be clear that the survivor behavior in conjunction with his use of narcotics contributed to this accidental killing" (R. 753). Thereafter, the court instructed the jury on this defense because it acknowledged that there was a possible defense of voluntary intoxication, possible even though it was not argued by counsel. The court instructed at guilt phase:

> JUDGE BALSIGER: I now instruct you on the circumstances that must be proved before William Reaves may be found guilty of first degree murder or of any lesser included crime. A defense asserted in this case is voluntary intoxication by 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.
>
> 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 that mental state, the mental state would not exist and, therefore, the crime could not be committed.
>
> As I have told you, premeditated design to kill is an essential element of the crime of first degree murder. That's first degree premeditated murder.
>
> Therefore, if you find from the evidence that the Defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming premeditated design to kill, or you have a reasonable doubt about it, you should find the Defendant not guilty of first degree murder.

(R. 1768-1769). Counsel unreasonably failed to pursue a voluntary intoxication defense even though the court suggested that it was appropriate.

Pursuant to Florida law specific intent may be negated by evidence of voluntary intoxication, i.e., the inability to form the requisite intent for robbery or the specific intent required for premeditated murder due to intoxication. Linehan v. State, 476 So. 2d 1262 (Fla. 1985); Gurganus v. State, 451 So. 2d 817 (Fla. 1984). See also Occhicone v. State, 570 So. 2d 902, n.2 904 (Fla. 1990). Intoxication was a relevant and significant defense to the charge which supported, rather than conflicted with, the defense that Mr. Reaves' counsel presented. There was

no tactical or strategic decision made by counsel after investigation for the rejection of a voluntary intoxication defense, and an evidentiary hearing is warranted. Patton v. State, 2000WL 1424526 (Fla.).

Voluntary intoxication could and should have been employed as a defense to Mr. Reaves' first-degree murder charge and could have rebutted the necessary element of premeditation implicated in the murder charge. Use of the intoxication evidence and an appropriate mental health expert in Mr. Reaves' case would have prevented a verdict of first-degree murder on the premeditated murder theory. Prejudice from counsel's failure is clear because Mr. Reaves could not have formed specific intent for murder. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). The trial court's pre-trial ruling should be reviewed in light of subsequent developments in case law provide that the rule in Chestnut does not allow the trial court to exclude expert testimony about the combined effect of a defendant's mental disease and intoxicants allegedly consumed by the defendant on the defendant's ability to form a specific intent even if the expert cannot offer an opinion without explaining that one of the facts relied on in reaching the stated opinion was defendant's mental disease. State v. Bias, 653 So.2d 380 (Fla. 1995). Had Dr. Weitz been properly prepared by defense counsel to testify as to the impact of substance abuse on Mr. Reaves' ability to form specific intent, with complementary testimony about PTSD as a mental defect also necessary for him to offer an informed opinion, his testimony

would be allowed under Bias because there was "sufficient evidence in the record to show or support an inference of the consumption of intoxicants." See Gurganus v. State, 451 So.2d 817, 823 (Fla. 1984). As noted above, the trial court did give the voluntary intoxication instruction (R. 1768-1769). To the extent that expert testimony supporting the defense of voluntary intoxication requires that the expert express opinions about mental disease or defect as a basis for the testimony "as to the effect of a given quantity of intoxicants" such testimony is proper. Bias quoting Gurganus at 383.

> If the basis includes the expert's opinion that the defendant has a mental disease or defect which has a recognized diagnosis and acts in combination with the given quantity of alcohol, the entire basis for the expert's opinion should be admitted. The jury is then made fully aware of the basis of the expert's opinion, and such basis can be explored on cross-examination.

Id. at 383. Dr. Weitz did in fact testify at the *sentencing phase* as to his diagnoses of Mr. Reaves, including cocaine abuse and polysubstance abuse (R. 2041, 2043). He also testified that Reaves had reported using heroin on a significant basis while in Vietnam and significantly escalated drug use after returning from Vietnam (R. 2082). On cross-examination Dr. Weitz pointed out that he was also well aware that in an in depth taped interview with the police on September 25, 1986, Reaves blamed the shooting of the deputy sheriff on the fact that he, Reaves, was under the influence of cocaine and panic and paranoia (R. 2090, 2093). Defense counsel failed to investigate his client's substance

abuse history or to instruct and prepare Dr. Weitz to do so, so as to provide testimony appropriate for presentation at the guilt phase as part of an intoxication defense. The testimony from Dr. Weitz during the sentencing phase testimony points out defense counsel's negligence and error in this regard:

> MR. KIRSCHNER: The prosecutor mentioned something about drug usage. What significance is there, or what is important in your analysis in terms of your diagnoses about William Reaves' relative use of drugs and narcotics prior to the time he entered the Military, during the time he was in the Military, and subsequent to the time he was in the Military?
>
> DR. WEITZ: My notes and my recollections, I am aware that he used narcotics, drugs, prior to the Military.
>
> MR. KIRSCHNER: On what level? Or do you know?
>
> DR. WEITZ: I would be unable to answer the significant level, the intensity level, except to be very clear that his remarks to me indicated that he had a great increase of usage of heroin during the time he was in Vietnam. And when he got out of Vietnam, he maintained his heroin use as well as cocaine and other substances. Had a high level and high frequency. And the point being that whatever the initial utilization, that his reports are indicative of the fact that his frequency and intensity use of illegal drugs increased during and after the Vietnam experience.

