IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-891

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 appeal involves the denial of Mr. Reaves's Rule 3.850 motion following a limited evidentiary hearing after remand. References in the Brief shall be as follows:

(R.) -- Record on Instant appeal;

(T.) -- Supplemental Record on Instant appeal (Transcripts)

(R2.)-- Record on appeal of 1992 trial

(SuppR2.) –Supplemental Record on appeal of 1992 trial

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Reaves requests that oral argument be heard in this case. 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 stakes at issue.

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STATEMENT OF THE CASE AND OF THE FACTS

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) (R2. 2051-2055). Thereafter, the State dismissed Counts II and III of the indictment (R2. 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 this 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. 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 (R2. 1811, 2320). Thereafter, the trial court sentenced Mr. Reaves to death (R2. 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).

Mr. Reaves filed an initial incomplete Motion to Vacate on February 15, 1996. Mr. Reaves' amended 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 an appeal followed.

Thereafter, this Court remanded the instant case back to Circuit Court for a evidentiary hearing after the summary denial of Mr. Reaves' 3.850 motion, finding that:

> The postconviction court denied Reaves' allegation without an evidentiary hearing despite evidence that his counsel had evidence supporting this defense which he did not present. Specifically, the judge found that voluntary intoxication was not an available defense since the defendant's expert witness testified during a proffer that Reaves was not so intoxicated that he did not know right from wrong. This reasoning obscures the difference between an insanity defense and a voluntary intoxication defense. Insanity is a complete defense if, at the time of the crime, the defendant was incapable of distinguishing between right and wrong as a result of a mental disease or defect. Voluntary intoxication is a separate theory and is available to negate specific intent, such as the element of premeditation essential in first-degree murder. In order to successfully assert the defense of voluntary intoxication, "the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. *Rivera v. State,*

> *717 So. 2d 477, 485 n.12 (Fla. 1998) (quoting Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985)).* Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense. As Reaves' claim of ineffective assistance was legally sufficient and was not refuted by the record, it was error not to afford him an evidentiary hearing on this issue.

Reaves v. State, 826 So. 2d 932, 938-939 (Fla. 2002). An evidentiary hearing was held below in Vero Beach, Florida, on March 4-6, 2003.

Trial counsel Kirschner testified at the evidentiary hearing on March 4, 2003 (T. 13-94). He stated that he was admitted to the bar in November 1984 and had been practicing as a defense attorney for about eight years at the time of Mr. Reaves' re-trial in 1992 (T. 14). He testified that he had never tried a capital murder case prior to Mr. Reaves' (T. 14).

Trial counsel stated that his theory of defense in the Reaves case was excusable homicide, not voluntary intoxication. He also said that he had no recollection of ever discussing voluntary intoxication as a potential defense with Mr. Reaves (T. 16). Kirschner stated that he had prepared for the case by reading the trial transcript of the first trial and by reviewing the discovery that he obtained from prior counsel. He noted that "[t]here were references to cocaine usage throughout those materials" (T. 17). He also recalled that the expert he retained, Dr. Weitz, noted cocaine abuse by Mr. Reaves as part of his diagnostic impression (T. 18). He confirmed that although he requested co-counsel for the Reaves'

trial, that request was denied and he was forced to do the trial by himself (T. 18).

Mr. Kirschner testified about a number of items, both of record and extra-record, that involved Mr. Reaves' drug use and possible intoxication. Defense exhibit 1 was Mr. Reaves' confession, which trial counsel testified he was familiar with and had read prior to the trial (T. 20). He agreed that Mr. Reaves' statement "indicated plenty of times that he was high on cocaine during the time of this incident" (T. 21-24).

Mr. Kirschner then testified that he had been aware that Mr. Reaves had been dating a woman named Jackie Green at the time of the murder (T. 24). He stated that he never interviewed her, and did not recall if she had given a statement to the police or if her home had been searched as part of the Reaves' investigation (T. 24). He stated that he had reviewed all the depositions that the original trial counsel had taken before Mr. Reaves' first trial as part of his own pre-trial preparation (T. 25).[1] Mr. Kirschner was then shown Defense Exhibit #2, an Indian River County Sheriff's Department police report, and Defense Exhibit #3, a 1987 deposition of Detective Mary Lenz (T. 25-26). After he reviewed the police report, Mr. Kirschner recalled that Mr. Reaves had been at Jackie Green's home immediately prior to going to the Zippy Mart where the shooting of the officer took place (T. 27). As to the deposition of Detective Lenz, which included a detailed description of items taken into

[1]The record reveals that Ms. Green's statement was never transcribed and she was not deposed in 1987 or in 1992.

evidence from Jackie Green's house (wine bottle, ashtrays with marijuana residue, marijuana roaches including "one really large one"), counsel testified that although he probably reviewed this deposition he did not necessarily recall the details, other than having had his recollection refreshed that Ms. Green had signed a consent to search and had stated to the police that Mr. Reaves had been in the house by himself after she had left on Monday evening (T. 28).

A taped Sheriff's Office interview of Jacqueline Green (Spencer) was admitted into evidence as Defense Exhibit #17 after Ms. Green (Spencer) appeared in open court at the evidentiary hearing and was released from an Order to Show Cause (T. 454). Trial counsel Kirschner testified he was unfamiliar with the tape (T. 30). He also testified that he never interviewed Ms. Green (T. 24).

During his testimony, trial counsel also identified Defense exhibit #4, a packet of discovery material and police reports from the Dougherty County Sheriff in Albany, Georgia where Mr. Reaves was arrested on September 24, 1986 after the murder (T. 29). He agreed that a document in the Georgia materials stated that Mr. Reaves, after his arrest, was "complaining of head injuries, left eye, and also coming down off cocaine" (T. 29). Kirschner testified that he listened to Mr. Reaves' confession prior to the trial but he stated that he did not recall if he had asked the expert he retained, Dr. Weitz, to listen to the tape (T. 30). He also stated that he did not recall if he had ever listened to the taped statement of Mr. Reaves' girlfriend, Jackie Green (T. 30)(Defense Exhibit #17).

Mr. Kirschner stated that he talked to Mr. Eugene Hinton in the jail and off the record during Mr. Reaves' trial in an attempt to convince him to testify (T. 30). Trial counsel said that during the interview he never asked Hinton any questions about Mr. Reaves' drug use, about whether Hinton was using cocaine with Mr. Reaves, or to what extent Mr. Reaves was doing cocaine (T. 31). He further testified that the excusable homicide defense that he pursued at trial did not preclude developing and using an intoxication defense (T. 31). He agreed that a voluntary intoxication defense would have gone directly to Mr. Reaves' ability or lack thereof to form the specific intent to commit premeditated murder of the deputy (T. 32).

Trial counsel admitted that he never concerned himself with the failure of the crime lab to test the drugs found after the search of Jackie Green's home (T. 32). He agreed that his Defense Exhibit #5, a request for examination of physical evidence directed to the Regional Crime Laboratory at Indian River Community College, failed to include any request for lab testing of the drugs (T. 33). Likewise, he identified his Defense #6, a composite exhibit that included: an agreement between the defendant and the chief detective in Mr. Reaves' case requesting a blood draw for drug testing; an order for the blood draw signed by the judge on September 29, 1986; and documentation that the blood was not taken until October 3, 1986, at which time no alcohol or drugs were detected (T. 33-34). Trial counsel also agreed that lab reports showed that hairs were collected from clothing taken from Mr. Hinton's home and from Mr. Reaves at the

time of his arrest that were deemed to be "suitable for comparison or elimination" (T. 35). He further testified that he was familiar with the testing of hairs for the presence of drugs, and he agreed that if the hairs were those of William Reaves, that they could have been tested for the presence of cocaine (T. 35).

Trial counsel testified that if he had been provided with a copy of the Jackie Green tape during discovery, it would be in his trial attorney file (T. 35).[2] He testified that listening to the tape recording would not help him to recall if he was provided with a copy of the Jackie Green tape by the State prior to the trial (T. 36). Although Mr. Kirschner testified that he interviewed family members and friends during trial preparation as "mitigation witnesses," and that those interviews included questions about Mr. Reaves' drug use after he came back from the war in Vietnam with "a significant drug problem," he stated that he failed to talk to any of the witnesses about Mr. Reaves' drug use at or around the time of the offense (T. 37). He stated that he did not recall if he ever asked his expert, Dr. Weitz, about how "Vietnam syndrome" might interact with the use of drugs (T. 38). He testified that he did not request funds for a neuropharmacologist or any other expert to explain how the drugs Mr. Reaves was using might have affected his behavior at the time of the offense (T. 38).

On cross-examination Mr. Kirschner testified that it was clear

[2]The tape of Jackie Green's police interview was not included in the trial attorney file in the possession of CCRC South, nor has a transcript of the tape ever been provided through the public records process.

to him by the time he finished talking to Eugene Hinton in the holding cell at Mr. Reaves' trial, that Hinton was not going to give any testimony in the case (T. 41). He testified that "if it didn't gut" his excusable homicide defense, his inability to get Dr. Weitz's testimony admitted at the guilt phase "damaged it a lot" (T. 51).

He testified that he failed to object to the State introducing at trial the 4.5 ounces of cocaine found on Mr. Reaves after his arrest in Georgia (T. 51-52). He agreed that during the trial he had asked the undercover police officer in Georgia who had been involved in Mr. Reaves' arrest whether the defendant's appearance was consistent with him being a "crack head" (T. 53). In response to why he did these two things, he explained, "I suppose that I wanted to be able to get the instruction on voluntary intoxication and that would explain both that and the previous failure to object to the introduction of the cocaine at the point of the arrest" (T. 53). He stated that during the charge conference he requested that the jury be given the instruction of the defense of voluntary intoxication "to leave that as an option for the jury, a fall-back position if you will from my primary defense which was excusable homicide" (T. 53).[3]

Trial counsel agreed with the state attorney's characterization that the voluntary intoxication defense required "a complete negation of the ability to form a specific intent" (T. 55). On the specific question as to what that meant in this case, trial counsel testified

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[3]On redirect, after reviewing the trial record on the stand, Mr. Kirschner testified that the trial court actually brought up the possibility of an intoxication instruction, not him (T. 78-79).

that, "[i]f the jury believed that Mr. Reaves was voluntarily intoxicated, that he would not be able to be convicted of first degree murder and have to look at second" (T. 55). Trial counsel agreed that the State never rebutted Mr. Reaves' statements that he was on cocaine at the time of the offense (T. 59-60). He also agreed that the trial judge's sentencing order which rejected the two statutory mental health mitigating factors was a rejection of Dr. Weitz's testimony that both were present (T. 60).

Trial counsel testified that he never even discussed the possibility of using voluntary intoxication with Mr. Reaves, and that he had not investigated the defense to begin with:

> Q Now, the defense that you argued as your primary defense, excusable homicide, that was a complete defense to murder, correct?
>
> A Yes.
>
> Q Meaning, if the jury believed what you were saying, they would find the defendant not guilty?
>
> A That's correct.
>
> Q Whereas voluntary intoxication is an incomplete defense, it excuses first-degree murder -- or lessens it to second degree murder?
>
> A Right. Specific intent.
>
> Q Based on your conversations with Mr. Reaves, do you know if he would have authorized you to concede his guilt to second-degree murder?
>
> A I don't know.

(T. 66-67).

Trial counsel testified that Mr. Reaves' own statement indicated

that he "believed that cocaine was a significant part of the explanation for what happened on the night of the shooting" (T. 68). He also disagreed with the state attorney's characterization that Mr. Reaves' behaviors in escaping from the crime scene by running for miles cross country to Eugene Hinton's house, providing Hinton with an account of the shooting, and managing to evade capture until he got to Albany, Georgia were inconsistent with voluntary intoxication:

> [I]f one looks at DUI videos and you see someone who is intoxicated, or impaired beyond the legal limit maybe two, three, or four times, performing well on physical performance tests conducted at the point of arrest, behavior sometimes is dependent upon the level of intoxicants that are used over time.

(T. 71).

On re-direct trial counsel admitted that he failed to ask any questions concerning intoxication during voir dire and failed to mention it during opening argument (T. 77). Generally, trial counsel testified that his allusions to intoxication during the trial were very minor (T. 78). He stated that Dr. Weitz was never retained as a substance abuse expert and he did not advise trial counsel as to the effects of cocaine on Mr. Reaves at the time of the offense (T. 80). He also testified that he was not allowed to impeach the testimony of Eugene Hinton that was read into the record at the 1992 trial with any of Mr. Hinton's four prior inconsistent statements (T. 82). He testified that he could have presented both excusable homicide and voluntary intoxication defenses in a consistent way if he had prepared them (T. 84). He also stated that the judge of how an intoxication defense is going to work is the jury

in the case (T. 86). He agreed that the jury never heard any testimony from Dr. Weitz at the guilt phase of the case and thus basically never heard anything from the defense arguing voluntary intoxication (T. 88).

