IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-15

WILLIAM REAVES,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent,

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Phillips was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. Citations to the Record on the Direct Appeal shall be as follows:

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

"Supp. R" -- supplemental record on direct appeal; all other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Reaves requests oral argument on this petition.

PROCEDURAL HISTORY

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, an appeal followed and is pending before this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY RESENTENCING COUNSEL AT THE 1992 RE-TRIAL PROCEEDING.

A. INTRODUCTION

Mr. Reaves had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Further, this Court has held that "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Because the constitutional violations which occurred during Mr. Reaves' resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Reaves'] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Reaves' behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Reaves involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a

reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

This Court recently articulated the standard for evaluation of appellate ineffective assistance of counsel:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, WL746764 (Fla., July 5, 2001)(No. SC00-660). Mr. Reaves' case is not a case like Thompson v. State, 759 So. 2d 650 (Fla. 2000), where this Court has made clear that habeas is not proper to argue a variant

to an already decided issue.

1. RECORD OF RE-SENTENCING HEARING

A. Objections and Motions During Pre-trial period

Jonathan Jay Kirschner was Mr. Reaves trial lawyer in 1992 and he also handled the direct appeal of Mr. Reaves' case. As appellant counsel Mr. Kirschner failed to raise a preserved objection after the trial court denied Mr. Reaves' motion to compel discovery of Deputy Raczkowski's personnel records. (R. 169).

The motion to compel, filed on August 5, 1991, laid out the specifics of the discovery request:

> The Defendant...requests this Court to issue an Order requiring the State of Florida to disclose personnel records, training and on-the-job evaluations of the victim in this cause, and as grounds for same, would allege:
>
> 1. The Defendant is on trial for premeditated first degree murder. Further, the undersigned counsel has been specially appointed to represent him after declaring the defendant indigent pursuant to Florida law.
>
> 2. Florida Rule of Criminal Procedure 3.220(f) provides that "upon a showing of materiality, the Court may require such other discovery to the parties as justice may require".

> 3. The key issue in this case is evidence of premeditation. The Defendant's state of mind is at issue, especially during the moments and seconds immediately prior to the shooting.
>
> 4. Assuming the Defendant's actions were responsive in nature, then the stimulus that precipitated those responses are relevant in determining the defendant's state of mind at the [time of] shooting.
>
> 5. Personnel records of the deceased officer, as well as records of evaluations compiled during his training and while employed as a deputy for the Sheriff's Department, are probative on the issue of whether the officer was trained to respond to situations in a prescribed manner, and whether the officer did in fact conform to those prescribed codes of conduct.
>
> WHEREFORE, the Defendant, WILLIAM REAVES, requires this Court to issue an order requiring the State of Florida to produce training and on-the-job performance evaluations, as well as all personnel records of the victim in this case.

(R. 2457-2458). Defense counsel argued at the pre-trial hearing that after consulting with experts, his position was that the deputy's records could be relevant to "supply probative information on the issue of how that officer tends to respond in certain situation." (R. 174). The State responded that the personnel records

could not cast any light on the State of mind of the defendant at the time of the offense, and specifically argued that the Defendant's taped statements to law enforcement, including "I panicked, I was all coked up" were sufficient to establish Mr. Reaves' state of mind at the time of the offense. (R. 171). Thereafter the trial court found that the personnel records of the victim were not material. (R. 174). This issue was properly raised and preserved during the trial court proceedings by Mr. Kirschner, however, he negligently failed to raise the issue on direct appeal as appellate counsel for Mr. Reaves.

Appellate counsel also failed to raise on appeal the issue of the trial court's pre-trial denial, pursuant to Chestnut v. State, 505 So. 2d 1352 (1987), of the admission of any psychological testimony from Dr. Weitz as to intent issues related to intoxication defense at guilt phase. The State took this issue very seriously. They went so far as to file a motion for psychiatric examination of the defendant on December 12, 1991. (R. 2538-2547). The State's motion noted that they bore the burden of proving "that the crime of first degree

premeditated murder was committed with the specific intent of killing a human being." (R. 2540). In addition, the State's motion advised the lower court that "[t]he defenses of Post Traumatic Stress and/or Voluntary Intoxication by use of a controlled substances such as cocaine, are potentially defenses to which Dr. Weitz will testify." Id. After a hearing on December 19, 1991, on December 30, 1991, Judge Balsiger denied the State's Motion, his order stating that he was without authority to grant the motion "unless and until Defendant enters a plea of not guilty by reason of insanity." (R. 2574).