(R. 2137-2138). And, as he continued to respond to the questions of defense counsel, Dr. Weitz opined on the interaction of Mr. Reaves psychological disorder, his Vietnam experience and his Axis One polysubstance abuse:

> MR. KIRSHNER: The prosecutor spent quite a bit of time on the significance of William

> Reaves never telling anybody: "Hey, I suffer from P.T.S.D." Is there any significance to that?
>
> DR. WEITZ: Yes, I believe there is.
>
> MR. KIRSHNER: What is it?
>
> DR. WEITZ: As I have indicated, I do not believe that Mr. Reaves in this case, or many veterans, are able to definitely state, or are even aware that Vietnam plays a major role in their life. The psychological and emotional effects it has. The way it impacts on their behavior, such as maybe the depression. Their isolation. Their rage response. Symptoms that they may simply identify as having a problem coping, but not relating it to their military experience. What I'm clearly saying is, I would be amazed if Mr. Reaves would be so knowledgeable and informed and articulate to be able to present that he knows Vietnam was a major factor in his behavior
>
> ***
>
> MR. KIRSHNER: Would there be any expected response from a person suffering from Vietnam Syndrome, using Vietnam Syndrome as an explanation to explain behavior?
>
> DR. WEITZ: No. I don't believe that many individuals -- in this case, Mr. Reaves -- would have the knowledge or psychological understanding; therefore, he may simply allude to overtive ends such as cocaine, cocaine, paranoia, suspiciousness, and potentially not be aware of some of the significant factors that affected his behavior. Hopefully, that is where clinical evaluations can help elucidate some of the other factors.

(R. 2138-2140).

In addition, substantial and valuable lay testimony as to Mr. Reaves' intoxication was available. Numerous witnesses testified to Mr. Reaves' extreme nervousness and excessive sweating, both signs of cocaine use. The taxi driver testified

that Mr. Reaves' appeared excessively nervous. (R 1232). If witness Hinton's testimony is to be believed, as the court has held, then he and Mr. Reaves' were smoking marijuana on the night of the offense. (R. 1202). Hinton himself was providing drugs to Mr. Reaves on the night of the crime. The remains of a marijuana cigarette confiscated from Mr. Hinton's residence was discovered in public records produced for the first time in 1998 and examined by undersigned counsel at the Indian River Sheriff's Office. Furthermore, Hinton has now provided an affidavit stating that Mr. Reaves was a long time drug user and was "all strung out, he had been smoking crack and was pretty much out of his head. . ." the night of the incident. (PCR. 612). Reverend Leon Young has provided an affidavit stating that William's life was "overpowered" by drugs (PCR. 616). Mr. Reaves' brother, Byron Reaves, also provided an affidavit stating that William "could not get away from drugs although he tried." (PCR. 619). The taped confession itself reflects Mr. Reaves own admission of feelings of panic and paranoia from the excessive use of crack cocaine including use on the night of the offense.[3] All of these facts corroborated a voluntary intoxication defense which would have rendered Dr. Weitz's testimony admissible. During argument regarding the admission of Dr. Weitz's testimony, the trial court acknowledged the fact that the expert testimony could have been

[3]Unreasonably, counsel failed to provide a copy of the taped confession to Dr. Weitz so that he could evaluate the demeanor of Mr. Reaves on the night of the offense. Failure to provide this basic background material was ineffective.

used if it was offered to buttress an affirmative defense such as voluntary intoxication (R. 1470).

Other witnesses testified concerning the physical evidence that Mr. Reaves was a chronic crack cocaine abuser. For example, the bag of cocaine found on the ground at the crime scene. Mr. Reaves attempt to sell crack cocaine to the undercover officer in Georgia, the crack cocaine that was confiscated from his person at the time of his arrest. (R. 1266). All of these elements pointed to voluntary intoxication.

Had counsel investigated, numerous additional and independent sources of information regarding Mr. Reaves' severe substance abuse problem would have been discovered. Family members, friends, and acquaintances could have provided compelling information as to Mr. Reaves' longstanding substance abuse problems and his constant attempts to get help for his problem. Military records would have reflected that Mr. Reaves was undergoing drug treatment counseling just prior to his release from the military. This important evidence was not developed for the jury or for consideration by a mental health expert.

Defense counsel ineffectively failed to present this evidence or was prevented from presenting this evidence by the court. During the defense proffer of the testimony of Dr. Weitz, a psychologist, the state attorney specifically pointed to instances of Mr. Reaves' cocaine use as being more credible than the doctor's testimony:

> STATE: ...The reason he shot at the deputy was the cocaine; not Vietnam, not flashbacks, not any sort of syndromes, not any sort of reasoning along those lines. He's blaming the cocaine and he names the cocaine as the reason.
>
> DR. WEITZ: As best he understands it, yes, he is identifying the drug.
>
> STATE: ...Page eight, " I was under the influence of cocaine. I panicked and paranoid." The Defendant again blames cocaine for the reason he shot.
>
> DR. WEITZ: He also indicated he panicked and paranoid, which are psychological -- potentially moving toward psychological factors. He may not explain the other components which I've identified.