After reviewing Defense Exhibit #7 for identification, the Eugene Hinton affidavit obtained by postconviction counsel, trial counsel testified that he just couldn't remember the particulars of Hinton's prior statements and how they compared with what Hinton said in the affidavit (T. 89).

At the evidentiary hearing on March 5, 2003, counsel for Mr. Reaves proffered Eugene Hinton's February 11, 1999 affidavit into the record after the lower court ruled that counsel could not provide a further written statement from Hinton or a personal proffer of counsel's February 26, 2003 meeting with Mr. Hinton in a Tampa Correctional facility (T. 423-426). The lower court had denied the Defendant's February 21, 2003 Writ of Habeas Corpus Ad Testificandum, directed to transporting Mr. Hinton to testify in person at the evidentiary hearing, after the State filed an objection and a hearing was held on February 26, 2003. The lower court's written order was entered the next day.[4]

4Counsel has been unable to obtain a transcript of the hearing. Volume I on the instant record on appeal includes unnumbered computer docket pages for this case. Page 19 of the docket sheets includes the following listings: 12/19/02 Defendant's Witness List; 2/21/03 Defendant's Motion for Writ of Habeas Corpus Ad Testificandum & Motion for Examination of Evidence; 2/28/03 Order on Motion for Writ of Habeas Corpus Ad Testificandum, denied; 3/04/03 Defendant's Motion for Forensic Testing Following Examination of Evidence, denied in open court. None of these items are in the record prepared by the Clerk. A simultaneous Motion to Supplement the Record is being filed

Before Hinton’s affidavit was proffered, the lower court reiterated his reasons for denying the writ of habeas corpus ad testificandum:

> THE COURT: I did it because he didn't testify at the second trial, and I accepted the State's argument that it wasn't relevant to this action. Also, during this hearing all of your experts have testified that they read the affidavit of Mr. Hinton and formed opinions based on that and other documents, and if they hadn't had the affidavit, it wouldn't have affected their opinions one way or the other. It's becoming less and less relevant as we go through the witnesses.
>
> I think your expert witnesses have communicated their opinions as, they looked at it, relied on it, even without relying on it, their opinions would have stayed the same. I don't see where there is any relevance beyond maybe if you want to proffer the affidavit. I think that would probably be sufficient for making a record that I didn't allow him to testify and this is what he would have testified to for any appellate issues that would come up.
>
> I don't think we need to go over and get a sworn statement from him and proffer that statement. I think his affidavit would be fine as a proffer. You can mark it and you can read it into the record, if you want to.

(T. 423). The Court then stated that the State was not contesting that Mr. Reaves' was a drug addict, but rather if he was voluntarily intoxicated at the time of the commission of the crime (T. 424). The affidavit was read into the record and it included Mr. Hinton's comments relevant to a potential voluntary intoxication defense:

> 3. Fat and I sold drugs together between Gifford and Tallahassee. On our trips, Fat

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with this Initial Brief including these and other relevant and material items that were not included in the instant record on appeal.

> would shoot up and smoke drugs. We had been to Tallahassee the weekend before this happened. I saw Fat the night this happened. He said he was going to his girlfriend's house to chill out. I believe that meant that he was going to do drugs.
>
> 4. Fat, he used drugs sometimes he would start to talk about what happened over there and would take off running.
>
> 5. Fat came to my house after the police got shot. He was scared and thought people wanted to kill him. Fat was all strung out. He had been smoking crack and pretty much out of his head. He was real scared. I have never seen Fat violent with anyone but that night, he would run away from a fight if he could.

(T. 425-426).

Trial counsel testified at the evidentiary hearing that information from an expert neuropharmacologist would have been helpful to him in preparing a voluntary intoxication defense (T. 89). He agreed that Dr. Weitz's examination at trial did not rule out voluntary intoxication, but mixed apples with oranges by confusing the voluntary intoxication standard with the M'Naughten insanity standard (T. 90-91).

Dr. William Weitz testified at the evidentiary hearing on March 4, 2003 (T. 95-158). He testified that he is a licensed psychologist in Florida, with a specialty in clinical psychology and a focus on post-traumatic stress disorder (PTSD) and military psychology (T. 95). He stated that he worked on Mr. Reaves' case prior to the first trial in 1987, but testified only at the 1992 proceedings after being retained by Mr. Kirschner (T. 96). Dr. Weitz testified that he had worked with defense counsel Clifford Barnes in the 1986-1987 timeframe but was not never called to testify

because he determined that Mr. Reaves was competent and sane (T. 98). He stated that when Kirschner contacted him in 1992, he conducted a second evaluation and came up with dual diagnoses of anti-social personality disorder (ASPD) and cocaine abuse/polysubstance abuse (T. 98-99). He stated that he also opined on the presence of PTSD in Mr. Reaves' case (T. 99). Dr. Weitz testified that Kirschner developed the excusable homicide defense based on Dr. Weitz's "findings and []psychological perceptions of the events that took place on the date of the offense" (T. 99).

Dr. Weitz confirmed that the jury at the guilt phase did not hear his testimony, but that Mr. Kirschner proffered the testimony before the court (T. 101). He opined that once the trial judge denied the jury the opportunity to hear his guilt phase testimony, the entire defense was gutted because "it was clear in my mind that the case was done...that the whole basis of the defense rested with an understanding of the variables and human factors that are associated with combat training and combat behavior" (T. 102).

Dr. Weitz testified that although he was never asked to do so, he could have testified at the 1992 guilt phase regarding a voluntary intoxication defense (T. 103). He detailed what his testimony would have been if he had been asked by trial counsel to so testify:

> I would have specifically looked at the way, the type of drugs, specifically cocaine, combined with alcohol - beer is alcohol as well - beer/alcohol combined with cocaine, the way that affects human intellectual process, judgment, reasoning, perception, decision making, problem solving, the increase - I know

> this from interviews - the fact that cocaine increases suspiciousness and paranoia for the defendant, the fact that it impairs judgment and reasoning, that it certainly minimizes effective cognitive processing and problem solving, especially with the length of time both over the years and the amount of time during that day that the individual had been using the substances, that alone would traumatically affect his behavior to form intent and things of that nature. Certainly, there were critical factors, and I would have been able to discuss those as well.

(T. 104-105). Dr. Weitz testified that based on his interviews in 1992 and before, it was his opinion that Mr. Reaves was unable to form the specific intent to kill on the night of the incident (T. 105, 110). He further testified that his testimony about "Vietnam Syndrome" behaviors would have supplemented and completed the picture of Mr. Reaves' behavior on the night of the offense:

> But, the critical factor then says, given that drugs and alcohol impact, and the fact that we know there's a co-morbidity of 80 to 90 percent between heavy drug use in combat veterans and the stress disorders they experience. One of the behaviors would typically -- Given the judgment, reasoning, perceptual distortions that take place, what behaviors typically occur, or fill the void when those functions are impaired, and in that case they are well conditioned, well learned, highly automated behaviors, survival behaviors which fill the gap and which allow veterans to survive, and that's exactly the kinds of behaviors that the defendant exhibited on that evening.
>
> Together, it would complete the process, although certainly I could describe the alcohol/drug effects independently, but here it helps to explain the kinds of behaviors that took place in addition to the impairments.

(T. 106). Dr. Weitz also offered his opinion that the personality disorder, ASPD, that he identified in his diagnosis of Mr. Reaves had

nothing to do with Mr. Reaves' behavior on the night of the murder (T. 108).

Dr. Weitz testified that the altered perception and behavior that Mr. Reaves was experiencing at the time of the offense, associated with his stress syndrome, was impacted by his concurrent drug use:

> When you're talking about adding on with that reality cocaine, which impairs we know his judgment, increases his paranoia and suspiciousness, alters his clarity of perception and thinking, that intensifies exponentially the inability for him to make reasonable and rational judgements at that time, and to accurately assess the situation. It just compounds the events dramatically.

(T. 115). Dr. Weitz stated under oath that he did have information in 1992 that would have assisted him in forming an opinion about voluntary intoxication, including family interviews and Mr. Reaves's "whole pattern of alcohol and drugs use for many years" going back to his military service (T. 116). He also agreed that it would have been helpful to have had the assistance of a neuropharmacologist in preparing any 1992 testimony about intoxication because "it certainly helps understand the levels he was taking, the frequency, chronicity, the interaction of drug use, and just the fact that this was the severity and complexity of the problem" (T. 117).

On cross-examination Dr. Weitz was asked repeatedly about his understanding of specific intent and specifically about Mr. Reaves' ability to form the intent to kill Deputy Raczcowski. He testified that his opinion was that the killing "was not a preplanned, reasoned, or intended act," because:

> At the time that behavior took place, the level of his reasoning, judgment, perception was so impaired that any decision that he would make would be impacted by the conditions he was under, specifically, cocaine and beer at the time, so that there was great distortions and alterations of his judgment, perception, and reasoning. So under those conditions, whatever he decided to do was affected by those conditions.

(T. 121). In response to the State's question, "he decided to shoot the police officer?", Dr. Weitz specifically disagreed:

> That, I did not say. No. What I said was, he was aware of who he was shooting and, basically, because of the perceptions that he had at the time, the way in which his judgment, perception, and reasoning process, that he perceived that once the officer was fearful of losing control and his life was at risk, and then he responded in a very conditioned, automated, survival means, which meant retrieving the weapon and getting off the shot before the officer did, which he believed was a threat to his own life.
>
> Now, if you interpret that as deciding to shoot -- It was a reactive, well-conditioned pattern of behavior based upon how his judgment, perception and reasoning were operating, which I already testified, were greatly impaired. But, if you want to define that as decided, that's your word, I wouldn't use that word.

(T. 135-36). The State also asked Dr. Weitz questions about his diagnostic impression of ASPD concerning Mr. Reaves (T. 122). Among other criteria for ASPD that Dr. Weitz read into the record from DSM IV, at the request of the State, was that the individual displayed evidence of conduct disorder prior to age fifteen in three of seven areas (T. 123). Dr. Weitz confirmed that in a deposition he had testified that Mr. Reaves told him that he smoked and snorted one and

three quarter grams of cocaine on the day and night of the murder and also told him he was drinking beer (T. 132). Dr. Weitz specifically disagreed with the State's line of questions inferring that the florid detail in Mr. Reaves' confession was inconsistent with being too impaired to form specific intent to kill:

> My testimony is that every detail surrounding a potentially life-threatening event, when he felt his life was at risk, would have a higher probability of being accounted for accurately. Every perception, and every event around a life threatening situation can mean life and death.
>
> At that moment in time I would basically say that the details he was presenting have a great probability of being accurate. However, I am also suggesting that, generally, cocaine, beer, alcohol contribute to impaired reasoning, impaired information processing, paranoia, and suspiciousness, which were operating here, paranoia and suspiciousness, but the irony is, the details at the exact moment of the risky situation. Ironically, in those settings, his memory is improved because they become critical to survival.

(T. 142). Dr. Weitz opined that avoidance of incarceration provided a grossly insufficient motive for Mr. Reaves killing the officer (T. 153). Dr. Weitz, a psychologist, had earlier testified that when he worked on this case in 1992, he did not believe that Mr. Reaves had all the criteria for PTSD, but he also testified that he had done no further active evaluation of Mr. Reaves since 1992 (T. 136). Dr. Weitz was not asked on direct or cross for a current opinion of Mr. Reaves' PTSD status, but he did testify that "[i]n the 15 years since the initial trial, there have been revisions of the MMPI, and there have also been some new procedures for assessing trauma, traumatic stress, which if I were doing it today, I would utilize to either

confirm or modify my initial finding" (T. 136-37). Weitz stated that he did not diagnose PTSD in 1987-1992 "because I felt that some of the very fine, discrete conditions were not met at that time" (T. 137). He also pointed to his MMPI personality testing as one reason for his failure to diagnose PTSD in 1992. He indicated that the scale he utilized did not indicate a pattern indicative of PTSD (T. 136).