The State responded on January 6, 1992, by filing a detailed "Motion to Prohibit Testimony of Abnormal Mental Condition Not Constituting Legal Insanity," that specifically attempted to bar any testimony from the defense psychologist at the guilt phase of Mr. Reaves' trial. (R. 2577-2605). After a hearing the preceding day, on January 17, 1992, Judge Balsiger entered an order granting the State's motion pursuant to Chestnut, but making clear that he was not prepared to absolutely bar the testimony of the defense psychologist. (R. 208-214)(R. 2618). During the hearing the State argued that

Dr. Weitz, during deposition, had specifically said that Mr. Reaves' level of intoxication at the time of the offense was not at the level of voluntary intoxication. (R. 212). A few weeks later, during a pre-trial hearing on February 14, 1992 on Mr. Reaves' motion in limine to exclude testimony about his arrest while attempting to sell cocaine in Albany, Georgia, the State argued that Mr. Reaves' statement to the police and evidence of his arrest should be admitted at the trial:

> ...throughout that confession to the homicide of the deputy in this case, the defendant blamed being high on coke, coke-out, wired out, and various other terms that referred to his cocaine use.
>
> Specifically on pages two, three, page five, page six, page eight, page thirteen, page fourteen, page sixteen, page nineteen, pages twenty-one, twenty-two, twenty-three, twenty-four, twenty-nine, thirty, thirty-one, there are all references made by the defendant to his cocaine use, and the purposes of the cocaine that he was caught in Georgia with.
>
> ...the defendant specifically stated...that he went to Albany because he still had four and a half ounces of cocaine to sell...

(R. 272-273). The State was obviously concerned about the defense presenting expert evidence at the guilt phase to corroborate Mr. Reaves' confession supporting

voluntary intoxication. Dr. Weitz's diagnosis that Mr. Reaves was suffering from "disorder of cocaine abuse or cocaine dependence", was part of the rationale for the State hiring of Dr. McKinley Cheshire. (R. 4), (Supp. R. 137-146). The proffer by defense counsel of Dr. Weitz' testimony was intended to support an affirmative defense of excusable homicide. (R. 1469). Yet the testimony on proffer also brought out Dr. Weitz' diagnoses in 1987 of "cocaine abuse" and in 1991 of "poly-drug abuse". (R. 1490-1492). Weitz also testified during the proffer that these diagnoses

> ...would help to understand what occurred at the night of the event, specifically the aspect of poly-drug abuse where certainly it was clear that the Defendant had utilized cocaine and having used alcohol the day and night during -- preceding the shooting. So certainly that phase of the diagnosis would help to explain that this was an individual that frequented the use of substances and certainly one has to consider the impact of those substances with respect to issues of judgment, perception and reasoning.

(R. 1492). This testimony was not heard by the jury at the guilt phase of the trial. Mr. Reaves' Initial Brief described the homicide in this case only as "the panic killing of a police officer." Initial Brief at 29. (R.

211). So although the issue of the trial court's pre-trial denial, pursuant to Chestnut, of the admission of any psychological testimony from Dr. Weitz as to intent issues related to intoxication defense at guilt phase was properly raised and preserved during the trial court proceedings by Mr. Kirschner, he negligently failed to raise the issue in his alter-ego role as appellate counsel for Mr. Reaves.

B. Objections and Motions During the Guilt Phase

The jury in Mr. Reaves' case did not receive an instruction concerning felony murder. The trial court found that the only possible enumerated felony that the State might be able to argue, escape, did not apply in Mr. Reaves' case because the State presented no testimony that Mr. Reaves had ever been placed under arrested by Deputy Raczkowski. (R. 1570). Therefore, the State was able to argue only a straight up premeditated first degree murder theory in Mr. Reaves' case.

Based on the record Mr. Kirschner, who was both the trial and appellate counsel for Mr. Reaves, attempted to present an excusable homicide defense at the guilt phase, which the trial court denied him the opportunity to

present. (R. 1469-1474). As part of that defense, Mr. Kirschner would inevitably have presented evidence of Mr. Reaves' cocaine or narcotics addiction and intoxication at the time of the offense that arguably negated the required intent for premeditated murder. And in fact, during Mr. Kirschner's opening statement, defense counsel promised the jury that he would produce evidence that Mr. Reaves' narcotics addiction, which began during his Vietnam service, was a coping mechanism that contributed along with his "survivor behavior" to the killing of Deputy Raczkowski. (R. 753). This was an intoxication defense.[1]

As it turned out the only intoxication evidence which came before the jury at the guilt phase was Reaves' taped statement to law enforcement, wherein he blamed cocaine for the offense, along with evidence from the arresting officer in Albany, Georgia that Reaves had been busted with hundreds of cocaine rocks. (R. 1360, 1266).

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[1]One of non-statutory mitigating circumstances that appellate counsel plead as factors requested but not found by the lower court, #5, included language that "[Reaves] became addicted to narcotics and violence used to support his drug habit." (Appellant's Initial Brief at 84).