(R. 1528). Even the State was forced to acknowledge that Mr. Reaves' crack cocaine addiction was a major factor in the commission of the offense. Therefore, the overwhelming evidence of intoxication would have been consistent with counsel's defense at trial. Counsel did not contest guilt -- in fact, he conceded it. Counsel argued that the circumstances surrounding the incident and Mr. Reaves' actions were dispositive in the jury's consideration of the facts of the case.[4]

Counsel's failure to investigate and present this defense prevented the jury from considering a basis for guilt on a lesser included offense to first degree murder, thereby increasing the risk that Mr. Reaves would face death in violation of the Eighth

[4]Counsel failed to ask a single question during voir dire about the jurors' feelings concerning the intoxication defense or their feelings towards people who use the defense to explain their actions. Counsel also failed to adequately examine the jurors' feelings on the use of forensic testimony to establish an intoxication defense.

Amendment. See Beck v. Alabama, 477 U.S. 625 (1980). It also denied Mr. Reaves a fair trial, in violation of the Sixth, Eighth and Fourteenth Amendments. Confidence is clearly undermined in the outcome by counsel's deficient performance.

Further, counsel failed to obtain the testimony of expert witnesses who could have explained how Mr. Reaves' conduct at the time of the offense and his subsequent flight was motivated by his chronic substance abuse and the remaining effects of post-traumatic stress disorder from his involvement as a black soldier in the Vietnam War. Counsel also failed to secure the services of an expert qualified to conduct neuropsychological testing even though there were indications from the county jail in Georgia that Mr. Reaves was hospitalized shortly after his arrest complaining of head injuries. Such expert testimony and assistance was available, and would have been significant information for the jury to know. Postconviction counsel is prepared to present such evidence at a hearing.

4. Conceding guilt/failure to object

Counsel conceded guilt without consulting Mr. Reaves regarding his strategy or decision. This decision was within the purview of those decisions which must be discussed with a defendant. This Court has recognized that an evidentiary hearing is warranted when it was "unclear as to whether [the client] was informed of the strategy to concede." Harvey v. State, 656 So. 2d 1253 (Fla. 1995); see United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991). To the extent that counsel also conceded any

inculpatory evidence, counsel was ineffective. Mr. Reaves is entitled to an evidentiary hearing.

Counsel's concerns about any bias or prejudice with the jurors regarding Mr. Reaves being a Vietnam vet should have been explored during voir dire. Counsel asked no questions on this topic during jury selection. Counsel failed to ask any questions on voir dire regarding the jurors' notions about the Vietnam War, black veterans, substance abuse, or post-traumatic stress disorder. Counsel's failures prejudiced Mr. Reaves. The failure to conduct any voir dire on this subject constitutes ineffective assistance of counsel. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). See also Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991).

Having never filed a notice of intent to introduce evidence of other crimes, wrongs, or acts as required by section 90.404.2 (2), Florida Statutes, the State nevertheless repeatedly presented evidence of drug use, crime, and other bad acts by Mr. Reaves. Counsel's repeated failure to effectively argue these issues was prejudicially deficient performance. The introduction of this irrelevant evidence deprived Mr. Reaves of a fair trial in violation of the United States Constitution. Redman v. Dugger, 866 F.2d 387 (11th Cir. 1989).

D. THE BRADY ISSUE

In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required

to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963).

In 1998, postconviction counsel obtained access to previously undisclosed public documents and materials from the Indian River Sheriff during the inspection of a previously undisclosed box of materials at the Sheriff's Office by undersigned counsel. One of the items found therein was the remains of an alleged marijuana cigarette butt apparently confiscated from Mr. Hinton's residence during the questioning of Mr. Hinton by law enforcement concerning Mr. Reaves visit to Hinton's home after the murder. No forensic analysis of the substance has ever been undertaken. Mr. Hinton testified that he and Reaves were smoking marijuana on the night of the murder. (R. 1202).

In a deposition taken prior to the the first trial, Hinton said that he and Reaves were selling drugs together at Shorty's Poolroom on the evening before the murder, that he saw Reaves smoking marijuana and drinking beer there, and that when he left he anticipated that Reaves was going to take cocaine later when he returned to his house. (R. 102-09). Other materials in the box included notes regarding witness interviews and copies of automobile registrations. Undersigned counsel is not aware if trial counsel had any this material provided as part of discovery. This would be an avenue of inquiry at an evidentiary

hearing. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.[5] Confidence is undermined in the outcome since the jury did not hear all the evidence.

ARGUMENT II

THE PROSECUTORS' MISCONDUCT ARGUMENT

The prosecutor in Mr. Reaves' case engaged in acts of misconduct by making improper comments during his closing argument at the sentencing phase. A prosecutor may not use epithets or derogatory remarks directed toward the defendant as they impermissibly appeal to the passions and prejudices of the jury. See, Green v. State, 427 So. 2d 1036, 1038 (Fla. 3d DCA 1983) ("It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them.") See also, Duque v. State, 498 So. 2d 1334, 1337 (Fla. 2d DCA 1986); Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978). Despite this prohibition, the prosecutor repeatedly referred to the defendant as being "bad" (R. 2289 - 2290, 2292, 2296) "a vicious criminal, robber and murderer" (R. 2290) as a "cop-killer and anti-social

[5]Mr. Reaves argues Brady and ineffective assistance of counsel in the alternative. Either the prosecutor unreasonably failed to disclose or defense counsel unreasonably failed to discover exculpatory or impeachment evidence. Either way the resulting conviction was unreliable and the Sixth Amendment violated. State v. Gunsby, 670 So. 2d 920 (Fla. 1994).

personalit[y]" (R. 2295) and as a "killer[]" and "murderer[]" (R. 2296).