Dr. Richard Dudley testified on March 4, 2003. He stated that he is a medical doctor based in New York City specializing in psychiatry (T. 159). He further testified that he interviewed Mr. Reaves at Union Correctional Institution on December 9, 2002, and also reviewed the background materials concerning Mr. Reaves' case that were introduced as composite Defense Exhibit #9 at the hearing (T. 162-63). He testified that pursuant to the order of the lower court, he had provided a report concerning his evaluation and findings, introduced at the hearing as Defendant's Exhibit #10 (T. 164). Dr. Dudley testified that his opinion is that at the time of the offense Mr. Reaves was suffering from polysubstance abuse, Post Traumatic Stress Disorder and that on the night of the crime he was intoxicated with cocaine (T. 165-66).

Dr. Dudley's report and his testimony indicate that he did not diagnose Mr. Reaves as suffering from Anti Social Personality Disorder (T. 166). He also testified that his review of the trial testimony of the state's psychiatric expert, Dr. Cheshire, indicated that Dr. Cheshire failed to diagnose Mr. Reaves in 1992 as suffering from any psychiatric disorder, including ASPD (T. 167). Rather, Dr.

Dudley testified that Dr. Cheshire found an "adult anti-social personality behavior" in Mr. Reaves, which Dr. Dudley described as "a way of describing bad behavior in adults" (T. 168).

Dr. Dudley responded to a series of questions concerning what significance the background materials he was provided had with regard to forming his medical/psychiatric opinions concerning Mr. Reaves. He noted that Mr. Reaves' September 25, 1986 confession and the trial testimony of Eugene Hinton as noted in the appellate opinion were of significance (T. 169-70). He recalled that in the confession, Mr. Reaves "repeatedly mentioned that he was intoxicated at the time [of the offense] and that the amount of cocaine that he had taken was having an impact on his behavior, and he described that in various ways" (T. 170). He also testified that he reviewed the affidavit of Eugene Hinton that was included behind tab 14 of Defense Exhibit #10, and he affirmed that the information in it differed substantially from the account of Hinton's trial testimony in the appellate opinion provided:

> The difference is his affidavit is in contrast to his earlier testimony, that he indicated that Mr. Reaves' mental state was dramatic, and he gave very different accounts of him being high, a very different sort of mental state that was given in the testimony, and also he even, as a general matter, described Mr. Reaves differently in the affidavit that he did in the testimony.

(T. 173). Dr. Dudley also testified that after he submitted his own report, but before his testimony at the evidentiary hearing, he had the opportunity to review the reports of Dr. Thomas Michael Hyde, Dr. Erwin R. Parson, Deborah V. Mash, Ph.D, and Barry Crown, Ph.D. (T.

174).[5] He stated that while his opinions concerning Mr. Reaves were not changed by his review of the other expert reports, he believed that the reports supported the opinions in his own report (T. 175).

Dr. Dudley testified that an analysis of the illegal substances confiscated from the home of Mr. Reaves' girlfriend Jackie Green would be useful in supporting his opinions (T. 176). He also agreed that the September 25, 1986 "injured inmate report" from Georgia, created after Mr. Reaves' arrest, indicated that Mr. Reaves reported that he was "coming down off cocaine" (T. 176). Dr. Dudley stated that this information supported his diagnosis of chronic polysubstance abuse (T. 177). He testified that he reviewed the background materials provided by postconviction counsel including affidavits and a pre-sentencing report concerning Mr. Reaves (T. 178). Dr. Dudley stated that he believed that Mr. Reaves suffers from depression, associated with his PTSD, which is clinically significant and which might require medication if Mr. Reaves were a private patient (T. 180-81). His interview of Mr. Reaves and review of materials resulted in Dr. Dudley's conclusion that "[Mr. Reaves] never was given the benefit of therapeutic intervention that would have addressed both the substance abuse problem and other psychiatric problems, which would have been required to have some sort of successful psychiatric intervention" (T. 182).

5All the expert reports were provided to the State and the lower court through a Notice of Filing on January 31, 2003. That Notice and the attachments were not included in the instant record, but are included with the aforementioned Motion to Supplement the Record also being filed today. The State’s expert did not file a report.

Dr. Dudley explained in some detail the reasons that he did not think Mr. Reaves met the criteria for adult anti-social personality disorder under DSM IV (T. 182-186). He found no evidence of conduct disorder prior to age fifteen and opined that there was evidence in the literature supporting racial bias in assigning a diagnosis of ASPD when "it is often quickly applied in situations where evaluators that are faced with people who have been charged with different sources of criminal behavior, as if that's the diagnostic criteria" (T. 185). He explained what he needed in order to make such a diagnosis:

> [Y]ou're required to see a significance in terms of conduct, going back to the childhood years. Because for the diagnosis of a conduct disorder, you're expected to see children at seven, eight or nine begin to exhibit conduct disturbances. You are required to see the anti-social behavior by the time that they are early adolescents, and then that continues to become a part of who they are. You can't make the diagnosis until somebody is 18 because it's an adult diagnosis. You expect the behavior to be fixed.

(T. 186). Dr. Dudley also testified that his report reflected his opinion that Mr. Reaves developed a post-traumatic stress disorder as a result of his service in Vietnam (T. 187). He summarized the basis for his findings regarding PTSD in his testimony:

> It's my opinion, based on that body of information, that [] his experiences in Vietnam were certainly of the type that could result in the development of post traumatic stress disorder, that as he talked about how he experienced those experiences at the time, that he described that in a way that's consistent with what I see in people who develop post traumatic stress disorder, having been so traumatized, and then he described a collection

> of symptoms that were consistent with symptoms described by others who had observed him long before this incident. And those symptoms, collectively, I felt met the diagnostic criteria of post traumatic stress disorder.

(T. 187). Dr. Dudley testified that he reviewed Dr. Weitz's MMPI results along with other MMPI results from Mr. Reaves' prison records (T. 171, 186-87). Based on his own clinical findings, and comparisons to the prison MMPI scales, Dudley's view was that Dr. Weitz's interpretation of the MMPI scale elevations was incorrect, both as to supporting an ASPD diagnosis and as to not supporting a diagnosis of PTSD (T. 188). Dr. Dudley testified that his opinion was that "based on clinical examinations and the impressions of physicians who had examined him and administered those [earlier] tests" the scale elevations were "more reflective of high levels of anxiety, distress, worry, and some sort of reaching out for assistance...viewed in the context of their clinical interpretation about what was going on" (T. 188).

Dr. Dudley testified that he was practicing psychiatry in 1992 and would have been available to do forensic work at that time (T. 191). He stated that he would have been able to testify in 1992 as to his opinion as stated in his report, namely that Mr. Reaves was acutely intoxicated with cocaine at the time of the offense, September 23, 1986, and was unable to form the intent to kill Deputy Raczkowski (T. 191). He further described his opinion as to intent:

> It's my opinion the combination of the effect of the acute intoxication of cocaine on him and as it interacted with his other psychiatric difficulties [PTSD and depression], that his actions were simply reflexive [rather] than

> thought through decisions when he took that action.

(T. 191-92). On cross-examination, Dr. Dudley testified that testing of the marijuana found at Jacqueline Green's home would be relevant to his opinion because Mr. Reaves had described "various routes of administration" of cocaine to himself on the day of the offense, "including chopped up, and mixed with, and smoked with marijuana" (T. 197). The State asked Dr. Dudley if he had seen any evidence in this case "that contested the defendant was using drugs on the day of the event, any testimony, anyone who suggested that he wasn't using drugs?" (T. 198). Dr. Dudley responded that Eugene Hinton's trial testimony could be interpreted to mean that Mr. Reaves was not engaged in substantial use of drugs (T. 199).

On re-direct, Dr. Dudley affirmed that his review of the background materials indicated that Mr. Reaves was honorably discharged from the military service (T. 221). He also testified that he had reviewed Dr. Weitz's pre-trial deposition and 1992 trial testimony (T. 221). He testified that Dr. Weitz was equivocal in the deposition about what, if any, drug use Mr. Reaves had reported engaging in prior to military induction (T. 222). Dr. Dudley further testified that he recalled that Dr. Weitz had stated in his deposition that Mr. Reaves first reported "bad dreams" to him in a December 1986 interview, but later denied "nightmares" in a January 1987 interview (T. 223). As to these alleged inconsistencies that State tried to implicate in Dr. Weitz's 1992 deposition: the onset date of Mr. Reaves' substance abuse and whether he used heroin, and

when and whether Mr. Reaves reported "nightmares" or "flashbacks" that might be symptomatic of PTSD, Dr. Dudley then testified that:

> Again it was unclear, so we spent some time talking about this to try to clarify this, as well as the third issue which is raised by this, the issue about whether he has any sort of thing that could, in fact, be a flashback or whatever. So we spent some time on that as well.

(T. 223). To summarize, Dr. Dudley opined that Mr. Reaves was intoxicated at the time of the offense and unable to form specific intent. He also diagnosed PTSD, depression, and polysubstance abuse, but ruled out ASPD diagnostically.

Dr. Barry Crown, a Board certified neuropsychologist, testified at the evidentiary hearing on March 5, 2003. (T. 238-269). Dr. Crown testified that another psychologist, Dr. Ruth Latterner, had originally been retained by postconviction counsel, but she retired from the profession without writing a report or testifying in Mr. Reaves' case (T. 241). He stated that he was first retained to obtain and review her raw data, then asked to review three volumes of background materials and to perform his own evaluation and testing, which he did on February 5, 2003 (T. 241).

On direct examination he testified as to his findings, based on his review of materials, clinical interview, and neuropsychological testing battery:

> My findings indicate that Mr. Reaves does have organic brain damage. It is primarily anterior, it is bilateral, meaning it involves both left and right hemispheres of the brain, but predominant to the left hemisphere, which is his dominant hemisphere since he is right-handed, and that the areas are defused in

> frontal temporal subcortical.

(T. 243). He offered his opinion as to how this brain damage, if present, would have affected Mr. Reaves at the time of the offense:

> He has an underlying condition [brain damage]. As a result of that condition, stressors such as drugs, alcohol, lack of sleep, generalized stress, depression, anxiety, and so on, will have a greater affect on him. And in addition, as a result of the underlying condition, a smaller amount of substance has a greater affect.
>
> * * *
>
> In a heightened situation, he would have difficulty with concentration, with attention, with understanding the long-term consequences of immediate behavior, which in a sense is forming intentionality, or direction, instead would act in a rather impulsive way.

(T. 244-45). Dr. Crown testified that he had significant expertise in working with substance abuse, and among other professional qualifications, is a certified addiction specialist (T. 246). He testified that his evaluation indicated that Mr. Reaves had a long term cocaine abuse problem (T. 247). He would have been available to testify in 1992 (T. 247). He testified that his findings were consistent with Dr. Latterner's raw data from 1999 (T. 249).

Dr. Crown testified that he did have an opinion as to the issue of whether Mr. Reaves was able to form specific intent at the time of the offense:

> That he was not able to do so. In neuropsychological terms, he has damage in an area that relates to understanding the long-term consequences on immediate behavior that would be further aggravated by substance use and abuse, and as a result would not have been able to, his behavior would have been impulsive. Other people in their wisdom would attempt to ascribe purposefulness to that type

> of behavior and attentionality. That's much in the same way that we attempt to make sense out of a dog running out in the back yard to bury a bone. We do it simply by looking at it and wanting to ascribe behavior and purpose to something that is impulsive.

(T. 250). On cross-examination Dr. Crown testified that the etiology or source of the brain damage that he identified in Mr. Reaves is unknown, but that it could have resulted from a head injury or from Mr. Reaves' use of drugs (T. 259). Dr. Crown also testified that the ASPD criterion in the DSM should not be used when diagnosing a person with underlying brain damage (T. 263). Finally, Dr. Crown agreed that "on a chemical and cellular level" a neuropharmacologist might be a better expert to talk about the affects of cocaine on Mr. Reaves on the night of the offense (T. 269).

Dr. Deborah C. Mash, Ph.D., a professor of neurology and molecular cellular pharmacology at the University of Miami School of Medicine, testified on March 5, 2003 (T. 270-335). She testified that she does not have a clinical practice (T. 271). She stated that she had published in different areas, but affirmed that "[o]ne of my primary areas of interest is substance abuse and dealing with the affects of cocaine" (T. 273). She then testified that she interviewed Mr. Reaves on November 22, 2002 for about two hours, using an instrument called Addiction Severity Index, 5th Edition (T. 274-75).

She testified that Mr. Reaves' counsel had provided her with background material to review, then she described what was important to her in that material for purposes of forming her opinion, and she

also provided a brief sketch of Mr. Reaves' substance abuse history from his teen years until 1986 (T. 275-85). Dr. Mash pointed out that the date of the offense in this case, 1986, had some independent historical significance for her:

> At 1986 is when the face of cocaine changes radically in the United States. It switches from powder, from Miami Vice where everybody is using recreational cocaine to crack cocaine abuse, which changes the entire face of this epidemic. In 1986 we see the largest number of deaths in Dade County, that's sort of the curve of the whole epidemic. We also see a large increase in violent crime related to cocaine, et cetera. So, it was very plentiful throughout.

