IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-15

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WILLIAM REAVES,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

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# REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## PROCEDURAL HISTORY

The State's Response correctly states that Mr. Reaves' pending appeal of the summary denial of his motion below for postconviction relief involves a claim of ineffective assistance of trial counsel Kirschner, who also was appellate counsel for Mr. Reaves. The State's Response also states that "Reaves contends that trial counsel failed to pursue as a defense at trial the claim that he was voluntarily intoxicated at the time of the crime. Had [Kirschner] adequately investigated the issue, he would have uncovered evidence in support of such a defense. Additionally such evidence would have forced the trial judge to allow the testimony of Dr. Weitz at the guilt phase." **Response at 1**. Mr. Reaves is compelled to point out that the brief cited by the State speaks for itself, "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." **Initial Brief at 41**. The brief also states that "during argument regarding the admission of Dr. Weitz's testimony, the trial court

acknowledged the fact that the expert testimony could have been used if it was offered to buttress an affirmative defense such as voluntary intoxication (R. 1470)." **Initial Brief at 44**.

## 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.**

The State's response takes the position as to this claim that it is procedurally barred and without merit. The State cites Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000) for the proposition that "ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy." **Response at 3**. As was noted in the Procedural History, trial counsel and appellate counsel

were one and the same person. The summary denial of Mr. Reaves' postconviction motion by the lower court has precluded Mr. Reaves from presenting Mr. Kirschner as a witness at an evidentiary hearing below. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000)(holding that, after an evidentiary hearing, the failure by trial counsel to present an intoxication defense was a strategic decision where counsel wanted to present an insanity defense and had decided not to have defendant testify); see also Presley v. State, 388 So. 2d 1385 (2nd DCA 1980)(An evidentiary hearing is required when the client is misinformed by trial counsel as to the availability of the intoxication defense). Any conclusions as to Mr. Kirschner's trial or appellate strategy are at best only speculation.

The State contends that "[t]he appellate record is very clear that voluntary intoxication was never considered a viable defense by trial counsel [Kirschner]. Therefore appellate counsel [Kirschner] could not have properly presented such an issue on appeal." **Response at 5**. The prejudicial deficient performance by trial counsel Kirschner that resulted from his failure to

adequately prepare and present an intoxication defense at trial simply does not preclude appellate counsel Kirschner from being held responsible for failing to carry forward an arguably preserved issue. Put another way, Kirschner's failure to present an adequate affirmative intoxication defense at trial is not a strategic justification for his failure to carry the issue forward on appeal. The State's position concerning the intoxication defense is belied by any number of events that do not fit their analysis. For example, by Kirschner's own request at trial for an intoxication instruction, which was granted by the lower court without any objection by the State. (R. 1635-1636). Or, as has been plead elsewhere, the inquiries he made about obtaining a substance abuse expert for trial. And although defense counsel presented no corroborative evidence regarding Mr. Reeves' intoxication during the guilt phase, during his opening statement he referred to Mr. Reaves' "narcotics addiction" (R. 753). He also 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). This comment by Kirschner contradicts the State's position that "such a defense cannot be consistent with one of voluntary intoxication." **Response at 9**. In fact, the record supports an interpretation that trial counsel Kirschner was pursuing alternate defense theories, which is not precluded by the law. Harich v. Wainwright, 813 F. 2d 1082, 1090 (11th Cir. 1987). This is precisely what the State argued on direct appeal. The intoxication defense available in 1992 could be used as an alternate defense theory to negate the intent element of premeditated murder.[1]

In addition, the State's Response contends that "[a]t no point did Weitz opine that Reaves was...intoxicated at the time of the crime...And Weitz refused to offer a diagnosis with regards to voluntary intoxication." **Response at 6**. On the specific issue of intoxication, Kirschner did inquire of Dr. Weitz during a proffer:

> Q Did you feel that your formal diagnosis or the diagnoses reached by

[1]Florida enacted Fla. Stat. §775.051 (1999) in response to the decision by the United States Supreme Court in Montana v. Egelhoff, 518 U.S. 37 (1996). This statute makes evidence of a defendant's voluntary intoxication inadmissible for the purpose of negating the specific intent element of a crime.

