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

REPLY BRIEF OF APPELLANT

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ARGUMENT I REPLY

A *de novo* review by this Court of the lower court's final order denying relief must take into account the paucity of credibility that was given to the testimony and findings of State expert psychiatrist Cheshire below. Not a word in the order even mentions Dr. Cheshire. R. 301-310. The lower court's order acknowledges the testimony of the defense experts at the evidentiary hearing:

> As to the Defendant's sub-issue of trial counsel's failure to retain experts to testify on the combined effect of the Defendant's cocaine use and mental defect, the Defendant presented six expert witnesses that testified that the combined effect of cocaine and some mental defect of the Defendant, either Vietnam syndrome (Dr. Weitz), Post Traumatic Stress Disorder (Dr. Dudley, Dr. Mash and Dr. Parson) or brain damage (Dr. Crown and Dr. Hyde) would have precluded the Defendant from forming specific intent to commit murder.

R. 309. As was been noted in the Initial Brief, the testimony of the defense experts was credible enough for the Veterans Administration to grant Mr. Reaves a 100% service related disability due to Post Traumatic Stress Disorder subsequent to the evidentiary hearing but before the lower court entered a final order denying relief. R. 281-293. This Court should carefully review the State's contention in its Brief at 59 that

Dr. Cheshire was "available to rebut" potential defense testimony at trial from Dr. Weitz about Mr. Reaves's ability to form specific intent. As noted supra, the State's reliance on Dr. Cheshire is misplaced. Dr. Cheshire's testimony at the evidentiary hearing was notably ignored in the lower court's order for good reason. See Statement of the Case in Initial Brief at 43-46. Dr. Cheshire never examined Mr. Reaves. To this day State has never asked for an in-person evaluation of Mr. Reaves by Dr. Cheshire or any other expert. Dr. Cheshire freely admitted during his 1992 testimony that he did not consider Mr. Reaves to be presenting with Anti Social Personality Disorder or any other mental disorder, yet he changed his mind and his testimony by the time of the 2003 evidentiary hearing. T. 489-490. And despite the State's concession at the evidentiary hearing that Mr. Reaves was a drug addict, Dr. Cheshire refused to diagnose Mr. Reaves with any substance abuse disorder.

The State belittles the importance of the expert testimony presented at the evidentiary hearing below on two important grounds. First, that "Reaves failed to present any additional testimony at the evidentiary hearing, other than what was presented at trial, regarding his level of intoxication at the crucial time, the time of the murder;" and, second, that the

defense experts' opinions about intoxication and inability to form specific intent could not have been presented at the time of the trial. State's Brief at 43. This is the same approach that the lower court adopted in the final order denying relief:

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

R.306. As to the potential presentation of experts to testify about intoxication at the guilt phase of the trial, the lower court found that "even if trial counsel was expected to predict the ***Bias*** decision, trial counsel had made a strategic decision not to actively pursue the defense of voluntary intoxication. Therefore, the Court finds that trial counsel cannot be ineffective for failing to retain experts to testify regarding a defense he chose not to utilize." R. 309.

In virtually every potential voluntary intoxication case recently considered by this Court the issues surrounding proving

up the impact of the alleged intoxicant on the defendant's state of mind at the time of the offense reign supreme. Given the facts of the instant case, what evidence could possibly have been presented below that potentially would meet the standards reflected by the lower court's order and the arguments presented by the State? The Initial Brief argued that the live testimony of Eugene Hinton along with the expert testimony presented at the evidentiary hearing was necessary to the presentation of an effective voluntary intoxication defense. In addition, the Brief argues that defense counsel should have provided expert psychologist Weitz with the many out-of-court statements of Hinton about his drug sales and drug use with Mr. Reaves and then directed his expert to meet with Hinton. Since there were no eyewitnesses to Mr. Reaves's drug use immediately before the offense at Jackie Green's house, and no close-up witnesses to the offense, other than the victim and Mr. Reaves, the only evidence of intoxication around the time of the crime in Vero Beach was the drug residue and paraphernalia left at the Jackie Green house a few blocks from the crime scene and Hinton's observations of Mr. Reaves after he fled from the crime scene and ran some seven miles to Hinton's residence.