In addition, the prosecutor made numerous improper comments capitalizing on the jurors' fears surrounding a lawless society and exhorting them to vote for the death penalty as a means of protecting the community. (R. 2280 - 2282)

The prosecutor preyed on the jury's fears of rising crime and the ever increasing frustration of stemming the tide of community violence. The police were portrayed as the sole barrier between the huddled townspeople and the frenetic marauders. Without the protection of law enforcement, the jurors were told that they would be at the mercy of vicious killers like Mr. Reaves. (R. 2284 - 2285). The Assistant State Attorney argued that the police represent "The Rule of Law", without which there would be total anarchy.

The prosecutor's statements were irrelevant to the charged offense and were highly inflammatory. See Viereck v. United States, 318 U.S. 236, 247 - 48 (1943) (appeals to passion and prejudice and other inflammatory appeals to the jury are impermissible). The jury's exposure to such arguments violated the defendant's right to state and federal due process of law.

The prosecutor remarks also violated the "Golden Rule." Through his comments, the prosecutor improperly asked the jurors to envision themselves in the place of the victims. Bullard v. State, 436 So. 2d 962 (Fla. 3d DCA 1983).

Moreover, the assistant state attorney inappropriately curtailed the jury's consideration of relevant statutory mitigating evidence, in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987) and Lockett v. Ohio, 438 U.S. 586 (1978).

Standard 3-5.8(c) of the American Bar Association Standards Relating to the Administration of Criminal Justice warns prosecutors "not to use arguments calculated to inflame the passions or prejudices of the jury." Prosecutorial arguments, like the above, emphasizing the community's frustration and paranoia surrounding violent crime in their neighborhood, suggests that the jury should apply a different standard at sentencing because of the diminution in the armed forces on the war on crime.

The prosecutor impermissibly argued facts not in evidence based upon speculation. Such arguments violate the Eighth Amendment because of "'the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."'" Skipper v. South Carolina, 476 U.S. 1, n.1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986) (quoting Gardner v. Florida, 430 U.S. at 363).

Decisions concerning penalty phase prosecutorial misconduct, like those regarding other features of a capital trial, have been governed by the maxim that "death is a different kind of punishment from any other which may be imposed in this country." Gardner v. Florida, 430 U.S. 349, 357 (1977). The death penalty may not be the product of arbitrariness or caprice.

Consequently, "[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law." Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986).

"An attorney's personal opinions are irrelevant to the sentencing jury's task." Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. en banc 1985); see also, United States v. Young, 470 U.S. 1, 9 (1989). Argument stating the prosecutor's personal beliefs and commenting on evidence not in the record is improper. Disciplinary Rule 7-106(c) of the ABA Model Code of Professional Responsibility provides that:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * * *
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused . . . .

Despite the clear admonishment against the prosecutor stating his/her individual views, the State repeatedly resorted to this impermissible argument. The prosecutor's continuous expression of his personal beliefs violated Mr. Reaves' state and federal due process rights.

The prosecutor engaged in additional improper arguments as evidenced by the following inappropriate comments upon Mr. Reaves' alleged future dangerousness (R. 1873, 1914, 1925, 2078 -

2079, 2134, 2263 - 2265, 2277 - 2279, 2288 - 2291, 2293 - 2294, 2297); derogatory references that the defense concealed evidence and mischaracterizing the duty of confidentiality (R. 2086, 2103 - 2105, 2111, 2242); commenting on Reaves' First Amendment rights (R. 2293); and diminishing juror responsibility (R. 1834 - 1837, 2255, 2261 - 2262, 2267, 2272 - 2273, 2278, 2298, 2300).

The prosecutor is prohibited from misstating the law when arguing to the jury, whether during the guilt or innocence phase or the sentencing phase. Rogers v. Lynaugh, 848 F.2d 606, 610 (5th Cir. 1988). The State improperly argued the "law" to the jurors and made improper comments, including: (a) the law imposes the death penalty for people who kill law enforcement (R. 2284), whereas an automatic death penalty, especially one based upon the death of a police officer, is unconstitutional, See, Sumner v. Shuman, 107 S. Ct. 2716 (1987); Taylor v. Louisiana, 419 U.S. 522 (1975); Woodson v. North Carolina, 428 U.S. 280 (1976), (b) the jury may not consider sympathy in rendering a sentencing verdict (R. 2294), whereas sympathy and mercy engendered by defendant's mitigating evidence is proper consideration at the penalty phase, See, California v. Brown, 479 U.S. 538, 93 L.Ed.2d 934 (1987). To the extent that the State suggested an incorrect rule of law to the sentencing jury, Mr. Reaves' due process rights were violated. The misstatements concerned a fundamental constitutional right that infected the sentencing phase of Mr. Reaves' trial.

The prosecutor's impermissible comments, in isolation or collectively, had such a pervasive prejudicial effect that they precluded the jury's rational consideration of the verdict and sentence. To the extent trial counsel did not preserve any portion of this issue, Mr. Reaves received ineffective assistance of counsel. The incidents were improper and allowing the jury to hear them prejudiced Mr. Reaves.