(T. 279). Dr. Mash testified that her source of information about Mr. Reaves' drug use at and around the time of the offense was from Mr. Reaves and from the postconviction affidavit of Eugene Hinton (T. 280). She opined that at the time of the offense "[Mr. Reaves] was definitely in the state of voluntary intoxication and would not have been able to form the intent to commit murder" (T. 293). She described her opinion as to his physiology at the time of the offense: "Fully intoxicated, fully paranoid, fully neuroadapted to the cocaine, no frontal lobe functioning, basically shutting down the frontal lobes which would get him out of trouble, and he is now in this heightened state" (T. 292). In her testimony, Dr. Mash described how Mr. Reaves use of drugs and alcohol impacted on the offense:

> This was his pattern. On that day he started using again, his daily pattern of use, start smoking first thing in the morning. He then goes, has his drugs with him, brings his

drugs over to his girlfriend's house, Jackie Green, stays at the house continues to use, waits for her, she doesn't come home. He is running out of his drugs and starts to do a cocaine Jones.

Understand, when you do a cocaine Jones, if you see these individuals, which I have close up and personally, there's nothing that will stop you from going out there and getting that drug. In this case, he has the drug. So what he needed to do was to travel to get his stash of cocaine.

Q Which was at his mother's house?

A Yes. I believe so. That means miles away. That's why he required some kind of transportation to get there, which was the reason why he made the phone call, at that time a cab, to transport him to that place.

He describes himself as being fully wired. What does that mean? What is cocaine wired mean? Individuals who use cocaine when you start out you use cocaine because you like the way it makes you feel. You feel alert, you feel happy, you feel up, you got a buzz, you feel very stimulated by your environment.

He, as described by his friends and himself, wasn't there anymore. This was the kind of person who would go and just sit for hours, after hours, after hours, hitting that pipe by himself alone, in a state of full cocaine paranoia, and this is what happens. When the brain neuros adapt you don't even get the pleasurable effects anymore, you go straight to a paranoid state of mind. In that paranoid state of mind - this is really bizarre to watch - and this is what he did every day, stayed in that state, fully hyperaroused, completely paranoid, completely wired. He then goes, of course, to that place, makes a phone call in that state, and that's when he encounters --

Q As a lay person standing here, I just think, how does a person function in that world for years at a time?

A It's amazing to me. It's something that has occupied ten years of my life, to try and understand it. It's a fully distorted

> state of reality. They have hallucinations in that state, auditory hallucinations, visual hallucinations, they hear voices, they get ringing in their ears.
>
> * * *
>
> So in that state, you are fully altered. It is the most intense level of cocaine dependence and altered cocaine sensorium. It is not normal perception of the universe around you.

(T. 282-85). Dr. Mash offered her opinion that Mr. Reaves was a polysubstance abuser, that he met the clinical criteria for depression, and that at the time of the offense was intoxicated, paranoid and fully delusional, all "due to the effects of a severe amount of cocaine abuse" (T. 285-86). She analyzed the impact of that chronic abuse and the resulting acute cocaine intoxication on the night of the offense on three different neurotransmitter brain chemicals: dopamine, serotonin and epinephrin (T. 286-92). She testified that with all three of these chemical systems in an altered state, the result would be that Mr. Reaves was "paranoid and delusional with the dopamine, fully depleted and probably in a kindled panic state with the serotonin, and then the epinephrin full throttle, he's hypervigilant" (T. 288). She explained that when Mr. Reaves was in the state of heightened cocaine arousal:

> [T]hey do not have the ability to delay reaction time. That's what the frontal lobes do.
>
> The frontal lobes of our brain is what we call the executive function of the brain. Those of us that function well in society, have well developed frontal lobes. It's the ability to take information from all the senses, hold it upstairs in working memory and look at it. I am not going to die. I can deal with this. But you need to be able to delay. You need to have all that information upstairs in the

> frontal lobes so you can evaluate that set of circumstances and not go on limbic overdrive and react.
>
> In essence, this is what happened. He didn't have a front lobe to engage. Substance abusers do not have frontal lobe functioning. This has been shown over, and over, and over again. We study it over, and over, and over again. Not only that, he has, neurologically speaking, frontal lobe dysfunction, that's documented in the here by some of your experts.

(T. 289-90). Dr. Mash testified that she would have been available to testify in 1992 and stated that her testimony would not have significantly differed from her testimony at the hearing (T. 292).

Finally, Dr. Mash testified that she was familiar with the fact that several of the other experts have diagnosed Mr. Reaves with PTSD (T. 296). While she did not hold herself out as an expert on PTSD, she testified that Mr. Reaves presented a classic PTSD profile, akin to the classic cocaine dependency profile she found (T. 298). She offered her opinion that if you have PTSD, the worst thing you can abuse is cocaine (T. 300).

On cross-examination, Dr. Mash agreed with the state attorney that nothing in the case rebuts or questions whether Mr. Reaves was a chronic drug abuser at the time of the offense (T. 308). She agreed that her diagnostic impression that Mr. Reaves was in a cocaine psychosis at the time of the offense differs from Dr. Weitz's testimony at the 1992 trial that Mr. Reaves knew right from wrong at the time of the offense (T. 310). She testified that Mr. Reaves told her that during the day of the offense, he ingested ten grams of cocaine (T. 313). She stated that she believed that Mr. Reaves' statement to Dr. Weitz, as reported by Weitz in his deposition, that

he ingested one and three quarters grams of cocaine during that day has to be considered in the proper context, which is unclear from the Weitz deposition (T. 314). She testified that Mr. Reaves did tell her he smoked cocaine mixed with marijuana as well as free base style (T. 314). Dr. Mash also testified that her review of Mr. Reaves' confession revealed evidence of amnesia and not exquisite recall (T. 316). On redirect she agreed that the confession could have been impacted by confabulation (T. 334). Dr. Mash discounted much of the "detail" in the confession as an attempt after the fact by Mr. Reaves to make sense of what happened, 48 hours after the offense, when he has "crashed off the cocaine, [and] he's had time to reflect on this, think about what happened" (T. 324).

> What I see is an individual who is severely drug dependent. I see a pattern of drug abuse that was not significant prior to going to Vietnam. Many people were using drugs in the 60s, lots of them, and they are not using drugs today. Many people were exposed to marijuana and various things in the 60s. They are in various high places in society, paying taxes, not in jail. We know this.
>
> He goes in, he enlists. He does see active duty. I know there's a lot of testimony in this thing about how much he really saw and whether they were in Cambodia or not, and all those things. To me that's irrelevant. He sustained trauma while in Vietnam. There's no doubt in my mind about that. God only knows what was going on over there. He started being exposed to the drugs and that eventually brought him here today, while in Vietnam.
>
> That night that officer was very kind to him. This was a horrible thing that happened. There's no doubt about it, a man is dead. But this was cocaine. This was cocaine. He did not need to pick up that gun and do that.

(T. 327).

Dr. Erwin R. Parson, Ph.D., testified at the evidentiary hearing on March 5, 2003 (T. 335-410). He identified himself as a professor of psychology and a clinical psychologist. He indicated that he was first contacted about Mr. Reaves' case by CCRC in 1995 (T. 336). He also testified that he is board certified in clinical psychology and psychoanalysis (T. 337). Dr. Parson also stated that he is a Vietnam veteran, having served in Vietnam as a medic in the United States Army in 1966-67 (T. 338). Dr. Parson then detailed his background of professional work as a psychologist with the veterans population, beginning in 1978, and later, beginning in 1981, as a manager of 23 clinics for the Veterans Administration (T. 339). He explained that his work involved treatment of veterans with psychological problems, including PTSD (T. 339-40). He stated that at present he is employed as a clinical psychologist at two different Veterans Administration clinics in Maryland, where he deals with a variety of clinical problems the veterans present, including PTSD, substance abuse, and other psychiatric disorders (T. 340).

Dr. Parson then identified the three volume set of background materials provided to him in the instant case by defense counsel, and acknowledged that he had reviewed them (T. 342). He also stated that he met with Mr. Reaves three times in the course of his evaluation, prior to preparing his court-ordered report, Defense Exhibit #14 (T. 342-43). Dr. Parson also noted that he did have the opportunity after completing his own report, but before his testimony, to review the reports of Dr. Dudley, Dr. Hyde, Dr. Mash and Dr. Crown. He advised that nothing in those reports changed the

opinions he expressed in his own report (T. 345).

Dr. Parson indicated that he also reviewed the deposition and testimony of Dr. Weitz, the defense psychologist who had been retained at the prior proceedings in Mr. Reaves' case (T. 346). He indicated that he had been aware of Dr. Weitz professionally, but had no prior personal relationship with Dr. Weitz (T. 346).

Dr. Parson testified about the basis for his opinion that Mr. Reaves did present with PTSD. He indicated that his diagnostic approach from 1995 on took into account DSM IV criteria, and explained in some detail the four specific war-zone stressors that in his opinion met criteria A for the PTSD diagnosis (T. 347-48).

> The important criteria for criteria A is that the event is threatening to the individual, threatening to his life or her life, to his or her physical integrity, each of these stressors do at least that. The first one I mentioned -- One of them I mentioned is, of course, the U-shaped ambush, which we heard about before in previous reports, and the amount of stress that particular event brought to bear upon his psychological functioning at the time, and that in itself would reach criteria A very easily.
>
> In addition to that, it was just the day-to-day exposure to uncertain terror, counter terror from very determined enemies who wanted to kill him, and how to deal with it, what was necessary to survive, to protect your friends, and to continue to complete the mission.

(T. 348). Dr. Parson indicated that the primary source for finding the presence of this stressor was his in-depth interviews with Mr. Reaves and the corroboration from the testimony of his war buddies from the prior proceeding (T. 349). The other stressors he found involved: Mr. Reaves' contact with a North Vietnamese enemy soldier

whom he initially assumed was a "Kit Carson scout" for the American forces; Mr. Reaves' medical problems connected to contracting a venereal disease; and, the death in his arms of a white soldier comrade of Mr. Reaves (T. 349-52). He further testified that he was practicing psychology in 1992 at the time of Mr. Reaves' trial and would have been available to testify that Mr. Reaves met the criteria for PTSD under the DSM-IIIR that was used in the field until DSM IV was published in 1994 (T. 353-55).[6] Dr. Parson testified that, pursuant to his report, in his opinion all the necessary criteria for him to diagnose Mr. Reaves with PTSD today or in 1992 are met (T. 355).

Dr. Parson testified that his conclusions and opinions in this case were based in part on Mr. Reaves' performance on the testing instruments that he administered during his three contacts with Mr. Reaves (T. 356-381). Dr. Parson testified that it is very difficult to find PTSD without depression (T. 364). He stated that on the Beck Depression Inventory he administered to Mr. Reaves, the defendant's score was in the moderate to severe range of depression (T. 365). Dr. Parson also administered the MMPI-2, which he described a "a very well known instrument, widely used as a measure of clinical syndromes, symptoms, and personality function" (T. 365).

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[6]"[T]he person has experienced an event that is outside the range of usual human experience that would be markedly distressing to almost anyone, e.g. serious threat to someone's life or physical integrity, or harm to one's children, spouse or close relatives and friends, sudden destruction of one's home or community, or seeing another person who has been or is being seriously injured or killed as a result of an accident or physical violence."

Dr. Parson did not interpret his MMPI-2 results to indicate that Mr. Reaves suffers from ASPD (T. 366). He testified that the scales that were elevated on the MMPI-2 he administered to Mr. Reaves, scales two and eight, were the scales that he has found to be elevated in the clientele of veterans he has treated for PTSD (T. 366).

On the question of malingering on test instruments, Dr. Parson testified that he used multiple test instruments in the same areas of inquiry because "[o]ne instrument is not enough" (T. 367). He testified in great detail about the administration of multiple instruments, all of which indicated that Mr. Reaves was within the range for PTSD. These included the Mississippi Scale for Combat-related PTSD, the Clinician Administered Scale of PTSD for the DSM IV, MMPI-2 subscales PK and PS, the War Zone Related PTSD Scale, Post-Traumatic Stress Disorder Diagnostic Scale, Impact of Event Scale, Revised, Assessing Post Traumatic Association - A Structured Clinical Interview of the DSM-IV - Associative Disorders, and the Dissociative Experience Scale (DES).