Defense counsel's motion in limine to exclude this evidence was denied. (R. 2900). Defense counsel Kirschner argued for the admission of defense expert psychologist Dr. Weitz's testimony at guilt phase, analogizing in his argument what the trial court referred to as Mr. Reaves' "mental condition" evidence, to intoxication evidence that was deemed admissible pursuant to Gurganus v. State. (R. 1469-1470). In a memorandum of law filed in open court on February 24, 1992, Kirschner contended that "the expert psychological evidence is offered here solely for the purpose of exploring the applicability of the elements of excusable homicide to the defendant's circumstances." (R. 2909). The trial court stated on the record that Mr. Reaves' case was not a voluntary intoxication case. (R. 1470).

During a later defense proffer of the testimony of Dr. Weitz, the state attorney specifically pointed to instances of Mr. Reaves' cocaine use based on his own confession 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 acknowledged by implication 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.

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 fell within the class of impairments discussed by this Court in Bunney which negate specific intent. On proffer, Dr. Weitz testified

that one of the psychological diagnoses that he initially reached in 1987 after reviewing background materials and first interviewing and testing Mr. Reaves was "cocaine abuse." (R. 1490). He further testified that after being retained by Mr. Kirschner and seeing Mr. Reaves a second time prior to the 1992 hearing, he broadened that diagnosis because "[m]y subsequent information revealed that the Defendant used a variety of drugs and alcohol and I would shift that to a poly-drug abuse as opposed to just cocaine." (R. 1491). On the specific issue of intoxication, defense counsel asked Dr. Weitz on the proffer as follows:

> Q Did you feel that your formal diagnosis or the diagnoses reached by you were sufficient to explain what occurred relative to William Reaves' behavior patterns during the night of the shooting in this case?
>
> A I think that it partially would help to understand what occurred at the night of the event, specifically the aspect of poly-drug abuse where certainly it was clear that the Defendant had utilized cocaine and having used alcohol the day and night during -- preceding the shooting.
>
> So certainly that phase of the diagnosis would help to explain that this was an individual that frequented the use of substances and certainly one has to consider the impact of those

substances with respect to issues of judgment, perception and reasoning.

(R. 1491-1492). During the cross-examination of Dr. Weitz on proffer, the State specifically inquired about the issue of intoxication.

> Q The Defendant advised you that he was on cocaine and had smoked a great deal of cocaine and had even drunk some beer during the day and prior to the incident on each of those occasions; correct?
>
> A That is correct.
>
> Q But you also reached the opinion, did you not, that a defense for a voluntary intoxication would not be a proper psychological condition in this case; he wasn't that intoxicated during these incidents?
>
> A **I simply indicated the behavior. It's not my intent or purpose to come up with a particular defense strategy**.
>
> Q Your opinion is based on what the Defendant told you, in addition to reading all these reports, the Defendant was never that intoxicated to not be able to know right from wrong?
>
> A I clearly stated that he knew right from wrong.
>
> Q And the reason that we know that the cocaine was not sufficient or the beer that he was drinking sufficient to raise to a level of intoxication so great as to prevent the Defendant from

knowing right from wrong is because the Defendant immediately knew to flee the area; correct?

A That is correct.

(R. 1517-1518)(emphasis added). The State's cross-examination of Dr. Weitz indicates a confusion between the standards for competency to proceed or an insanity defense with the requirements for the admission of material testimony about intoxication. Dr. Weitz' guilt phase proffer testimony **was** relevant to the issue of Mr. Reaves' ability to form the specific intent necessary for premeditated murder because he was prepared to testify before the jury that based on ingestion of a combination of drugs Reaves "would have a lessened capability for making rational choices and directing his own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose his ability to understand or reason accurately." See Gurganus v. State, 451 So. 2d 817, 823 (Fla. 1984). Defense counsel clearly attempted to get this testimony before the jury but was rebuffed by the trial court. Kirschner renewed his motion for the jury to be allowed to hear Dr. Weitz on these substance abuse and

intoxication issues and renewed his objection after the proffer. (R. 1533). However, appellate counsel Kirschner failed to carry forward on appeal the intoxication defense aspects of this preserved issue. Although he tried to have his cake and eat it too by presenting a muddled combination of excusable homicide based on "Vietnam Syndrome" and voluntary intoxication based on poly-substance abuse, Kirschner failed to include the intoxication aspects upon which he had been thwarted at trial in his appellate briefs or argument.

In light of subsequent changes in the applicable case law, appellate counsel's failure to carry forward on appeal issues related to intoxication is even more troubling. The impact of counsel's negligent failure to so do should be reviewed by this Court in light of subsequent developments in case law providing that the rule in Chestnut relied on by the State and the lower court in Mr. Reaves' case 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).