ARGUMENT III

THE PUBLIC RECORDS ARGUMENT

Undersigned counsel specifically requested information on the jurors in Mr. Reaves' 1992 trial, pursuant to Buenoano v. State, 708 So. 2d 941 (Fla. 1998), from Florida Department of Law Enforcement, Marion County Clerk of Circuit Court, Indian River County Clerk of Circuit Court, and the Indian River State Attorney. This was done pursuant to then in effect Emergency Florida Rule of Criminal Procedure 3.852, which required that counsel make any additional new or supplemental public records requests in Mr. Reaves' behalf by the end of December 1998. During 1999, counsel was informed by the Marion County Clerk of Court, the jurisdiction where the 1992 trial took place, that all jury related materials relevant to the time of Mr. Reaves' trial in 1992 had been destroyed.

Undersigned counsel is unable to assure the Court that all relevant files and records from public agencies have been provided. (Supp.PCR. 505). This information is needed in order for undersigned counsel to conduct a full investigation of jury

issues which pertain to this case. See Buenoano v. State, 708 So. 2d 941 (Fla. 1998). Mr. Reaves is not in a position to know if any other documents were not disclosed. He does not waive any Chapter 119 claim that may exist if allegedly destroyed documents should reappear.

ARGUMENT IV

MR. REAVES IS INNOCENT OF FIRST-DEGREE MURDER, INNOCENT OF THE DEATH PENALTY AND WAS DENIED ADVERSARIAL TESTING.

Mr. Reaves is innocent of first-degree murder and was denied an adversarial testing, in violation of Brady v. Maryland, 373 U.S. 83 (1963), Strickland v. Washington, 466 U.S. 668 (1984), and Herrera v. Collins, 113 S. Ct. 853 (1993).

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).[6] The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla. 1991). The Florida Supreme Court has recognized that innocence of the death penalty also constitutes a claim.

[6]According to Sawyer, where a death sentenced individual establishes innocence, his claims must be considered despite procedural bars.

Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992). Mr. Reaves can show both innocence of first degree murder and innocence of the death penalty.

A review of the record, the claims in Mr. Reaves' post-conviction motion, and the proffers by counsel at the Huff hearing supports the theory that Mr. Reaves was suffering from P.T.S.D and substance abuse addictions. Additionally, experts for Mr. Reaves will testify at an evidentiary hearing that William was unable to form the intent necessary to commit premeditated murder.

Under Florida law, a person is eligible for the death penalty if he is convicted of first degree murder, § 921.141, Fla. Stat. (1996); and if the co-sentencers find at least one aggravating factor sufficient to justify a death sentence. Mr. Reaves trial court relied upon three aggravating circumstances to support his death sentence: (1) prior violent felony; (2) the crime was committed for the purpose of preventing a lawful arrest, or effecting an escape from custody; and (3) heinous, atrocious, or cruel. (R. 2331)[7]. The prior violent felony occurred almost twenty years prior to the trial. The finding by the court that the crime was committed to avoid arrest or effect escape is defied by the facts in the record and Mr. Reaves mental illness and drug abuse.

[7]. Note that this Court on direct appeal found the heinous, atrocious, and cruel aggravating factor not to apply to Mr. Reaves case. However, the jury still considered it.

Mr. Reaves jury was given unconstitutionally vague instructions on one of the aggravating circumstances relied upon by the judge to support Mr. Reaves's death sentence: heinous, atrocious, and cruel. As a result, this aggravating circumstance cannot be relied upon to support Mr. Reaves's death sentence.

Furthermore, Mr. Reaves's death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the available but unpresented evidence of mitigation render the death sentence disproportionate. Mr. Reaves is innocent of the death penalty.

To the extent that trial or appellate counsel failed to adequately preserve this issue or failed to raise it Mr. Reaves was denied effective assistance of counsel.

ARGUMENT V

THE JUROR INTERVIEW AND JUROR MISCONDUCT ARGUMENT

Florida Rule of Professional Responsibility Rule 4-3.5(D)(4) provides that a lawyer shall not initiate communications or cause another to initiate communications with any juror regarding the trial. This prohibition impinges upon Mr. Reaves' right to free association and free speech.

In Mr. Reaves capital trial, actual juror misconduct occurred. Trial counsel, was approached by two female jurors after the trial was concluded who related to him that one of the other jurors, Mr.

John Ujvarosi, was discussing the guilt of Mr. Reaves from the beginning of the trial, long before they were able to discuss such issues and after they were instructed not to discuss such issues. This allegation could certainly amount to jury misconduct. Mr. Reaves requested the opportunity to interview the jurors in his case in his 3.850. (PCR. 504). The summary denial order by the trial court simply ignores this request in its finding that "if the Defendant believes that juror misconduct occurred, he can seek an order permitting a juror interview." (PCR. 1095-96).

At the Huff hearing, counsel for Mr. Reaves argued that the pleading was intended to identify trial counsel Jonathan Jay Kirschner as the direct source of the juror misconduct allegation. (PCR. 308). The specific language in the pleading is as follows:

> Undersigned counsel has learned through investigation that Jonathan Jay Kirschner, trial counsel, was approached by two female jurors after the trial was concluded and related that one of the other jurors, Mr. John Ujvarosi, was discussing the guilt of Mr. Reaves from the beginning of the trial, long before they were able to discuss such issues. This allegation could certainly amount to jury misconduct.

(PCR. 574). Mr. Reaves' 3.850 pleading requested from the trial court the opportunity to interview the jurors and challenged the constitutionality of the Florida Bar rule preventing counsel from doing juror interviews without leave from the court. (PCR. 501, 504). The trial court's finding in its summary denial order that "[t]he defendant does not identify the source of the information . . ." (PCR. 1096), ignores the pleadings and counsel's proffer at the Huff hearing. (PCR. 308).