Dr. Parson agreed that for a diagnosis of PTSD, DSM-IV requires that the traumatic event or stressor in criteria A be re-experienced, and that one of the ways that DSM-IV can be met is dissociation:

> A Yes. Disassociation is usually seen in persons reliving an experience. For example, it's not unusual for a victim to be hearing a sound, or some smell, or some other sensory experience that takes them back to the original trauma. They become extremely terrified, threatened, lose control, lose a sense of being.

> Q Do you think that particular circumstance was in action at the time of the offense in this case?
>
> A Yes. Indeed.
>
> Q That's what is reflected in your report?
>
> A Yes.

(T. 377). Dr. Parson testified that he was not a lie detector, but he stated that his own Vietnam experience helps him to establish trust and rapport with Vietnam veterans like Mr. Reaves, and that his own opinion was that Mr. Reaves was telling him the truth (T. 383-84). Dr. Parson explained his opinion concerning Mr. Reaves' lack of intent to kill as follows:

> Q You also mentioned in your report, again you put in quotation marks, you talk about from your perspective, it's not really a case about voluntary intoxication, it's involuntary intoxication. I think you are sort of using that to make a point. Explain what you mean by that.
>
> A People who have been traumatized experience - they don't always notice - a certain basic change in their personality, a basic change in how their brain works. What the individual is confronted with for the most part is a lot of hyperarousal.
>
> Hyperarousal contributes to the sense of being vulnerable. So anything that's going to help dampen hyperarousal, for instance substance, alcohol, drugs, avoidance, overworking, a person will do to be able to survive, to allow conscious life to go on.
>
> Q So would it be fair to characterize your opinion as expressed in your report, that around 3:00 in the morning of September 23, 1986 the combination of post traumatic stress disorder, substances, dissociation, the numbing effect, combined to negate any intent to kill on the part of Mr. Reaves?

A I believe so.

(T. 388-89).

The state attorney asked Dr. Parson several questions about Mr. Reaves' account of his combat experience, including the details of traumatic episodes he reported and his claim in 1987 that he had been a sniper (T. 397-400). On re-direct, Dr. Parson explained, based on his own Vietnam experience, the differences between the experiences of officers and line soldiers, "grunts" like Mr. Reaves:

> A The experiences were like night and day. Officers were in charge, and they were usually far removed from the field. They were in headquarters, and the grunt was in the bush. So, it is not unusual for officers to have a very different understanding of what's going on in the bush. Officers know, but in terms of the day-to-day personal experience of combat, they don't have a good handle at all.
>
> Q In your opinion who would be more likely to know about the day-to-day life of soldier Mr. Reaves, a comrade who served ten of the twelve months he was in Vietnam in the same unit with Mr. Reaves, or an officer who spent a few months in command of the unit?
>
> A A fellow grunt.

(T. 403). Dr. Parson stated that he had reviewed Mr. Reaves' military records (R. 404). He agreed that the records revealed that Mr. Reaves was honorably discharged and was an Air Medal Sharp Shooter qualified on the M-16 rifle (T. 404). He also agreed that the 1992 trial testimony of Mr. Reaves' army buddy, Hector Caban, corroborated Mr. Reaves' accounts of a fellow soldier buddy who died in his arms, Mr. Reaves’ being trapped in a U shaped ambush, Mr. Reaves’ participation in the secret incursion into Cambodia, and his

involvement in numerous "firefights" (T. 406-407).

Dr. Thomas Hyde testified at the evidentiary hearing in this case on March 6, 2003 (T. 455-481). He described his professional qualifications as a medical doctor specializing in behavioral neurology, "a neurologist who specializes in disorders of the brain that have behavioral manifestations and helps work often times with psychiatric patients to determine what component of their problem is related to psychiatric illness and neurological damage" (T. 455).

Dr. Hyde then explained that he was retained by CCRC, reviewed background materials and then he "traveled up to the prison and interviewed Mr. Reaves extensively about his background, his experiences, his psychiatric symptoms, neurological history, his general medical history, substance abuse history, [and] performed a full neurological evaluation" (T. 459). He then described a neurological evaluation as "a relatively structured set of tests looking at mental status, cognitive function, cranial nerve function, motor, balance, reflex, coordination, gate and sensation, and then a limited general physical examination" (T. 459).

Dr. Hyde then testified that he had prepared a summary report of his findings, which was introduced at the hearing, identified by the witness, and admitted as Defendant's Exhibit #15. He reported that his neurological findings were that Mr. Reaves "[h]ad compromised complex motor sequencing in the hands and he had mirror movements of one hand while doing the motor function on the contralateral side" (T. 461). Dr. Hyde reported that his interview of Mr. Reaves revealed a reported closed-head injury following his

arrest and polysubstance abuse, with emphasis on alcohol and cocaine abuse (T. 461). As to the etiology of the neurological problems, Dr. Hyde opined that if not developmental in origin, they most likely were acquired as a result of the poly substance abuse, or as a consequence of the head injury (T. 462). Dr. Hyde acknowledged that he had reviewed Defense Exhibit #4, which included the offense report documenting Mr. Reaves' emergency room treatment after his arrest on September 24, 1986 (T. 462). Dr. Hyde then explained what affect a closed head injury eight to ten hours before Mr. Reaves' statement might have had on the confession:

> A Well, historically, Mr. Reaves reports that he had fairly dense amnesia for 24 hours after the beating, which would be within the time frame of his confession.
>
> The concussive injury to the brain would compromise his cognitive function, would leave him to be confused, would make any statements and reports that he would make during that time period and probably for several days after that time period, suspect as to their validity.
>
> Q He was coming down off of cocaine as the report indicated, would that have an affect on his confession?
>
> A Absolutely. Cocaine abuse, both in the acute intoxication phase and as you are withdrawing from cocaine, can have a profound effect upon behavior, including impulse control, judgment, reasoning, memory, paranoid hallucinations in some individuals.

(T. 463-464). On cross, Dr. Hyde explained that in these circumstances, Mr. Reaves' confession could have included confabulation (T. 470). Dr. Hyde indicated that his findings as to indications of frontal lobe dysfunction were based on his neurological findings on examination of Mr. Reaves (T. 465). He

opined that front lobe dysfunction would compromise an individual's reasoning, judgement, and impulse control (T. 465). Dr. Hyde testified that he had reviewed the reports of Drs. Dudley, Crown, Parson and Mash, and he stated that Dr. Crown's preliminary report based on Dr. Latterner's data generally confirmed his own findings regarding Mr. Reaves' frontal lobe problems (T. 466).

Dr. Hyde testified that to a reasonable degree of medical certainty, Mr. Reaves has major recurring depression, polysubstance abuse probably including cocaine and alcohol dependence, strong elements for PTSD, and a post-concussive brain injury (T. 465). As to the issue of Mr. Reaves' behavior at the time of the offense, Dr. Hyde opined:

> A Having had a closed-head injury after the offense, it certainly would affect his testimony, particularly in the immediate post concussive phase, usually for 48 to 72 hours after the acute head injury. If it was preexisting prior to that event, and having not examined him, of course, prior to the offense, I can't make an exact determination, if it was present prior to the offense, it certainly in combination with acute intoxication would make him quite disinhibited, and impulsive, prone to rash behavior.

(T. 467). On cross, Dr. Hyde testified that he did not state in his report an opinion as to Mr. Reaves' mental state at the time of the offense (T. 475). He did offer, in response to the state attorney, a general comment on the impact of Mr. Reaves' depression on his behavior at the time of the offense: "[I]ndividuals with depressive disorders are much more prone to polysubstance abuse, they often self medicate with alcohol, particularly cocaine, which has a euphoric

effect" (T. 476). Finally, Dr. Hyde stated that he was practicing in 1992 and would have been available to have evaluated Mr. Reaves and to have testified in this case if he had been retained (T. 467-468).

Dr. Cheshire, a psychiatrist, testified as the sole rebuttal witness for the State at the evidentiary hearing on March 6, 2003 (T. 481-514). He stated that he had testified in 1992 in the instant case (T. 483). He testified that he expected to bill the State $8,000 to $ 10,000 for his current round of work on this case (T. 484). He further testified that he never met or examined Mr. Reaves and that it was not necessary for him to do so to form his opinion, because, "at the time of the commission of the crime, he knew what he was doing, he knew right from wrong, and he understood fully the responsibility of what he was doing" (T. 485).[7]

Dr. Cheshire testified that he had reviewed "the testimony and examinations in depth" of the other experts, and that in his opinion, Mr. Reaves made a conscious decision to kill the deputy (T. 485). In response to the State's query as to whether he had considered the other experts' opinions relating to use of cocaine, symptoms of PTSD and organic brain injury, he stated that he had considered those opinions, but his opinion had not changed because "none of it validates his right to kill a man" (T. 486).

Finally, Dr. Cheshire confirmed his 1992 testimony that Mr.

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[7]The State has never filed a motion requesting access to Mr. Reaves for purposes of a postconviction mental health examination by a State expert.

Reaves' behavior was anti-social:

> A   Anti-social people are against society's rules and regulations, and do not honor and recognize the rights of others, except as they choose, they individually make a decision on other people's rights. They think only of themselves, unless they are diverted and pay attention at time for others. But, basically, they are motivated that this life is theirs and anybody else is not equal to them, basically.
>
> Q   Now Mr. Reaves' conduct in this case with regard to the murder of Deputy Raczkowski, is that conduct consistent or inconsistent with him having anti-social personality?
>
> A   It is very consistent.
>
> Q   How so?
>
> A   He is thinking only of himself, and he is willing to go against society and take the life of a human being who is doing his duty. And, it was remarkable that he did this to avoid going to jail. He traded a life for his avoidance of going to jail.

(T. 487-488). The State failed to specifically elicit an ASPD diagnosis from Dr. Cheshire on direct examination.

On cross-examination, Dr. Cheshire testified that he now diagnoses Mr. Reaves with ASPD pursuant to the DSM-III and/or DSM IV (T. 488). He acknowledged that in his 1992 deposition he testified that he was not willing to make a diagnosis of someone he had not examined (T. 489). He also agreed that his impression as reflected in the 1992 deposition was that Mr. Reaves presented anti-social behavior, not ASPD (T. 489). Dr. Cheshire then testified that the reason he had changed his opinion was that "I have seen every one of the experts who have written anything. I have studied everything

they have said and their thinking, and based on that, I say he is an anti-social personality disorder" (T. 490).

Dr. Cheshire was examined about the DSM-IV diagnostic criteria for ASPD concerning conduct disorder before age fifteen (T. 491-492). Dr. Cheshire acknowledged that he received a letter from the State dated January 17, 1992, Defense Exhibit 18, prior to forming his initial opinion, in which the prosecutor, Mr. Barlow, advised him that the State's position was that Mr. Reaves was "a dangerous person with a minimum of anti-social personality disorder" (T 505). He acknowledged that in his 1992 testimony, he offered his opinion that Mr. Reaves had anti-social behavior, not ASPD (T. 510). Finally, Dr. Cheshire agreed that if Mr. Reaves had assisted officers in an attempted 1971 jail break, that would not be consistent with a diagnosis of anti-social personality disorder (T. 513).[8]

Dr. Cheshire opined that he was not diagnosing Mr. Reaves as presenting polysubstance abuse disorder, either in remission in 2003 or back in 1986 at the time of the offense. He testified that, instead, Mr. Reaves "was using drugs to accomplish his mission, and his mission was illegal" (T. 509).

Following the evidentiary hearing the Defendant and the State filed memoranda (R 37-101, 102-254).[9] While a decision by the lower

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[8]The incident referred to by counsel actually occurred on August 26, 1973 at the Martin County Jail, when Mr. Reaves assisted head jailer Sal Massulo when he was assaulted by the Miller brothers in an attempted jailbreak.

9The Clerk failed to include a copy of the Defendant’s Post Hearing Memorandum, filed on June 2, 2003, in the instant record on appeal. This item is also included in the Motion to Supplement being filed

court was pending, on June 24, 2003, Mr. Reaves filed a successive Rule 3.851 motion predicated on Ring v. Arizona, 122 S.Ct. 2428 (2002).

On December 10, 2003, Mr. Reaves filed a supplement to the still pending claims upon which evidentiary hearing had been held in March 2003 (R 281-293). This pleading included correspondence dated August 28, 2003 from the United States Department of Veterans Affairs notifying Mr. Reaves that he had been approved for monetary veterans benefits based on a finding that he was 100% disabled due to Post Traumatic Stress Disorder (PTSD) related to his military service.