There were no lab reports or drug tests of Mr. Reaves at the time of the offense because he was not arrested until after

he made it to Georgia with his stash of cocaine. After being beaten upon arrest, he was seen at an emergency room where he was memorialized in a hospital notation as reporting that he was under the influence of cocaine. The only other additional evidence that could have been presented at the evidentiary hearing was testimony from Mr. Reaves himself, which would certainly have been attacked by the State as "self-serving," as was his statement to law enforcement admitting his responsibility for the shooting. State's Brief at 44.

The State argues that Mr. Reaves's awareness and ability to recall the events around the shooting are contra-indications of voluntary intoxication. State's Brief at 48-49, 58. The State is mistaken to describe the "kill or be killed" "thought mode" as the epitome of having requisite intent. This "mode" is instinctual and more akin to a reflex action. Dr. Mash's report and testimony at the evidentiary hearing contradict the State's position entirely. She says that Mr. Reaves's behavior was not intentional because "the perceptual disturbances associated with cocaine intoxication were markedly exacerbated by the characteristic features of the mental disorder PTSD." R. 556. Dr. Parson came to a similar conclusion: "[T]he shooting event that caused the death of the Deputy Sheriff on September 23, 1986 was an at-the-moment, on-the-spot reflexive (meaning

impulse-driven action without the modulating effects of higher cortical contacts and judgment). R. 551. Dr. Mash detailed her opinion about the crime:

> Cocaine intoxication affects a person's behavior in such a way that it may be accentuated or markedly altered. For example, a person who tends to be somewhat suspicious may become very paranoid and/or delusional. As stated above, Mr. Reaves had abused more than 10 grams of cocaine in addition to alcohol on the day of the murder. The acute crash phase from cocaine leads to a very severe depression and paranoid delusions. In reconstructing the events that occurred on the day of the murder, it is my opinion that the effects of cocaine in combination with alcohol severely affected Mr. Reaves ability to accurately perceive the situation that confronted him, Mr. Reaves's alleged act of violence that led to the death of the victim occurred because he was markedly intoxicated, paranoid and in a delusional state. His heightened sensitivity is clearly related to his underlying diagnosis of PTSD. Mr. Reaves stated that he was not aware that he had killed an officer until he saw the murder on television. Why he was drawn into the sequence of events that lead to the murder is not completely clear, but it is certain that his higher order reasoning and judgment were severely affected by the combination of cocaine and alcohol in his system. Combined cocaine (and cocaethylene) and alcohol intoxication would have resulted in Mr. Reaves having a severely altered mental state at the time of the crime.

R. 556.

The State's Brief at 55 takes the position that Mr. Reaves's IAC sub-claim is unpreserved concerning trial counsel's failure to investigate and prepare his expert, Dr. Weitz, about Mr. Reaves's ability to form the specific intent necessary for first degree murder.[1] Appellant refers the Court to Claim III of his postconviction motion:

> Defense counsel failed to investigate his client's substance abuse history or to instruct and prepare Dr. Weitz to do so, so as to provide testing appropriate for presentation at the guilt phase as part of an intoxication defense.
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> * * *
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> [S]ubstantial and valuable lay testimony as to Mr. Reaves intoxication was available . . .if Witness Hinton's testimony is to be believed, as the court has held, then he and Mr. Reaves were smoking marijuana on the night of the offense. Hinton himself was providing drugs to Mr. Reaves on the night of the crime . . . All of these facts corroborated a voluntary intoxication defense which would have rendered Dr. Weitz's testimony admissible. During argument regarding the admission of Dr. Weitz's testimony, the trial court acknowledged the fact that the expert testimony could have been used if it was offered to buttress an affirmative defense such as voluntary intoxication.