To the extent that Mr. Reaves trial counsel knew of or suspected jury misconduct, he unreasonably failed to move for a mistrial or bring the misconduct to the court's attention. The resulting prejudice is clear, a biased jury, who engaged in overt acts of misconduct, was allowed to pose as a fair and impartial jury. The end result is a conviction of first degree murder in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT VI

THE RIGHT TO CONFRONTATION ISSUE

A key state's witness against Mr. Reaves at trial was Erman Eugene Hinton. Hinton testified at the first trial, but when called to testify at the second trial, he testified that he did not remember anything from 1987, that he had been in prison twice since the first trial, that he was unable to read or write and had no memory of anything that happened so long ago (R. 1122-1127).

Over defense objection, the court ruled Hinton was "unavailable" and his testimony from the first trial was read into the record (R. 1128-1130). However, not all of the testimony was read to the jury. The trial court prevented the jury from hearing the prior inconsistent statements of Hinton that undermined Hinton's credibility over defense objection (R. 1130-1133). Defense counsel was forced to proffer Hinton's prior inconsistent statements and the evidence of his nine prior felony convictions (R. 1133-1145). The jury relied on Hinton's prior testimony without knowledge of all his prior convictions or inconsistent

statements. During cross-examination in his prior testimony Hinton admitted to "four or five" felony convictions or crimes involving dishonesty (R. 1189). The jury could not intelligently judge Hinton's credibility without this critical information.

The confrontation clause is applicable to the sentencing process. Spect v. Patterson, 386 U.S. 605 (1967); Tompkins v. State, 502 So. 2d 415 (Fla. 1986). The confrontation clause guaranteed Mr. Reaves' right to confront adverse witnesses and also guaranteed him an opportunity for the trier of fact to judge the credibility of state witnesses. Barber v. Page, 390 U.S. 719, 721 (1968). Mr. Reaves was denied these rights by the trial court's ruling.

The key role of Eugene Hinton was a major issue during the guilt phase. He was the only witness at trial that claimed Mr. Reaves confessed on the night of the murder. Without his testimony, there was no extrinsic corroboration of Mr. Reaves' confession. It was imperative that the jury know the true extent of Mr. Hinton's inconsistent credibility problems including his prior convictions and inconsistent statements. This Court agreed that it was error not to admit Hinton's prior inconsistent testimony but held that it was harmless because the inconsistencies "pertained to details and did not repudiate the significant aspects of his testimony." Reaves v. State, 639 So. 2d 1 (Fla. 1994).

However, this Court failed to consider the impact these omitted "details" had on the jury who knew nothing about Mr. Hinton's credibility problems. Nor did this Court consider that

Mr. Hinton's testimony was read into the record by the prosecution. Prosecutor Barlow gave the credibility of his office to Hinton's prior statements. This Court also ignored the fact that the trial court allowed testimony to be read from the first trial on which Mr. Reaves' conviction had been reversed because of a conflict of interest between the state attorney's office and his former defense counsel. Therefore, the cross-examination that occurred at the first trial was tainted. Mr. Reaves was never afforded true cross-examination of this witness by a conflict-free proceeding. More importantly, the jury was not apprised of this fundamental flaw in Hinton's testimony.

The trial court erred in ruling that Hinton's prior testimony could be admitted as substantive evidence. The cross-examination conducted of Hinton at the first trial was an insufficient basis on which to allow the testimony because Mr. Reaves did not have a fair trial or fair cross-examination of Hinton when his testimony was given. This Court acknowledged that this was error. The finding that Hinton was "unavailable" denied Mr. Reaves his right to face to face confrontation of the state's key witness. The requirements of section 90.904(1) were not met and the admission of Hinton's former testimony violated the Mr. Reaves' Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Counsel also notes that Mr. Hinton provided post-conviction counsel with an affidavit that was attached to Mr. Reaves' 3.850. (PCR. 612-14). A portion of the affidavit is specifically relevant here, since Hinton swears that at the time of the offense Reaves

was "all strung out, he had been smoking crack and was pretty much out of his head, he was real scared." (PCR. 613). This statement by Hinton, if he had been allowed to testify at an evidentiary hearing, would be applicable to both a guilt phase intoxication defense as well as to support for statutory mitigation that was not found by the trial court. This new information, which must be accepted as true, warrants an evidentiary hearing.

ARGUMENT VII

COUNSEL'S FAILURE TO OBJECT TO UNCONSTITUTIONAL JURY INSTRUCTIONS

A. AGGRAVATING CIRCUMSTANCES

1. Improper doubling

Mr. Reaves' jury was instructed on the aggravating factors of "previously convicted of another capital offense or a felony involving the use or threat of violence to some person" (Fla. Stat. §921.141(5)(b)), "the murder was committed to disrupt or hinder the exercise of a governmental function or the enforcement of laws" (Fla. Stat. §921.141(5)(g)), and "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody" (Fla. Stat. §921.141(5)(e)), based upon the state's theory that Mr. Reaves killed Officer Raczkoski to prevent his arrest (R. 2254-56, 2269, 2279-2285). Despite defense objections to the contrary, the court permitted impermissible doubling by the jury (R. 2301, 2314, 2331).

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981).