On March 10, 2004 the lower court signed orders denying both the successive motion for postconviction relief and the amended motion for postconviction relief (R 297-300, 301-310). After timely motion for rehearing on both, the lower court signed final orders denying both on April 20, 2003 (R. 330-335). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. The lower court's failure to grant the Appellant a new trial after a limited evidentiary hearing was in error. Trial counsel's performance in failing to investigate and prepare an intoxication defense at the time of the 1992 re-trial was deficient performance that operated to the extreme prejudice of the Appellant where no expert or lay testimony supporting intoxication was presented to the jury at the re-trial despite trial counsel's implicit promise of such evidence before the finders of fact and his testimony at the

today.

evidentiary hearing that voluntary intoxication was his “fall-back” defense. The evidence and expert testimony presented below was sufficient to require a new trial.

2. The lower court's failure to allow the testimony of witness Eugene Hinton at the evidentiary hearing below was erroneous and prejudicial to Appellant’s case. The lower court’s rejection of the appellant's Motion for Habeas Corpus Ad Testificandum for this witness denied the Appellant the opportunity to make an adequate record and forced the Appellant to rely on a 1999 affidavit in lieu of in-person testimony of a critical witness who was prepared to confirm that the Appellant was intoxicated at the time of the offense. These errors combined to make impossible a full and fair hearing on all aspects of the issues for which the case was remanded by this Court back to Circuit Court.

ARGUMENT I

THE LOWER COURT ERRED WHEN IT DENIED A NEW TRIAL WHERE THE EVIDENTIARY HEARING BELOW DEMONSTRATED THAT TRIAL COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO INVESTIGATE, PREPARE, OR PRESENT A VOLUNTARY INTOXICATION DEFENSE OPERATED TO THE SEVERE PREJUDICE OF THE APPELLANT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Ineffective assistance of counsel claims are governed by the two-step analysis set forth in Strickland v. Washington, 466 U.S. 668 (1984); to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice. Id. at 687.

Appellant claimed below that due to lack of preparation and investigation, trial counsel was ineffective in failing to present expert or other testimony in regards to an intoxication defense, thus depriving the jury and judge from hearing important testimony proving that Mr. Reaves's drug use at the time of the crime prohibited the formation of intent. "[C]ounsel was ineffective in failing to present a voluntary intoxication defense and a related Ake claim."[10] Reaves v. State, 826 So. 2d 932, 937 (Fla. 2002).

Dr. Weitz testified at the evidentiary hearing that he would

[10]"In a closely related subissue, Reaves argues that his attorney was ineffective in not retaining experts who could testify as to the effects of substances abuse combined with his mental defects." Reaves at 939.

have testified in 1992 that Mr. Reaves' was too intoxicated at the time of the offense to form specific intent, if trial counsel had asked him to do so (T. 105, 110). The fact that the trial court instructed the jury on voluntary intoxication in no way relieves trial counsel of the responsibility to adequately research, prepare and present the defense. Trial counsel acknowledged during his testimony at the evidentiary hearing that the possibility of an intoxication instruction was raised, not by him, but by the trial court (T. 78-79). 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). But in the instant case, the request did not come from trial counsel.

The lower court's order denying relief finds that "the only evidence that was available to counsel concerning the Defendant's intoxication at the time of the offense was the Defendant's own statements which were introduced" at the re-trial (R. 307). However, the lower court did acknowledge in its order that Mr. Reaves argued below that "the current testimony of Eugene Hinton and the forensic testing of certain evidence for the presence of drugs" were material to proving up the appellant's contention of ineffective assistance of trial counsel. The lower court's rulings denying both the testimony of Hinton and the relevant testing for drug reside thwarted the goal of a full and fair hearing below. The lower court's finding that "the

Defendant’s own expert witnesses conceded [forensic testing of clothing and evidence] cannot demonstrate that cocaine was ingested on the date of the incident or the quantity of cocaine that was ingested” (R.307). That finding does not comport with the testimony by Drs. Mash and Dudley below (T. 304-307, 333, 176).

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" (R2. 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" (R2. 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.

(R2. 1768-1769). Yet Counsel had unreasonably failed to pursue a voluntary intoxication defense even though the court suggested that the instruction was appropriate.

At the time of Mr. Reaves' trial in 1992, pursuant to Florida law, specific intent could 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 of excusable homicide that Mr. Reaves' counsel presented. The lower court’s order denying relief acknowledged that trial counsel Kirschner’s “fall back” defense was a stealth voluntary intoxication defense:

> Mr. Kirschner did not directly suggest voluntary intoxication to the jury, but assumed that his thought process at the time was to allow the jury to reach its own conclusion based upon the evidence presented. He believed that although the two defenses, excusable homicide and voluntary intoxication, were not necessarily inconsistent, there could be tension between the two defenses and an attorney must take care in presenting a variety of defenses or he could be perceived as being disingenuous by the fact finder. Mr. Kirschner believes that at the time of the re-trial jurors were less accepting of the idea that voluntary intoxication excuses criminal conduct.

(R. 305-306). The lower court concluded that this approach was "a reasonable trial strategy" and that "trial counsel cannot be ineffective for failing to retain experts to testify regarding a defense he chose not to utilize" (R. 308-309). The reality is that there was no tactical or strategic decision made by trial counsel after investigation for the rejection of a voluntary intoxication defense. See Patton v. State, 784 So. 2d 380 (Fla. 2000). Kirschner did not reject the defense at all, but rather tried to have it both ways without proper investigation or preparation. He never solicited an opinion from Dr. Weitz, his only expert, about voluntary intoxication.

As Wiggins v. Smith 123 S. Ct. 2527 (2003) makes clear, the solitary act of retaining a mental health expert is insufficient to constitute the requisite "reasonable investigation" and does not substitute for the investigation of the defendant's relevant social history. See Wiggins at 2536 in which the retained psychologist "[C]onducted a number of tests on petitioner...conclud[ing] that petitioner had an IQ of 79, had difficulty coping with demanding situations and exhibited features of a personality disorder" but

"revealed nothing of his life history" Id. at 2536.

Wiggins specifically addresses the failure by trial counsel to investigate an capital defendant's social history for the purpose of developing potential mitigation. Counsel's duties in preparing for the guilt phase are no less important. Wiggins clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . .fell short of the standards for capital defense work articulated by the American Bar Association (ABA) -- standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41 (C) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537). As the Wiggins Court further explained, the applicable ABA standards state that:

> [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

Id. quoting 1 ABA Standards for Criminal Justice 4-4.1. (emphasis in original).

However, as Wiggins makes plain, hiring an expert witness does not exonerate the need for trial counsel to conduct an investigation

into the individual's social history, particularly when the psychologist fails to perform any independent investigation.

This omission is precisely the kind of omission addressed by Wiggins. The Supreme Court emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

(Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003). Under Wiggins and Williams, Mr. Reaves' trial counsel's investigation in preparation for the guilt phase amounted to deficient performance. In light of Wiggins, this Court should take account of the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases when considering the performance of counsel in investigating and preparing for the guilt phase in Mr. Reaves' case.[11]

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 expert or experts to corroborate intoxication in Mr. Reaves' case would have prevented a verdict of first-degree murder on the premeditated murder theory. The prejudice to Mr. Reaves from counsel's failure is clear because Mr. Reaves could not have formed specific intent for murder.

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[11] See Guideline 11.4.1 INVESTIGATION, **ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 1989**.(R. 133-136)

See Bunney v. State, 603 So. 2d 1270 (Fla. 1992).

If defense expert Dr. Weitz been properly prepared in 1992 by defense counsel to testify as to the impact of voluntary intoxication on Mr. Reaves' ability to form specific intent, his complementary testimony about mental disease or mental defect, which clearly would now be allowed pursuant to State v. Bias, 653 So.2d 380 (Fla. 1995), may well have been admitted.[12] During argument at the guilt phase regarding the admission of Dr. Weitz's testimony, the trial court acknowledged the fact that the his testimony could have been admitted if it was offered to buttress an affirmative defense such as voluntary intoxication (T. 1470).

Based on the evidence before this Court, both from the record and the witnesses and documentary evidence presented at the March 2003 evidentiary hearing, it is clear that Mr. Reaves was a chronic crack cocaine abuser at the time of the offense. Disputes about whether he used 1.75 grams or 10 grams of cocaine around the time of the offense should be analyzed by the Court in light of all the facts of the case. The Court should review the Georgia arrest reports concerning Mr. Reaves attempt to sell crack cocaine to an undercover

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[12]"[T]he 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. 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.

officer in Georgia (Defense Exhibit #4)(T. 28). The Georgia police reports reveal that Mr. Reaves had a small plastic bag containing 7.5 grams of cocaine in his right front pants pocket, along with hand luggage that contained four plastic bags containing suspected rock cocaine and powder cocaine. Officer Alexander Hall's report describes one of the plastic bags as containing "about one hundred rocks of cocaine." The State introduced 4.25 ounces of cocaine found on Mr. Reaves in Georgia at the 1992 trial without defense objection (R2. 850). At 28.349527 grams to the ounce, Mr. Reaves had possession of 120.48 grams of cocaine at the time of his arrest. As noted elsewhere, the emergency room notes concerning Mr. Reaves' admission after being beaten at the time of his arrest indicate that he was under the influence of cocaine. This Court must now agree, based on the State's concessions and the Court's findings at the evidentiary hearing, that 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).

Defense expert Dr. Weitz testified at the *sentencing phase* of the trial as to his diagnoses of Mr. Reaves, including cocaine abuse and polysubstance abuse (R2. 2041, 2043). He testified that Mr. Reaves had reported using heroin on a significant basis while in Vietnam and that he said that he had significantly escalated drug use after returning from Vietnam (R2. 2082). On cross-examination Dr. Weitz pointed out that he was also well aware that in the transcript of his taped interview with the police on September 25, 1986, Mr. Reaves blamed the shooting of the deputy sheriff on the fact that he

was under the influence of cocaine, panic, and paranoia (R2. 2090, 2093). 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.[13]

The lower court's order denying relief failed to make mention the testimony of the State's expert, Dr. Cheshire, at the evidentiary hearing (T.301-310). Dr. Cheshire's conflicting testimony is evidence that he is not a credible witness and his testimony should offer no rebuttal to the defense presentation at the evidentiary hearing. His testimony also represents a personal bias against the defense of voluntary intoxication. In fact, opinions like his have resulted in the abolition of the defense in recent times in Florida and other states. See Derrick Augustus Carter, Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse, 64 Mo. L. Rev. 383, 384 (1999).[14]("A growing number of

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[13]Trial counsel failed to provide a copy of Mr. Reaves' taped confession to Dr. Weitz so that he could evaluate the demeanor of Mr. Reaves at the time of his statement to law enforcement (T. 30). Based on the Georgia emergency room summary, at the time of his statement, Mr. Reaves was suffering from the effects of both cocaine withdrawal and a post-arrest head injury (T. 29)(Defense Exhibit 4). Dr. Erwin Parson testified at the evidentiary hearing that listening to the tape in addition to having reviewed the transcript, was helpful to him in forming his opinion concerning intoxication (T. 385-386). Failure to provide this basic background material was another example of trial counsel's deficient performance.

[14]"There is a principle that nothing in common law is ever lost - that every precedent exists somewhere in space and time to be resurrected. By stating that "an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense," the Montana legislature effectively resurrected a fundamental principle of yesteryear. By means of this provision, the Montana legislature excised the entire subject of self-induced intoxication from the mens rea inquiry, based

states, however, are resurrecting the common law rule that bans the intoxication excuse to all crimes because of a renewed appreciation that self-induced intoxication is preventable and is a substantial cause of many crimes. Studies confirm that inebriation is involved in fifty percent of homicides."). For purposes of Mr. Reaves' case, however, the question for this Court is what should have been done by trial counsel in 1992, not what a politically correct opinion about the voluntary intoxication defense should be.

Dr. Cheshire's sudden change of diagnosis at the evidentiary hearing in apparent reliance on Dr. Weitz's 1987-1992 findings of ASPD is belied by Dr. Cheshire's testimony regarding Mr. Reaves' drug use which completely ignores Dr. Weitz's 1987 DSM diagnosis of chronic cocaine abuse disorder and his 1992 diagnostic refinement of polysubstance abuse disorder. Why did Dr. Cheshire adopt an ASPD diagnosis of Mr. Reaves without any additional evidentiary support, yet continue to ignore Dr. Weitz's other diagnostic findings? Why would he ignore all the expert opinion in 2003 in the case that diagnosed polysubtance abuse disorder and PTSD? And how, other than by the imputation of bias, can Dr. Cheshire's opinion that it was "a ridiculous assumption" that the intoxication defense was available in

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on the legislature's empirical view that criminal responsibility is not lessened by self-induced intoxication. The doctrine of mens rea has "historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." Egelhoff [Montana v. Egelhoff, 518 U.S. 37 (1966)] reconfirmed that the states are free to alter the substantive definitions of crimes, defenses, and relevancy, even if by doing so they make prosecution easier." Id at 435.