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[1]The State's Brief also takes the position that the IAC claims in Argument II concerning trial counsel's failure to provide the out-of-court Hinton statements to Dr. Weitz as part of preparation for an intoxication defense and the relevance of Hinton's prior statements themselves to an intoxication defense are both unpreserved. R. 83.

* * *

> Family members, friends, and acquaintances could have provided compelling information as to Mr. Reaves longstanding substance abuse problems . . .

1999 3.850 Motion at 33, 35-36, 37.

The State points to alleged contradictions in the opinions of the various defense experts, more specifically that Dr. Dudley found no organic brain damage while Dr. Crown opined that there was organic brain damage, perhaps caused by an injury sustained by Mr. Reaves at the time of his arrest. State's Brief at 62-63. Another alleged contradiction has to do with the amount of cocaine ingested by Mr. Reaves on the day of the offense as reported by Dr. Weitz and Dr. Mash. State's Brief at 63. The State finds it incredible that Mr. Reaves could simultaneously be unable to form specific intent and yet be highly alert and be able to remember every detail. State's Brief at 63. All of these issues were examined in the Initial Brief. A close reading of the testimony and reports of the experts reveals far more agreement and convergence that disagreement. And the Court should take into account that the different disciplines from which the respective experts opinions derive provide ample explanation for the State's complaints. Dr. Dudley, a psychiatrist, performed no psychological testing. Dr. Crown, a psychologist did perform neuropsychological

testing. Dr. Hyde, a neurologist, performed medical neurological testing, Dr. Parson, a psychologist and expert in PTSD in war veterans performed discrete tests aimed at documenting PTSD. Dr. Mash, an academic specialist in the impact of drugs on the human body and mind, did a detailed drug history of the client. Dr. Weitz, a psychologist, was called only to review his 1992 work. He never interviewed or tested Mr. Reaves after his service as the trial mental health expert. The State's expert psychiatrist, Dr. Cheshire, has never seen Mr. Reaves and has never asked to do so. There is no important difference in the findings of the respective defense experts retained during postconviction.

Mr. Reaves's case can be distinguished from Dufour v. State, 905 So. 2d 42 (Fla. 2005), cited at State's Brief at 75. Mr. Reaves trial counsel never explicitly rejected the intoxication defense, but rather used intoxication as a stealth defense while concentrating on excusable homicide. T. 16, 31-32. However, trial counsel admitted he did not really investigate or present intoxication as a primary defense. T. 32-38, 53, 66-68, 77-84, 88-91. This failure on the part of trial counsel prejudiced any possibility of presenting an adequate intoxication defense, stealthy or direct. See Rompilla v. Beard, 125 S. Ct. 2456 at 2463. ("And while counsel knew

from police reports provided in pretrial discovery that Rompilla had been drinking heavily at the time of his offense and although one of the mental health experts reported that Rompilla's troubles with alcohol merited further investigation, counsel did not look for evidence of a history of dependence on alcohol that might have extenuating circumstances"). Trial counsel's abdication of the responsibility to investigate voluntary intoxication in Mr. Reaves's case is comparable to the failure "to conduct a prompt investigation of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction" noted by the United States Supreme Court in Rompilla, wherein the Court points to the 1989 ABA Standards for Criminal Justice that were applicable to trial counsel's failure to investigate. Id. at 2470-1.

ARGUMENT II REPLY

The State and the lower court have taken the position that the Hinton affidavit does not speak to Mr. Reaves "level of intoxication" either at the time they met or at the time of the offense. State's Brief at 84. Counsel submits that the State is simply speculating that members of the jury at Mr. Reaves's trial would agree with that impression. Juror exposure to a

live witness testifying that another person appeared at their door in the middle of the night in a state of being "all strung out, he had been smoking crack and was pretty much out of his head" would have reasonably have been interpreted by a lay person as evidence of intoxication. T. 425-426. To insist otherwise belies both reason and common sense. In addition to denying the writ directed to obtaining the testimony of Eugene Hinton at the evidentiary hearing, the lower court also denied the request by Mr. Reaves's counsel to file either a further written statement from Hinton or to place on the record a personal proffer of co-counsel Melissa Minsk Donoho's February 26, 2003 meeting with Hinton in Tampa, Florida. T. 423-426.