During a guilt phase jury instructions conference, after defense counsel requested that an intoxication instruction be given "in view of the fact that there was evidence presented on the issue of -- through the Defendant's confession about cocaine consumption," the trial court agreed to give the instruction without objection by the State. (R. 1635-1636).

Because of rulings by the lower court, the jury never heard either the testimony of Dr. Weitz at the guilt phase or relevant prior statements from the unavailable witness Eugene Hinton whose 1987 testimony was read into the 1992 record at the guilt phase. Both witnesses would have strongly supported an intoxication defense. Hinton's prior testimony mentioned only that Mr. Reaves described in detail how he shot the officer after they started "loading up the marijuana and smoking." (R. 1163-1212, 1175). During the guilt phase, defense counsel represented to the court that the State had represented to him that Hinton would testify. (R. 1149).

He had intended to use Hinton's prior statements in his cross-examination, but was not prepared for Hinton being declared unavailable. (R. 1149). Trial counsel/Appellate counsel Kirschner objected repeatedly to being prevented from presenting in front of the jury the three prior statements (one on 9/23/86 and two on 9/24/86) and the 7/29/87 deposition of Eugene Hinton. He proffered some brief excerpts of the prior statements of Hinton at the guilt phase as an example of possible impeachment he wanted to present. (R. 1135-1143). The minimal portions that Kirschner read into the transcript were essentially impeachment evidence directed at Hinton. All three statements and the deposition were entered into the record for appellate purposes. (R. 1147).

On direct appeal, this Court held that Hinton's statements should have been admitted as an exception to the hearsay rule pursuant to Florida Statutes s. 90.806, but that the trial court's failure to do so was harmless error because "Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony." Reaves at 4. Sometimes, the devil is in the details. Such was the case in Mr. Reaves' appeal.

The corroboration of Mr. Reaves' substance abuse detailed in Mr. Hinton's prior statements would have been critical in assisting defense counsel in presenting an adequate defense incorporating intoxication at the time of the offense.

Counsel failed to argue intoxication grounds supported by some of Hinton's statement that was read into the record including statements that Reaves had smoked marijuana with him after Reaves came to his house following the shooting. (R. 1175). So although Mr. Kirschner raised on appeal the trial court's refusal to admit Hinton's statements at the guilt phase as Point I of Mr. Reaves' Initial Brief. (Initial Brief at 30), he utterly failed to include in his brief or oral argument those aspects of any of Hinton's statements relevant to the intoxication instruction that was given based upon his request before the jury was instructed. Failing to do so and thus to link up the materiality of Hinton's statements to the intoxication defense was deficient performance that operated to the substantial prejudice of Mr. Reaves by denying this Court an adequate context within which to undertake harmless error analysis.

This Court recently articulated the standard for evaluation of appellate ineffective assistance of counsel:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, WL746764 (Fla., July 5, 2001)(No. SC00-660). Mr. Reaves' case is not a case like Thompson v. State, 759 So. 2d 650 (Fla. 2000), where this Court has made clear that habeas is not proper to argue a variant to an already decided issue. Therefore, a review of the portions of the prior inconsistent Hinton statements that concern Mr. Reaves' substance abuse is directly relevant

to an exploration of counsel's failure to raise intoxication issues at the time of the offense on direct appeal despite having preserved the opportunity to do so with timely objections at trial. Defense counsel objected to the lower court's failure to allow prior inconsistent statements by Hinton to be used as impeachment of the unavailable witness and then proffered them. (R. 1130-1133).

The first interview of Hinton, by Indian River County Sheriff's Office Detective Paul Fafeita, took place on the afternoon of September, 23, 1986. In the interview Hinton denied seeing Reaves with a gun and could not offer an explanation as to why Reaves would kill a policeman. However, he did provide significant detail of Mr. Reaves use of crack cocaine:

> Q Is he doing dope again?
>
> A Fat..you know Fat doing dope man, how do you..how you think he pay for a car? You know very well he doing dope.
>
> Q Who's he selling for?
>
> A Selling for hisself.
>
> Q Who is he buying from?
>
> A From what his name..fat boy

shot Jin car?

Q The boy that shot Jim's car?

A One of them boys (mumbling)--

Q How much is he doing you reckon?

A Just a half ounce.

Q How often to go through a half ounce?

A He filling (phonetic) once a week.

Q Once a week?

A Sure.

Q How many rocks can you get out of a half ounce?

A Oh shoot let me see (mumbling--speaking very low)..

Q We talking..

A (Both counsel and witness speaking) you ask me that 'cause you know I know everything (indiscernible)..