1992, be squared with his finding that Mr. Reaves was "under the influence of cocaine" at the time of the offense and his testimony that he was unaware of what the degree of Mr. Reaves' intoxication was? (T. 493).

Dr. Cheshire's testimony flies in the face of the actual expert reports. The only expert who has ever opined that Mr. Reaves has a diagnosis of ASPD, up until Dr. Cheshire's testimony at the evidentiary hearing on March 6, 2003, was defense psychologist Dr. Weitz in 1987 and 1992. And Dr. Weitz testified earlier at the evidentiary hearing that his opinion was that his earlier ASPD diagnostic impression had nothing to do with Mr. Reaves' behavior on the night of the offense (T. 108). None of the experts who examined Mr. Reaves after 1992 have diagnosed Mr. Reaves with ASPD. Dr. Cheshire had the same reports, depositions and testimony by Dr. Weitz diagnosing ASPD available to him in 1992 when he testified only that Mr. Reaves exhibited anti-social behavior. Dr. Cheshire failed to diagnose Mr. Reaves with ASPD in 1992 when the only other expert in the case did so.

The experts presented by Mr. Reaves at the evidentiary hearing, Drs. Weitz, Dudley, Crown, Hyde, Mash and Parson, established that the presentation of an intoxication defense was appropriate and required in Mr. Reaves's case, based on their findings that Mr. Reaves was "so intoxicated that he [was] unable to form an intent to kill" Harich v. Wainwright, 813 F. 2d 1082, 1090 (11th Cir. 1987)(citing Willey v. Wainwright, 793 F. 2d 1190, 1194 (11th Cir. 1986).

The State and the lower court have essentially stipulated that Mr. Reaves was a drug addict, a position confirmed by all the experts except the State’s rebuttal witness. Trial counsel had a responsibility to link up Mr. Reaves history of substance abuse and addiction to his state of mind at the time of the offense. In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. United States, 582 U.S. 854, 857 (4th Cir. 1978), cert. denied, 447 U.S. 910 (1980), rhg. denied, 448 U.S. 913 (1980). There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974).

Trial counsel's use of Dr. Weitz at the guilt phase of Mr. Reaves' trial was ineffective, to the extreme prejudice of Mr. Reaves. Even without hearing the available corroboration of Mr. Reaves' substance abuse and intoxication from Dr. Weitz or Mr. Hinton, 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. (R2. 1786-1810; 1791-1792).

Dr. Weitz stated at the evidentiary hearing that, if asked, he would have testified at the trial in 1992 that at the time of the offense Mr. Reaves was intoxicated to the point of being unable to form specific intent (T. 103-106, 110, 121). Dr. Weitz prepared an eight page report for Clifford Barnes after his initial January 24, 1987 evaluation of Mr. Reaves at the Indian River County Jail. In section VII of his report, Weitz states, "[t]he subject did admit to the use of significant amounts of beer and cocaine during the day and the evening prior to the crime." The same report includes a history section wherein Mr. Reaves denies difficulties with authorities within the school system or any juvenile arrests until 1966, which is significant since he would have then been at least age 17, much later than required onset for childhood conduct disorder necessary for the Weitz diagnosis of ASPD which appears to be based solely on elevated MMPI scales. (Supp.R2. 253-260).

The trial jury that knew Mr. Reaves had shot the deputy and that knew if they accepted the defense that had been put forward, he would be back on the streets. The prejudice resulting from trial counsel's deficient performance in these circumstances is clear.

The trial court ruled pre-trial that <u>Chestnut v. State</u>, 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 (R2. 211-12, 2577-2605, 2618). That ruling did not prevent testimony from Dr. Weitz based on his opinion about intoxication. 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. (emphasis added). Mr. Reaves' depression, PTSD, and substance abuse arguably all fall within the ‘commonly understood conditions that are beyond one's control’ about which evidence of is admissible to negate specific intent at the guilt phase, as discussed

by this Court in Bunney.[15] Testimony or other evidence supporting a defense of voluntary intoxication clearly can be supplemented in certain circumstances by additional evidence concerning other mental diseases or defects, so long as the other evidence is not a disguised diminished capacity defense, but this Court's analysis as to what may be presented is based on evidentiary issues applied in a very case specific way, and not based in substantive criminal law doctrine. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003)("[W]e conclude that the evidence of Spencer's "dissociative state" would not have been admissible during the guilt phase of the trial").

A new jury in Mr. Reaves' case should be able to hear all the evidence relevant to an intoxication defense at the guilt phase.[16] This position is in line with the relevant American Bar Association Criminal Justice Mental Health Standards in effect at the time of his trial.[17]

The lower court found that Mr. Reaves is unable to meet his

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[15]Justice Kogan's concurring opinion in Johnson v. Singletary, 612 So. 2d 575, 580 (Fla. 1993) offers a compelling look at a self described "shell shock" case involving a Vietnam Veteran with PTSD.

16This argument should be considered in light of the Veterans Administration determination in August 2003 that Mr. Reaves is 100% disabled by combat related PTSD and eligible for monetary benefits. (R281-293).

[17]"Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible." ABA Criminal Justice Mental Health Standards, 1986, 1989, Standard 7-6.2.

burden of proof.[18] Reasonable inferences that a drug addict was using a portion of the large amount of cocaine he was eventually arrested with are not mere speculation. Trial counsel was negligent in failing to investigate the girlfriend, Jackie Green, or the items confiscated from her house despite the fact that the drugs and other items were located at the site where Mr. Reaves had been alone for many hours immediately before the offense. None of the drugs or other items noted in Mr. Reaves Motion for Forensic Testing have ever been tested.[19] Given the lower court's denial of the opportunity to present Hinton's testimony and to undertake forensic testing, Mr. Reaves questions what evidence he could possibly have presented below to meet the lower court's criteria for proving up his intoxication at the time of the crime. Counsel submits that the evidence he has attempted to present meets the requirements of the law in Florida in effect in 1992:

> [W]e note that this Court has long recognized voluntary intoxication as a defense to specific intent crimes. *Cirack v. State*, 201 So.2d 706 (Fla.1967); *Garner v. State*, 28

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[18]This Court should recall that the voluntary intoxication instruction was given at both of Mr. Reaves' trials. "Where the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required." Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). Trial counsel had an obligation to effectively investigate and to prepare an intoxication defense for the guilt phase of Mr. Reaves' trial and to affirmatively present it before the trial court and the jury. ("We emphasize that voluntary intoxication is an affirmative defense and that the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged.") Id.

19Defendant's March 4, 2003 Motion for Forensic Testing is not part of the instant record but is included in the Motion to Supplement.

> Fla. 113, 9 So. 835 (1891). In *Garner* we stated that when:
>
>> a specific or particular intent is an essential element of the offense, intoxication, though voluntary, becomes a matter for consideration ...with reference to the capacity or ability of the accused to form or entertain the particular intent, or ... whether the accused was in such a condition of mind to form a premeditated design. Where a party is too drunk to entertain or be capable of forming the essential particular intent such intent can of course not exist, and no offense of which such intent is a necessary ingredient, [can] be perpetrated.
>
> 29 Fla. at 153-54, 9 So. at 845.

Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985).

In Wiggins v. Smith, 123 S. Ct. 2527 (2003), the United States Supreme Court emphasized the principles set forth in Strickland v. Washington, 466 U.S. 558 (1984), when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

(Wiggins v. Smith, 123 S. Ct. 2527, 2535). The Supreme Court further held that counsel has:

> [A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 U.S. at 668 (citation omitted). Mr. Reaves has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at the guilt phase. Although Strickland and Wiggins focus on effective investigation and preparation for the penalty phase, the requirements for guilt phase investigation, selection and preparation of experts, and trial preparation are analogous. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). 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, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). While an attorney is not required to investigate every conceivable avenue of defense in preparation for the guilt phase, in Mr. Reaves' circumstances it was obvious that drugs played a significant role in the offense based on the most basic review of evidence including the depositions of the officers who interviewed Jackie Green, the confession, the Emergency Room report, the facts of the arrest including the large amount of cocaine seized, and Mr. Reaves' substance history. The United States Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney

to investigate further

(Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003)). This Court recently echoed this precise standard in Orme v. State, Case No. SC02-2625 & SC03-1375, at 9(slip opinion February 24, 2005)("The Court further stated that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy"). Dr. Weitz noted in his testimony, for example, that a neuropharmacologist could have helped him to support an intoxication defense. Trial counsel should have also been on notice that in light of the State's expert psychiatrist, Dr. Cheshire, he needed a medical doctor's opinion to supplement the psychologist, Dr. Weitz, that he retained from the prior proceeding. Furthermore, as the Court also noted :

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id at 2539, citing Strickland, 466 U.S. at 690-691. There was no good reason for trial counsel's failure to follow up on Jackie Green and the evidence taken from her house. There was no good reason for trial counsel's failure to investigate the voluntary intoxication defense.

In Jones v. State, 855 So. 2d 611 (Fla. 2003), the trial counsel testified at the evidentiary hearing that he strategically never used the intoxication defense in any case and that in the

instant case had failed to further investigate the defense because his client strongly denied both being intoxicated and committing the offense. Mr. Reaves' case is entirely distinguishable. Mr. Reaves' trial counsel was, at most, equivocal about the use of the intoxication defense. Mr. Reaves was arrested with a large stash of cocaine, he told medical personnel after his arrest that he had been using, he confessed to the murder, and he described being intoxicated at the time of the offense in his confession.

Trial counsel failed to discuss with Mr. Hinton Mr. Reaves' mental state or the level of his intoxication during his direct contact with Hinton before his appearance in court or when he had his investigators interview Mr. Hinton in prison.

The evidentiary hearing established that trial counsel never attempted to interview Reaves' girlfriend Jackie, or to investigate the drugs and paraphernalia confiscated from her house where Mr. Reaves had been for many hours until minutes before the shooting. Hinton's testimony would have provided additional detail to supplement the credibility of his affidavit which was offered as evidence at the evidentiary hearing, that Mr. Reaves was "all strung out" and that "[h]e had been smoking crack and [was] pretty much out of his head" at the time of the offense. Similarly, forensic testing of the drugs confiscated from Jackie's house and of the clothing worn by Reaves at the time of the offense would have confirmed both the drugs that Mr. Reaves was using and in what concentrations their residue and metabolites presented. (T. 333)

This Court should review trial counsel's deficient performance

in conjunction with the efforts by law enforcement to minimize the importance of intoxication during the initial investigation of the case, i.e., the failure to analyze the drugs found during the search at Jackie's, the negligent failure to preserve a sample of defendant's blood at the time of arrest despite his possession of thousands of dollars worth of cocaine and his admission to an emergency room in Georgia where he claimed to be under the influence of cocaine, and the failure to question Mr. Reaves about the timing or amount of his drug use during the taped interview where he repeatedly blamed cocaine for the shooting.

There was testimonial evidence available from Eugene Hinton, opinion evidence from the defense experts including Dr. Weitz, and physical evidence that could and should have been investigated and analyzed and presented to a jury, including the evidence inventoried at Jackie's, the clothing worn by the defendant at the time of the offense and comparison of any cocaine residue found at Jackie's or in the clothing with the large stash confiscated from Mr. Reaves in Georgia, introduced at trial and still held today as evidence at the Clerk's office.[20] Surely if Mr. Kirschner was really putting on an intoxication defense at the guilt phase the jury should have known about the drugs that were found at Jackie's house, and heard Jackie deny having any drugs at her house or using drugs, while confirming that she left William Reaves at her house, by himself, on the night

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20The evidence is inventoried in Defendant’s 2/20/03 Motion for Examination of Evidence, not included in the instant record, but included in the list of items included on the Motion to Supplement the Record.

before the offense. Such evidence would have provided meat on the bones of the "fall-back" defense that Kirschner and the State claim was presented.[21]

Dr. Weitz testified that in his opinion the ASPD he diagnosed had nothing to do with Mr. Reaves' behavior at the time of the offense (T. 108). Even so, Dr. Cheshire, who has never examined or tested Mr. Reaves, changed his testimony from the re-trial, where he found only adult anti-social behavior, to ASPD when he testified in rebuttal at the evidentiary hearing. Dr. Cheshire's new opinion is that ASPD explains everything. Dr. Weitz's 1987 report failed to include the necessary diagnostic criteria for ASPD. And as Dr. Dudley pointed out during his testimony, Dr. Cheshire failed to diagnose Mr. Reaves with any psychiatric disorder when he testified in 1992 (R. 167). Trial psychiatric and neurological expert evaluations that are inadequate and incomplete can and should be supplemented by additional investigation and expert evaluations and presented to the Court in postconviction as part of the process of proving ineffective assistance and Ake violations, and prejudice can

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21On the tape, Defense Exhibit 17 at the evidentiary hearing, Ms. Green confirms that she was the girlfriend of the defendant, William Reaves, at the time of the offense. She denies any knowledge of the drugs later found in her home by law enforcement after a search, and she denies ever using drugs with the defendant. She states that she left her home about 7:00 p.m. on the Monday evening before the shooting early the next morning, with Mr. Reaves still present, and that she had no further contact with him. He had no transportation because she had his car. She failed to return home that night and found out about the shooting only on the next morning. Her home was located only a few blocks from the crime scene on the other side of the main road, miles from the Gifford community where Mr. Reaves lived with his mother.

be found even when the State presents rebuttal. See State v. Coney, 845 So. 2d 120 (2003).