Grayson v. Thompson, 257 F. 3d 1194 (11th Cir 2001), stands for the position that it is reasonable in some circumstances for trial counsel to fail to present an intoxication defense when such a defense is not necessarily favorable evidence before the jury. However, Grayson is distinguishable from Mr. Reaves's case.

Unlike Mr. Reaves's trial counsel, Grayson's trial counsel did present an active intoxication defense case at trial. Grayson's subsequent federal habeas claim of ineffective assistance was based on arguments that: (1) trial counsel failed to develop and present additional evidence at trial regarding

his chronic alcoholism and intoxication at the time of the offense; (2) trial counsel failed to introduce hospital records supporting the intoxication defense; and (3) trial counsel failed "to gather and present a defense expert regarding intoxication and alcoholism and their effects on an individuals ability to appreciate and understand the consequences of his actions." Grayson at 1219-21. Unlike Mr. Reaves, at trial, Grayson himself testified in great detail in support of his own voluntary intoxication.[2] Trial counsel also called the defendant's mother, his sister and the local Sheriff to confirm portions of Grayson's testimony concerning loss of memory related to alcohol intoxication. Id. at 1220. In closing argument to the jury, trial counsel in Grayson argued lack of specific intent and "made references to Grayson's intoxicated

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[2] "At trial, defense counsel's theory was that Grayson lacked the specific intent to be guilty of capital murder. Grayson testified as to the large quantity of alcohol he and Kennedy had consumed on the night of the killing. Counsel emphasized Grayson's repeated trips to buy alcohol and his consumption of large amounts of wine right out of the bottle for several hours immediately preceding the crime. Consistent with his intoxication, Grayson repeatedly testified on direct regarding his inability to recall the specifics of the crime. Indeed, Grayson testified that he completely forgot committing the crime the next morning until his mother told him of Mrs. Orr's killing . . . Grayson again emphasized that he was extremely intoxicated at the time of the crime and his problem with alcohol. He insisted that he would not have committed the crime at all if he had not been so drunk." Grayson at 1218-19.

state at the time of the crime," although counsel argued that "We are not saying voluntary intoxication completely absolves him of his fault." Id. at 1223. (emphasis added). The State argued that intoxication was not an available defense because Grayson had been "sober enough to walk, talk, rape, pillage the house for valuables, and walk home of his own accord." Id. at 1205. There can be no doubt that a voluntary intoxication defense was presented and rebutted at Grayson's trial.

Grayson's trial counsel's performance regarding presentation of the intoxication defense was found by the Eleventh Circuit not to be "below the standard of reasonable professional performance" because "[c]ounsel highlighted the intent issue and Grayson's consumption of excessive alcohol on the night in question. In addition Grayson's counsel focused the jury on the physical and forensic evidence suggesting Grayson's lack of intent to kill Mrs. Orr. This approach was not unreasonable." Id. at 1220.[3] The Court held that Grayson's trial counsel's failure to obtain and present an expert

[3] Contrast this case with Kirschner's failure to obtain any testing of the fruits of the search at Jackie Green's home, his failure to interview Jackie Green, his failure to provide the out-of-court Hinton statements to his expert, Dr. Weitz, and his failure to ask Dr. Weitz if he had an opinion about intoxication.

regarding intoxication and alcoholism was reasonable due to the "limited resources available"[4] to counsel in Alabama and the fact that while expert testimony might have been "helpful", "the effects of excess alcohol consumption are not necessarily outside the ken of the average juror." Id. at 1221.