Q ..half..half a thou..you know half an ounce is what a thousand bucks?

A No man you ain't gonna' have no thousand dollars and ounce. (phonetic)

Q How much is half an ounce?

A You could have (indiscernible) about..nine hundred.

Q That's almost a thousand dollars.

A Yeah.

Q How many rocks (indiscernible) out of that?

A 130.

Q 130..give or take one or two?

A Huh?

Q Plus or minus one or two?

A Oh about..about 130.

(Supp. R. 12-13). The next morning, beginning at 7:45 a.m., Hinton was again interviewed by the Indian River Sheriff's Office, this time by Detectives Perry Pisani and Pete Lenz. (Supp. R. 26-49). In the second statement, Hinton still denies any knowledge of the murder, except what he has seen on the news. (Supp. R. 31). Hinton described seeing Reaves the night before the murder "at Jim's place" "up by Robert Smith's grocery store" where several persons were watching Monday Night Football. (Supp. R. 36). In this statement he says everyone watching football (including Reaves' girlfriend Jackie) was doing cocaine, "the whole corner doing cocaine, everybody except me and [Reaves]." (Supp. R.

37). Hinton's response to the detectives' follow up question about whether Reaves was doing marijuana is noted as indiscernible. Hinton said Reaves had a "few beers" but was not drunk when Hinton left during the 4th quarter of the game. (Supp. R. 38). He again insisted that he had never seen Reaves with a gun. (Supp. R. 39). On the subject of drugs, Hinton said the following:

> Q Was he dealing in drugs? Dealing in cocaine?
>
> A (inaudible)
>
> Q A lot?
>
> A (inaudible)
>
> Q Who was he dealing for?
>
> A Himself, I reckon.
>
> Q Who was he getting it from?
>
> A Pressley.
>
> Q Pressley? Did he have a lot of money Monday night?
>
> A Monday night? Had a couple of hundred dollars. I know that.
>
> Q Couple hundred cash. Was he doing any dealing Monday night?
>
> A No, we was just sitting -- (not discernible) -- sitting there, waiting on him -- (indiscernible) --

Q He was waiting on Pressly to come and bring him -- (inaudible) -- was he buying?

A Pound.

(Supp. R. 39). As to Reaves personal drug habits, Hinton stated:

Q How many -- (inaudible) -- per week?

A About two ounces.

Q Did he do two ounces --

A Not two ounces, two half ounces.

Q So an ounce total a week?

A Yes.

Q What was he doing most of his dealing with?

A Up in Fellsmere mainly, Fellsmere.

Q Fellsmere?

A Yeah.

Q Where at up there?

A -- (inaudible) -- Bar.

Q -- (indiscernible) --

A -- (indiscernible) -- come and get it.

Q Did he ever do any dealing out

of Jackie's house?

A No, no.

(Supp. R. 41-42). The third Hinton interview, this time conducted by Detective Pisani and Assistant State Attorney Dave Morgan, took place on the afternoon of September 24, 1986, ending at 2:43 P.M. (Supp. R. 50-81). During the third interview Hinton for the first time tells law enforcement that Reaves came to his house after the shooting and described to him in detail the shooting of the officer. Hinton says that when he saw Reaves after the shooting "he wasn't drunk, probably had a couple of joints or probably snorted a little bit of -- (inaudible) --." (Supp. R. 74-75). In response to Assistant State Attorney Morgan's question, "[d]id [Reaves] appear to know what he was doing?" Hinton replied "Oh, yeah." (Supp. R. 75).

The final pre-trial statement by Eugene Hinton was a deposition that was taken on July 29, 1987 by original trial counsel, Clifford H. Barnes. Barnes asked Hinton several questions about drugs:

Q You were doing drugs together?

A Selling drugs---no, I don't do drugs.

Q You don't do them?

A No.

Q Okay. Did Fat have a drug-drug addiction?

A All I know is him selling drugs, all I know, all I know at first sign.

Q You never saw him do any drugs?

A No.

(Supp. R. 87-88). Hinton did confirm that beginning in 1984 both he and Reaves were selling drugs that they acquired from a man named Killings. (Supp. R. 89). According to Hinton, Mr. Reaves purchased bigger quantities than he did, in cash, half ounces of cocaine at $800. (Supp. R. 90). He testified that he met Reaves "on the street" where they sold drugs at, competing with one another. (Supp. R. 90). Hinton stated that eventually both he and Reaves were caught up in the same drug sweep and went to prison on drug charges. (Supp. R. 93). After they were released they began to "party" and drink with each other in the period from May to September 1986. Barnes followed up:

Q You'd gotten to be better friends in---

A Right.

Q But you're not---neither one of you smoked pot or did any cocaine?