2. Unconstitutionally vague aggravating circumstances

In sentencing Mr. Reaves to death, the trial court found the aggravating factor of avoiding arrest (R.2253-54, 2279-80, 2301-02, 2314, 2331). However, the jury instructions regarding this aggravator did not include this Court's limiting construction of this aggravating circumstance in finding this factor. As a result, this aggravating factor was broadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence. See Zant v. Stephens, 462 U.S. 862, 876 (1983). Mr. Reaves' death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

In addition, At the time of Mr. Reaves' sentencing, the language of § 921.141 (5), Fla. Stat. (1991), which defined the"heinous, atrocious, or cruel," and "prior violent felony" aggravating factors were facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980). Relief is warranted

3. The "victim was a law enforcement officer" aggravating circumstance was improperly applied

Section 921.141 (5)(j) of the Florida Statutes became effective October 1, 1987, one year after Mr. Reaves was accused of committing a crime. Defense counsel objected to the use of this aggravator on the basis of its ex post facto application (R. 2183, 2254).

Although the trial court did not enumerate in its findings an aggravator that the "victim was a law enforcement officer," the jury considered it after instruction from the court:

. . .

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> . . .
>
> 5. The victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of the officer's official duties.

(R 2313 - 2314). The use of this vague aggravating circumstance changed the punishment that Mr. Reaves would receive. This enactment was retrospective and disadvantaged Mr. Reaves. This is a violation of the ex post facto clause of both the federal and state constitutions. Miller v. Florida, 482 U.S. 423 (1987). Relief under the 3.850 motion must be granted.

4. The Johnson v. Mississippi argument

The trial court found as an aggravating circumstance in support of Mr. Reaves' death sentence that he had previously been convicted of another felony involving the use of or threat of violence to a person (R. 2331). The basis for this finding was based upon two nearly twenty (20) year old convictions for

conspiracy to commit robbery and grand larceny (R. 1830, 1870, 1872) and a more recent conviction for battery on a law enforcement officer (R. 1880). Defense counsel objected to this aggravating circumstance and to the Court instructing the jury regarding this circumstance (R. 1829, 1832). Trial counsel conceded the convictions in 1973 as statutory aggravators at the penalty phase. (R. 2300).

It was unconstitutional for either the jury or the trial court to consider this aggravating circumstance. Mr. Reaves' sentencing proceedings were fundamentally unfair.

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 100 L.Ed.2d 575, 584 (1988).

To the extent trial counsel did not properly preserve this claim, Mr. Reaves received ineffective assistance of counsel. Mr. Reaves is entitled to an evidentiary hearing on this issue, as the records and files in this case do not conclusively show that he is entitled to no relief.

B. THE CALDWELL ARGUMENT

Mr. Reaves' jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" in violation of law. (R. 2272-73, 2278, 2298, 2315-22). Defense counsel did not object to this erroneous instruction. Here the jury's sense of

responsibility would have been diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985).

C. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So.3d 1 (Fla. 1973), cert denied 416 U.S. 943 (1974). This standard was not applied to Mr. Reaves' capital sentencing phase and counsel failed to object to the court and prosecutor, improperly shifting to Mr. Reaves the burden of proving whether he should live or die, Mullaney v. Wilbur, 4211 U.S. 684 (1975). Relief is warranted.

D. THE EXPERT TESTIMONY INSTRUCTION

The trial court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses, with one exception. The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1683-1684) (emphasis added). Defense counsel did not object to this instruction.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to

be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to judging his credibility, the jury was permitted to judge his expertise. That determination belongs solely to the judge. Trial counsel's failure to object, without tactic or strategy, performance was ineffective.

ARGUMENT VIII

THE STATE'S DECISION TO SEEK THE DEATH PENALTY IN MR. REAVES' CASE WAS BASED UPON RACIAL CONSIDERATIONS

In Mr. Reaves case, the State exercised its discretion to seek the death penalty based upon racial considerations. The State's racially-based decision to seek death in Mr. Reaves case violated equal protection and the eighth amendment. The equal protection violation arises because the racial bias of the State's decision is an arbitrary, unjustifiable classification which has no rational relationship to accomplishing a legitimate state objective. McCleskey v. Kemp, 481 U.S. at 291, n.8. The State's decision to seek death was based upon purposeful discrimination which had a discriminatory impact upon Mr. Reaves. Id at 292.

ARGUMENT IX

THE EXCESSIVE SECURITY MEASURES ARGUMENT

Excessive uniformed police presence prejudiced Mr. Reaves' trial proceedings. (R. 704). This fear of racial tensions resulting from a black defendant killing a white officer was so pervasive and the pre-trial publicity so inflammatory that a change of venue was granted in both trials that were held against Mr. Reaves. In this instance, a change of venue was granted from Indian River County to Marion County (R. 2467). Therefore, the presence of uniformed police officers was an especially volatile issue.

The record clearly demonstrates that Officer Raczkoski's fellow police officers were a uniformed presence in the courtroom and exerting pressure upon Judge Balsiger as well as intimidating Mr. Reaves, defense counsel, and most importantly, the jury. This intimidation prejudiced Mr. Reaves and resulted in his conviction of first degree murder and sentence of death.

Mr. Reaves' counsel objected to the presence of these uniformed police officers, but neither the State, nor the trial court prevented their presence (R. 704). Furthermore, to the extent some limit was placed upon the attendance of uniformed police officers, that limit did not curtail the attendance of numerous uniformed police officers nor did it consider the additional effect of the uniformed correctional officers and court liaison officers on Mr. Reaves' jury.

The presence of these uniformed officers intimidated the jury and the trial court into imposing the sentence of death upon Mr.