> 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). Dr. Weitz's only specific testimony about the use of an intoxication defense was on cross-examination during the proffer when he essentially indicated that he wasn't a lawyer:

> 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**.

(R. 1517-1518)(emphasis added). The State's Response argues that Kirschner's direct appeal challenge to the

trial court's finding that the proffered defense of "Vietnam Syndrome" was akin to diminished capacity and inadmissible, therefore directly precluding any challenge on ineffectiveness grounds to Kirschner's failure to challenge on appeal the trial court's failure to allow testimony from Dr. Weitz supporting an intoxication defense. This is what the State referred to as the "pith" of the claim. Since Mr. Reaves was in circuit court on postconviction, the Florida courts have allowed evidence of post-traumatic stress disorder to be presented at the guilt phase of a murder trial as state-of-mind evidence "quite analogous to battered spouse syndrome." State v. Mizell, 773 So. 2d 618, 620 (Fla. 2000). The same opinion found that PTSD evidence was not diminished capacity evidence. Id.

The claim is not a "variation" of the claim raised by Kirschner on direct appeal. Neither is it "a complete distortion of what transpired at trial" as the State contends. **Response at 9**. The State is now disavowing their position during the oral argument on Mr. Reaves' direct appeal, wherein they described intoxication as the "alternate defense" used by Mr. Kirschner. The State

conceded that it had been used. And as Mr. Reaves's Petition demonstrated, appellate counsel Kirschner's failure to raise on appeal the lower court's failure to allow any expert testimony regarding intoxication and substance abuse at the time of the offense was only one aspect of his deficient performance.

This must be considered by this Court in light of the trial court's failure to allow Kirschner to use the three prior statements and deposition of witness Eugene Hinton and this Court's holding that the failure to admit Hinton's statements was harmless error. Reaves v. State, 639 So. 2d 1, 4 (Fla. 1994). Although appellate counsel 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, he utterly failed to include in his brief or oral argument any aspects of any of Hinton's statements relevant to the intoxication instruction, an instruction that was given based upon his request. **Initial Brief at 30**.

The State argued for harmless error at the direct appeal oral argument about the Hinton statements based on the position that even if they had come in, there was no

reasonable chance that the jury would have decided otherwise. This argument failed to take into account the sections of Hinton's statements quoted at length in the Petition that are relevant and material to an intoxication defense and to the "Vietnam Syndrome" defense about which Kirschner had promised the jury "the evidence will be clear that the survivor behavior in conjunction with his use of narcotics contributed to this accidental killing" (R. 753).

The failure by appellate counsel to insure that the materiality of Hinton's statements to an intoxication defense was established was deficient performance that operated to the substantial prejudice of Mr. Reaves. The failure of appellate counsel denied this Court an adequate context within which to undertake harmless error analysis.

## CLAIM II

## FAILURE TO RAISE ON ORIGINAL DIRECT APPEAL OTHER RULINGS

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). Trial counsel Kirschner objected to the prior violent felony aggravating circumstance and to the Court instructing the jury regarding this circumstance (R. 1829, 1832). Trial counsel conceded the convictions in 1973 were statutory aggravators at the penalty phase. (R. 2300). Appellate counsel Kirschner failed to carry forward his own objections on direct appeal.

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).

The introduction of Mr. Reaves's 1973 Stuart conviction for conspiracy to commit robbery can be found at R. 1830 - 1831, 1838 - 1853, 2251 - 2252, 2275 - 2276,

2279, 2288; and the introduction of the 1973 Vero Beach conviction for grand larceny can be found at R. 1864 - 1871, 2251 - 2252, 2275 - 2276, 2279, 2288.

## CONCLUSION

Mr. Reaves submits that the errors claimed in his Petition and in this Reply demonstrate that he was denied the effective assistance of appellate counsel.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to 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, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401-3432, on March 11, 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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