A What do you mean-this time we got out? Yeah, we used to use pot.

Q Okay. Okay, and when you say "partied", what-how much cocaine would you or he do?

A Maybe like we-we gotten a grain---we might snort up half a grain or something like that.

Q Apiece or?

A No, together. You know, a small one; smoke a little reefer and drink a Henessey (phontetic),

Q Ya'll smoke rocks?

A No. I can verify that. I ain't never smoked; I ain't never seen him smoke.

Q Did ya'll ever sell rocks or were you all just selling the powder?

A Sell rocks, power, anything. That's what I was selling.

Q What was he selling?

A Well he was selling rocks and powder.

Q What did-what kind of relationship did he and Killings have?

A They got to be real close, you know, as the time went on. They got to

be real close.

Q Did Killings trust him with---

A Yes, Killings trusted him.

Q Did he-did he front him some cocaine? Larger amounts?

A Yes. Yes. Three ounces, first time; second time, five.

Q Okay and did Fats always give him the money for it after he sold it?

A I don't know. I didn't know, I never had business---

Q But he kept---

A He kept getting it so he had-he had to be giving him the money.

(Supp. R. 95-97). Although Hinton denied that Reaves had ever "stayed over" at his house, he did admit that "the only thing [Reaves] ever did at my house was come in; cook, cook up coke, we cook up coke there." (Supp. R. 102). He explained that on the Monday night before the homicide, he had been at Killings' place "selling drugs where all the dope pushers hang out and all the free basers." (Supp. R. 103). Later he saw Reaves at Shorty's Poolroom, where they were both selling drugs. (Supp. R. 104-105). He described Reaves as "drinking beer; smoking a little pot." (Supp. R. 106). He denied

that Reaves was smoking cocaine at the bar, stating that "**he don't use a smoke while he out there selling it, right there on the spot. He alway wait until he get-go to the house and cut up some more there and get a little snort**." (Supp. R. 106)(emphasis added). Interestingly, in the deposition Mr. Hinton says that the last time he saw Mr. Reaves before Reaves showed up at his home later in the early morning hours, Mr. Reaves told him he was leaving to go to "his baby's house" and was walking "back toward his momma house" about three blocks from the poolroom, on a route that Hinton assumed would take him to where he had parked his car. (Supp. R. 108). Later in the deposition he says that apparently Mr. Reaves did not take his car to his girlfriend Jackie's house. (Supp. R. 114). Since Hinton had consistently said in his prior statements that he and Reaves had been selling drugs at the poolroom that night, Reaves had to have his drugs somewhere. In the deposition, in response to questions from defense counsel Barnes, Hinton denied that Reaves had his cocaine with him when he showed up at Hinton's home.

Q Did-did Fat have any cocaine on

him that night that he came over to your House? That morning when all this happened?

A No. He had no cocaine, but he had five ounces, not on him.

Q He didn't have any in his pocket or anything else?

A No. No.

Q Did Jerry say he was going to take Fat over to get some money or drugs, or something?

A When they left the house-when they left my house, they went to the Fat Momma house, where Fat keep this-all this drug and money.

Q How did you know that? Did they say that?

A Yes.

Q Say that's where they were going?

A Yes. He said that and---

Q Which one said it? Fat or Jerry?

A Fat. Said, let's go to my Momma house and get some-thing. And that where he went, to his Momma house, in the pick-up truck and that was it.

(Supp. R. 133-134). A clear inference from the deposition testimony is that Mr. Reaves dropped off his cocaine at his mother's house and was not in possession

at the time the officer was shot or when he arrived at Hinton's house. According to this testimony, Mr. Reaves had the opportunity to use cocaine after his drug selling had been completed at the poolroom, and he had returned to his mother's house and went on to his girlfriend's home before he walked to the site of the shooting. This would have been entirely consistent with Hinton's earlier description of Mr. Reaves' state of mind when he arrived at Hinton's house after the shooting: "[Reaves] wasn't drunk, probably had a couple of joints or probably snorted a little bit of -- (inaudible) --." (Supp. R. 74-75).

Trial counsel Kirschner objected in pre-trial motion #28 to the State presenting the testimony of Alexander Hall of the Dougherty County, Georgia Drug Squad. This objection was raised again at trial. (R. 846-856). The gist of Hall's testimony was that Reaves had asked Hall in the Albany, Georgia bus station where to find drugs and then offered to sell cocaine to Hall, subsequently being arrested with 4.5 ounces of rock cocaine worth several thousand dollars. (R. 1248-1249). Defense counsel stated that he had no objection to the evidence

that Mr. Reaves had cocaine around the time of the offense coming into evidence, but he ridiculed the State's contention that they wanted evidence of the drug transaction in Georgia to come in to support Mr. Reaves' confession:

> [T]he prosecutors claim that it should be admitted in order to buttress the Defendant's confession when, in fact, what they're going to do is attempt to show the jury that the Defendant's confession was full of prevarication is absurd. And I just can't, I can't fathom him making that argument in good faith to this Court, that the reason that they need to put in the cocaine is in order to show what a truthful confession William Reaves made. They're going to claim he was lying.