Reaves. Mr. Reaves' rights were violated under Holbrook v. Flynn, 106 S. Ct. 1340 (1986).

ARGUMENT X

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

Florida's death penalty statute denies Mr. Reaves his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Reaves hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents. Mr. Reaves also claims all rights as an American citizen under international human rights covenants either signed by the President or ratified by the Senate.

ARGUMENT XI

THE CUMULATIVE ERROR ARGUMENT

Mr. Reaves did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 841 F.2d 1126 (11th Cir. 1991). It failed because the sheer number and types of errors that occurred in his trial, when considered as a whole, virtually dictated the sentence that Mr. Reaves ultimately received.

The flaws in the system which sentenced Mr. Reaves to death are many. They have been pointed out not only throughout this brief,but also in Mr. Reaves' direct appeal and while there are means for addressing each individual error, addressing each error

only on an individual basis will not afford constitutionally adequate safeguards against Mr. Reaves' improperly imposed death sentence. This error cannot be harmless. The results of the trial and sentencing are not reliable. Relief is warranted.

ARGUMENT XII

THE JUDICIAL BIAS ARGUMENT

At trial and sentencing, Mr. Reaves was denied an adversarial testing because the bias of the trial court so infected the proceedings as to substantially interfere with the defense counsel's ability to litigate his case that an impartial jury could not be impanelled.

The trial court's bias in favor of the state is evident in the record. For example, at trial during the penalty phase, Judge James Balsiger rushed the proceedings and abrogated Mr. Reaves' constitutional rights (R. 2173); overruled defense counsel's objection to testimony concerning information not in evidence (R. 1824 - 1825, 1871); sustained the State's objection to Fran Ross' testimony regarding her background and accomplishments (R. 1897 - 1898); failed to admit clearly admissible evidence in mitigation or to weigh and consider the mitigating testimony of Fran Ross, as her testimony related to the community in which Reaves was raised (R. 1903 - 1904, 1906); chastised defense witnesses and undermined their testimony and credibility before the jury (R. 1912, 1967, 1983 - 1985, 1989 - 1990, 1992, 1997 - 1998, 2017 - 2018, 2032, 2102 - 2103, 2107, 2129); precluded and misunderstood the presentation of mitigating evidence in violation of Hitchcock v.

Dugger, 481 U.S. 393 (1987) and Lockett v. Ohio, 438 U.S. 586 (1978) (R. 1912, 1967, 1983 - 1985, 1989 - 1990, 1992, 1997 - 1998, 2017 - 2018, 2027, 2032, 2065 - 2068, 2102 - 2103, 2107, 2129, 2259 - 2260); denied counsel opportunity to proffer evidence to perfect his record (R. 2068); overruled defense objection to State mischaracterizing the duty of confidentiality and imputing that the defense concealed evidence (R. 2086); denied trial counsel's motion in limine to exclude evidence of future dangerousness (R. 2263 - 2265, 2277 - 2279, 2288 - 2291, 2293 - 2294, 2297); assisted the prosecution in the presentation of its case (R. 2264); addressed the jury and commented on its sentencing verdict: "And I want you to know that you have my personal thanks and the State's personal thanks. Thank you very much, ladies and gentlemen." (R. 2325-2326); failed to consider and accord adequate weight to statutory mitigators (R. 2332); failed to restrict the presence of officers in the courtroom and in the adjacent hallways.

To the extent that the trial court would allow, counsel's failure to object or move for mistrial when the bias and misconduct of the court and was obviously prejudicing the jury, constitutes deficient performance.

Mr. Reaves was prejudiced by the court's improper and biased conduct, and by his counsel's failure to object to such conduct. Relief is warranted. Mr. Reaves requests an evidentiary hearing on this issue.

ARGUMENT XIII

THE JURY WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY

The State unconstitutionally exercised its peremptory challenges to discriminate on the basis of race, gender, and national origin in violation of Mr. Reaves' rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of the Florida Constitution. Batson v. Kentucky, 476 U.S. 79, 130 (1986); J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994). See, Powers v. Ohio, 111 S. Ct. 1364 (1991) (white defendant could challenge exclusion of African Americans from the petit jury). See also, Hernandez v. New York, 111 S. Ct. 1859 (1991) (Batson analysis applied to Latino potential jurors.)

The defendant, William Reaves. is an African American male. The victim was a white male. It is alleged that the jury was comprised of two (2) men and ten (10) women. The racial composition of the jury is not evident from the record, and is unknown at the present time. Mr. Reaves, however, does not waive any potential claims.

It is alleged that the alternates were comprised of two (2) women. The racial composition of the alternates is not evident from the record, and is unknown at the present time. As noted elsewhere, the county authorities report that the record of jury information from 1992 has reportedly been destroyed.

The failure to make an accurate record of the race, gender, and national origins of the jury venire members made it impossible for Mr. Reaves to obtain reliable appellate review of this claim.

To the extent trial counsel did not properly preserve this claim, Mr. Reaves received ineffective assistance of counsel.

ARGUMENT XIV

MR. REAVES IS INSANE TO BE EXECUTED

Mr. Reaves is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Reaves acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly Mr. Reaves must raise this issue in the instant pleading.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Reaves respectfully urges this Court to reverse the lower court's summary denial order, to grant an evidentiary hearing on the outstanding penalty phase claims and guilt phase claims, and to grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 17, 2000.

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