At trial the state argued in closing over defense objection and motion for mistrial that Mr. Reaves was a "seller of cocaine" and the trial court refused to allow Mr. Reaves to argue intoxication during closing argument. (R2. 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. (R2. 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." (R2. 272-273). The lower court’s order denying relief takes the position that Mr. Reaves' drug addiction and drug dealing have no inferential connection with an intoxication defense.

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. (R2. 1668-1677). Trial counsel argued 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 inconsistent. Otherwise, trial counsel simply failed

to respond to the State's extensive argument against voluntary intoxication. (R2. 1706-1707). He was not allowed by the trial court to use any of Hinton's prior statements to impeach the 1987 testimony that was read into the record at the 1992 re-trial. The lower court's finding that he presented a watered-down version of an intoxication defense as a "fall back" does not excuse his failure to investigate. See Wiggins.

ARGUMENT II

THE LOWER COURT'S FAILURE TO ALLOW THE TESTIMONY OF WITNESS EUGENE HINTON TO BE HEARD AT THE EVIDENTIARY HEARING WAS ERRONEOUS AND PREJUDICIAL TO THE APPELLANT'S CASE WHERE HINTON WAS PREPARED TO TESTIFY THAT APPELLANT WAS INTOXICATED AT THE TIME OF THE OFFENSE. LIKEWISE, THE COURT ERRED IN DENYING FORENSIC TESTING OF EVIDENCE IN THE POSSESSION OF THE STATE FOR DRUG METABOLITES

This Court should review Eugene Hinton's 1999 affidavit and compare it with his prior statements. See Evidentiary Hearing Defense Exhibit 7 for ID. When trial counsel interviewed Eugene Hinton at the jail he should have asked him about both Mr. Reaves' drug involvement and his demeanor on the night of the offense. Hinton later voluntarily provided an affidavit to postconviction counsel, which was proffered into the record at the evidentiary hearing, 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. . ." when he saw him in the early morning after the shooting. (T. 425-426).

Hinton's prior statements and his 1987 deposition and trial

testimony contain both contradictory and self-serving information. There was, however, good reason for trial counsel to offer Hinton's prior statements concerning Mr. Reaves' substance abuse into the record at the guilt phase. This he did, however, he did not provide the Hinton statements to his expert, Dr. Weitz. In 1992 the trial court failed to allow Hinton's prior inconsistent statements to be used as impeachment of his 1987 testimony which was read into the record before the jury at the 1992 trial when Hinton refused to appear again. Hinton was held to be in criminal contempt. Although trial counsel did proffer the statements into the record of the trial, he made no attempt to show their relevance to the development of an intoxication defense (R2. 1130-1133).[22] He did argue that the trial court's actions were a deprivation of due process that resulted in the jury not being able to hear the "full story" concerning Hinton's testimony, and Appellant adopts that position (R2 1144).

The first interview of Hinton, by Indian River County Sheriff's Office Detective Paul Fafeita, took place on the afternoon after the shooting, 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

22The proffered statements were included as Volume I of the Supplemental Record in the 1992 appeal, pages 1-86. They included Hinton's statement of 9/23/86, two statements on 9/24/86, and his 7/29/87 deposition.

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 Jim 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. R2. 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. R2. 26-49). In the second statement, Hinton still denied any knowledge of the murder, except what he has seen on the news. (Supp. R2. 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. R2. 36). In this statement he says everyone watching football (including Reaves' girlfriend Jackie Green) was doing cocaine, "the whole corner doing cocaine, everybody except me and [Reaves]." (Supp. R2. 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 said he left during the 4th quarter of the game. (Supp. R2. 38). Hinton insisted that he had never seen Reaves with a gun. (Supp. R2. 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. R2. 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. R2. 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. R2. 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 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. R2. 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. R2. 75). These statements do not match the lower court's finding in the order denying relief that "none of these statements contained any information that the Defendant was intoxicated at the time of the offense" (R. 307).

These three statements and the deposition of Hinton put trial

counsel on notice that further investigation into a possible intoxication defense was necessary, starting with interviews of Eugene Hinton and Jackie Green.

A deposition of Hinton 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. R2. 87-88). This statement directly contradicts much of what Hinton said about Mr. Reaves' drug use in the prior statements. Hinton did confirm that beginning in 1984 both he and Reaves were selling drugs that they acquired from a man named Killings. (Supp. R2. 89). According to Hinton, Mr. Reaves purchased bigger quantities than he did, in cash, half ounces of cocaine at $800. (Supp. R2. 90). He testified that he met Reaves "on the street" where they sold drugs at, competing with one another. (Supp. R2. 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. R2. 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 (phonetic),
>
> 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. R2. 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. R2. 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. R2. 103). Later he again claimed that he saw Reaves at Shorty's Poolroom, where he said they were both selling drugs. (Supp. R2. 104-105). He described Reaves as "drinking beer; smoking a little pot." (Supp. R2. 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. R2. 106).

Mr. Hinton says that the last time he saw Mr. Reaves, long before Reaves showed up at his home 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. R2. 108). Later in the deposition he says that apparently Mr. Reaves did not take his car to his girlfriend Jackie's house. (Supp. R2. 114). Since Hinton had consistently said in his prior statements that he and Reaves had been selling drugs at the poolroom, if true, Mr. Reaves had his drugs somewhere nearby.

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. R2. 133-134).   A clear inference from Hinton's deposition testimony is that Mr. Reaves dropped off some of his cocaine at his mother's house and was not in possession of the full five ounces at the time the officer was shot or when he arrived at Hinton's house. So, according to Hinton, Mr. Reaves would have had the opportunity to use cocaine after his drug selling had been completed at the poolroom. Hinton speculated that he had returned to his mother's house to drop off whatever amount of cocaine he was not going to use, taking the rest to his girlfriend's home across town, where he remained using up his supply until he walked to the site of the shooting to call a cab so he could return to his mother's house where the remains of his five ounces of cocaine was stored. This fact pattern is consistent with Hinton's earlier statement about 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).

The taped statement of Ms. Jackie Green, Mr. Reaves' girlfriend, which was placed into evidence at the evidentiary hearing, impeaches Eugene Hinton's statements as to her presence at

Shorty's Poolroom on the Monday evening before the shooting where Hinton claimed he and Mr. Reaves were selling cocaine. Her statement also impeaches Hinton's statement about her using cocaine at Shorty's Pool Room, since she denies being there or using drugs. In fact in her statement she says she left Mr. Reaves at her house at 7:00 p.m. and she denies ownership or knowledge of any of the drugs and residue found at her house where she last saw William Reaves. She evidently was the last person to see and talk to Mr. Reaves, except for the victim, until Mr. Reaves appeared at Eugene Hinton's place after the shooting. Yet trial counsel could not say that he ever listened to the untranscribed tape and recalled that he had never spoken to Ms. Green. This is deficient performance. And to the extent that trial counsel did not bother to find out that Jackie Green's statements on tape impeached Mr. Hinton, the most damaging witness in the case, the prejudice to Mr. Reaves' cause is evident.

During the evidentiary hearing, trial counsel opined as to what a defense attorney must look for in determining whether to use voluntary intoxication as a defense: "[y]ou look for a bunch of different things. You look for lab reports, you look for lay observations of how the defendant was behaving, toxicology reports, that kind of thing" (T. 56). Of course, trial counsel failed to investigate these areas.

Considering that the instant case involved the killing of a white law enforcement officer during the performance of his duties by a black defendant with a felony record, it strains credibility for the lower court to find trial counsel’s decision to use an excusable

homicide defense was a strategically rational decision when voluntary intoxication was available. A voluntary intoxication defense would reduce the act of killing the deputy to second degree murder, while a successful excusable homicide defense would have required the jury to let the shooter go free.

Trial counsel did object, 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. (R2. 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 cocaine worth several thousand dollars. (R2. 1248-1249). At trial, trial counsel stated that he had no objection to the evidence that Mr. Reaves had possession of a significant amount of 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.

(R2. 853).

The State used a significant portion of closing argument after

the guilt phase to argue that voluntary intoxication did not apply in Mr. Reaves' case. (R2. 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. (R2. 1706-1707). The outcome was extreme prejudice to Mr. Reaves' case.

There was a path that trial counsel should have taken to get Hinton's alternative statements into the record. He could have used them as part of a guilt phase intoxication defense supported by Dr. Weitz, who could have relied on the statements in formulating an opinion about voluntary intoxication. As noted supra, Dr. Weitz testified at the evidentiary hearing that he was prepared to testify that Mr. Reaves' was intoxicated at the time of the offense, but trial counsel never asked. Trial counsel should also have had Dr. Weitz interview Hinton. The reliance by the experts at the 2003 hearing on Hinton's affidavit in forming their opinions is similar to what would have happened at trial if Dr. Weitz had been properly prepared as a witness on voluntary intoxication in 1992 by trial counsel. See § 90.704, Fla. Stat.; EHRHARDT, FLORIDA EVIDENCE, § 704.1 (2000 Ed.) ("Under section 90.704, an expert may rely on facts or data that have not been admitted, or are not even admissible when those underlying facts are of `a type reasonably relied on by experts in the subject to support the opinions expressed. . . Experts may rely upon hearsay in forming their opinions if that kind of hearsay is relied upon during the practice of the experts themselves when not

in court"). The failure by trial counsel to prepare Dr. Weitz was deficient performance that operated to the severe prejudice of Mr. Reaves.

Only Hinton's 1999 affidavit, which was already part of the postconviction record, having been prepared as an attachment to Mr. Reaves' 3.850 motion, was made part of the evidentiary hearing record. Hinton's live or proffered testimony at the evidentiary hearing was relevant and material to any ineffectiveness determination. This Court's remand of the instant case back to circuit court was predicated on error below where the court found that "voluntary intoxication was not an available defense since the defendant's expert witness [Dr. Weitz] testified during a proffer that Reaves was not so intoxicated that he did not know right from wrong" Reaves at 938.

The lower court found that the State conceded that Mr. Reaves was under the influence of cocaine at the time of the offense, and the lower court further found that both sides presented evidence in support of that proposition (T. 526). Based on that finding, the lower court denied Mr. Reaves' Motion for Forensic Testing (T. 526).[23] Appellant argued that the forensic testing would provide scientific support to bolster the claim of intoxication at the time of the offense, supplementing the expert testimony and documentary evidence presented at the evidentiary hearing (T. 525). This

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23Defendant's 3/04/03 Motion for Forensic Testing was not included in the instant record on appeal but is one of the documents included in the Motion to Supplement the Record being served simultaneously with this Initial Brief.

evidence failed to include any in-person testimony by Eugene Hinton, the first person to see and meet with Mr. Reaves after the offense, because the lower court refused to allow Mr. Hinton to testify. The ultimate goal of the proposed forensic testing was to supplement the sum of evidence available to the defense for presentation to a jury at a new trial where the finders of fact could make a decision as to whether or not Mr. Reaves was intoxicated enough at the time of the offense to negate specific intent for premeditated murder (T. 525). Given the State's concession below and the lower court's finding, both noted above, along with Dr. Cheshire’s testimony that he had no opinion as to the degree of intoxication of Mr. Reaves at the time of the offense, a new trial is required.

CONCLUSION

Mr. Reaves requests that this Court, after a review of the entire record of the case, grant him a new trial before a jury so as to allow the presentation of a properly investigated voluntary intoxication defense including lay and expert testimony laying the groundwork for said defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial

Brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio and Debra Rescigno, Office of the Attorney General, Department of Legal Affairs, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401, on February 28, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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