(R. 853). The State actually portrayed the Reaves' confession as both self-serving as to his blaming cocaine for the offense and as simultaneously supportive of the State's position that Mr. Reaves' intentional flight from the scene of the shooting and escape to Georgia with his stash of cocaine were proof he could not have been so intoxicated as to not have premeditated the murder of Deputy Raczkowski.

Testimony at the trial by the arresting officer in Albany, Georgia established that the bag of cocaine

"rocks" confiscated from Mr. Reaves by law enforcement at the time of his arrest and introduced as Exhibit 84 contained 200-300 twenty-dollar "rocks" of cocaine. (R. 1263-1264, 1265-1266). On cross-examination of that officer, defense counsel's examination was clearly directed at getting the officer to agree that Mr. Reaves was a cocaine addict as well as a drug dealer. (R. 1267-1272). This examination by Kirschner was an additional ploy to get the jury to consider intoxication as a back-door defense.

During the June 2, 1993 oral argument on the direct appeal of Mr. Reaves' case, Assistant Attorney General Baggett stated that defense counsel Kirschner had specifically used intoxication at the time of the offense as an "alternate defense" at trial by "cloaking it as an affirmative defense and trying to get around Chestnut to prove [Reaves] could not have premeditated." She explained that the State's presentation of testimony at trial from the undercover police officer who had arrested Mr. Reaves at the bus station in Albany, Georgia after a narcotics transaction involving 4.5 ounces of cocaine, was specifically in order to rebut that Reaves was not so

intoxicated shortly after the offense as to be unable to form specific intent. Ms. Baggett stated that Mr. Reaves' defense was "I was so wasted at the time of the offense I didn't know what I was doing and I could not have possibly premeditated."

On direct appeal, this Court found that admission of evidence that Mr. Reaves attempted to sell cocaine in Georgia should have been omitted from the trial because "it was not relevant to the instant murder", but that the admission of the evidence was harmless error. Reaves at 5. Appellate counsel simply failed to plead or argue the prejudice to Mr. Reaves that resulted from him being portrayed as a big-time drug dealer through the law enforcement testimony at the same time the evidence of his personal substance abuse and intoxication was withheld from the jury.

Obviously trial counsel/appellate counsel Kirschner considered an intoxication defense. His timesheet affidavit for payment after the trial reveals that he was reviewing the vita of an addictionologist as early as April 1991. (R. 2446). And as noted supra, he proffered the prior statements of Eugene Hinton, which included a

rich variety of accounts of Mr. Reaves' drug involvement both generally and on the night of the offense. He also proffered the polysubstance abuse diagnosis of Dr. Weitz at the guilt phase, and, finally, he requested an intoxication instruction.

In spite of these efforts by trial counsel to protect Mr. Reaves' interests, appellate counsel negligently failed to raise any issues on appeal related to intoxication to the substantial prejudice of Mr. Reaves. This is particularly notable in light of the harmless error analyses by this Court noted supra.

Although the state argued in closing over defense objection and motion for mistrial that Mr. Reaves was a "seller of cocaine" the trial court refused to allow Mr. Reaves to argue intoxication during closing argument. (R. 1668, 1671-1672). During a December 19, 1991 pre-trial motions hearing the State specifically argued that Mr. Reaves had inadequate grounds to present a voluntary intoxication defense to first degree murder. (R. 212). The State based this position on a representation that in his deposition, defense expert Dr. Weitz had stated that the intoxication of Mr. Reaves at the time of the offense

"did not raise to that level of voluntary intoxication." (R. 212). However, in a subsequent February 14, 1992 hearing, the State argued against a defense motion to exclude testimony about the drug transaction that lead to Mr. Reaves' arrest in Georgia, taking a position that the arrest of the defendant when "he still had four and a half ounces of cocaine to sell" was intertwined with his confession to the homicide of the deputy which according to the State, Mr. Reaves "blamed [on] being high on coke, coke-out, wired out, and various other terms that he referred to his cocaine use." (R. 272-273).

The State used a significant portion of closing argument at the guilt phase to argue that voluntary intoxication did not apply in Mr. Reaves' case. (R. 1668-1677). Other than arguing that Reaves' confession to the police, in which he blamed cocaine for the shooting of the officer, was "internally consistent" and that Eugene Hinton's testimony was not, defense counsel simply failed to respond to the State's extensive argument against voluntary intoxication. (R. 1706-1707). On rebuttal, the State further argued that the facts of Mr. Reaves' cocaine arrest in Georgia were relevant to

the Defendant's voluntary intoxication defense. (R. 1746).

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).

The voluntary intoxication instruction that was read to the jury by the lower court read:

> A defense asserted in this case is voluntary intoxication by use of drugs. Now, 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 in capable 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 premeditated murder.

(R. 1169-1770). This issue was properly raised and preserved during the trial court proceedings by Mr. Kirschner, however, he negligently failed to raise the issue on direct appeal as appellate counsel for Mr. Reaves. Even without hearing the available corroboration of Mr. Reaves' substance abuse and intoxication from Dr. Weitz's proffer or Mr. Hinton's prior statements and deposition, the jury in Mr. Reaves case deliberated his guilt from 2:30 P.M. until 11:51 P.M. on February 25, 1992 before reaching a verdict, in the process sending out four different questions, including a request for a clear explanation of second degree murder. (R. 1786-

1810; 1791-1792).

It is simply inexplicable why appellate counsel failed to carry forward on appeal the intoxication issues from the trial.

C. Objections and Motions During the Penalty Phase

Appellate counsel complained in his brief about the sentencing order of the trial court focusing on the issue of intoxication at the time of the offense:

> In its sentencing order, the trial court focused exclusively on the issue of the extent to which appellant was under the influence of cocaine at the time of the shooting. The sentencing order below completely ignores the psychological and behavioral factors impacting on appellant's ability to appreciate the criminality of his conduct and to conform that conduct to legal requisites.

Initial Brief at 82. Appellate counsel failed to include argument concerning the proffered statements of Hinton noted supra as unrebutted support for a finding of the statutory and non-statutory mitigation that had been argued. Trial counsel had proposed a non-statutory mitigating factor, #5, that Mr. Reaves was "addicted to narcotics". This was one of eight factors enumerated in the direct appeal brief. Initial Brief at 84. The lower

court failed to find proposed factor #5. Hinton's unrebutted statements were proffered to the lower court, but are not noted in the lower court's sentencing order. (R. 3009-3036). Appellate counsel also failed to argue the relevance of Mr. Reaves' confession to the trial court's failure to find mitigation.

Dr. Weitz's diagnosis of Mr. Reaves as suffering from "disorder of cocaine abuse or cocaine dependence", was a serious concern to the State as was evidenced by their hiring of Dr. McKinley Cheshire. (R. 4), (Supp. R. 137-146). The trial court's sentencing order rejected the extreme mental or emotional disturbance factor based on Dr. Cheshire's rebuttal testimony. (R. 1317). After the trial court considered his testimony at the penalty phase along with Reaves' confession but, based on the sentencing order, not Hinton's proffered statements, it is difficult to understand why appellate counsel Kirschner failed to argue that the failure by the trial court to find mental health mitigation was related to the fundamental error by trial counsel Kirschner when he failed to introduce the same out-of-court statements of Hinton at the penalty phase. Perhaps this is too much to

expect of any attorney. See Downs v. Moore, 2001 WL 1130695 (Fla. September 26, 2001)(Wells, C.J. concurring)("The justification for the fundamental error exception to the preservation rule is that the error is so serious that the trial judge should have sua sponte acted to correct it even though defense counsel failed to object").

This issue either was properly raised and preserved during the trial court proceedings at the guilt phase by Mr. Kirschner, or his failure to do so at the penalty phase was fundamental error. In either case, however, he negligently failed to raise this argument either in his Motion for New Trial or on direct appeal as appellate counsel for Mr. Reaves in support of Points XIV and XV of the Initial Brief. (R. 2993). The prejudice to Mr. Reaves is self-evident where the only mitigation found by the trial court was non-statutory mitigation that "Reaves was honorably discharged from military service, had a good reputation in his community up to the age of sixteen, was a considerate son to his mother, and was good to his siblings." Reaves at 3. Relief is required.

CLAIM II

FAILURE TO RAISE ON ORIGINAL DIRECT APPEAL OTHER RULINGS

Appellate counsel also failed to raise on direct appeal other rulings which, alone or in combination, particularly with the other errors described in this petition, established that a new trial and/or a resentencing is warranted. These include but are not limited to: Failure to preserve defense counsel objection as to use of prior grand theft conviction and conspiracy to commit robbery conviction as prior violent felonies under Fla, Stat. 921.141(5)(b).

Analysis of all preserved and unpreserved error should be considered by this Court to evaluate harmlessness. See Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000).

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of

appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Reaves was denied the effective assistance of appellate counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Celia A. Terenzio, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401-2299, on January 2, 2002.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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