There was no such restriction on expenditure for experts in Mr. Reaves's case. Dr. Weitz, the same expert who had been hired by the defense at Mr. Reaves's first trial, testified at the evidentiary hearing that his opinion was that Mr. Reaves was too intoxicated to form specific intent. Trial counsel simply failed to investigate and develop an intoxication defense with the assistance of his mental health expert. An average juror in 1992 would have recognized Hinton's statements about Mr. Reaves's demeanor as indicative of intoxication, even if that juror did not have a "common-sense understanding" of the dynamics of chronic crack cocaine addiction and the impact of simultaneous consumption of cocaine and alcohol as was present in Mr. Reaves's case. Expert testimony was critical to support an intoxication defense in front of a jury.

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[4] The opinion notes that Alabama then had a statutory limit of $500 for expert funds. Id. at 1201.

The State's Brief complains that Appellant has failed to set forth any argument related to how the lower court abused its discretion when the writ of habeas corpus ad testificandum directed to obtaining the live testimony of Eugene Hinton at the evidentiary hearing was denied. State's Brief at 86. Argument II essentially sets out the proposition that the abuse of discretion was the lower court's rulings denying the Appellant either the opportunity to present Hinton's testimony at the evidentiary hearing or to have forensic evidence tested and the results provided to the testifying experts. Initial Brief at 74-89.[5]

Eugene Hinton supplied an affidavit to postconviction counsel and expressed his willingness to appear to "tell the truth" and testify as to the contents of his affidavit. Evidence that Mr. Reaves was intoxicated at the time of the offense is limited by the circumstances of the case. The State's theory of the case agrees with the fact that Hinton was

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[5] The State's Brief fails to mention that during the discovery process before the evidentiary hearing, the assistant state attorney did not oppose the motion for forensic testing and suggested to the court that it should go forward ("The part that concerns us is the part relating to forensic examination of evidence held by the Sheriff's office and in light of the nature of this proceeding we think the best course for the Court to take would be to allow them to do that.) T. 710.

the first person to see and talk to Mr. Reaves after the shooting. Mr. Reaves's intention was to use the evidentiary hearing as a forum as to highlight the prejudice that resulted from trial counsel's failure to properly develop and present evidence that could be presented to a jury at a re-trial where the intoxication defense was explicitly presented.

This evidence includes, but is not limited to; expert testimony about Mr. Reaves's intoxication; Mr. Reaves's statement to law enforcement where he claimed he was intoxicated at the time of the offense, the Jackie Green search evidence revealing Mr. Reaves's use of drugs immediately before the offense, the Jackie Green taped interview in which Mr. Reaves's girlfriend denies that she owned the drugs found at her home; and, the presentation of Hinton's testimony about Mr. Reaves demeanor and intoxication. Appellant's claim to this Court that trial counsel failed to properly investigate, develop and present an intoxication defense was the very reason that this Court remanded for an evidentiary hearing. This Court's opinion makes it very clear that the purpose of the evidentiary hearing below was to explore the conduct of trial counsel in preparing or failing to prepare an intoxication defense:

> 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). The facts concerning the denial of the pre-evidentiary hearing writ directed to Hinton in Mr. Reaves's postconviction case are distinguishable from the facts that resulted in denial of the

writ in Bolender v. State[6], cited in the State's Brief in support of standard of review and the action of the lower court. In Bolender the intended witness was a co-defendant whose testimony was sought by writ only after the state had rested at trial. Co-defendant's counsel had advised that his client had been found incompetent by another judge and would take the Fifth Amendment if called.

Another case cited by the State in support of the abuse of discretion standard of review for the lower court's ruling on the motion for a writ of habeas corpus ad testificandum is Merck v. State, 763 So. 2d 295 (Fla. 2000). This Court in Merck remanded back to trial court for a new penalty phase because the trial judge's sentencing order "failed to properly find, evaluate, or weigh evidence of Merck's alcohol abuse" and also "failed to find, evaluate, or weigh evidence of Merck's substantial alcohol intake on the night of the instant crime." Id. at 297. If the State is correct, the abuse of discretion by the lower court in Merck occurred when "the trial judge erred in that her explanation in the sentencing order of her evaluation as to nonstatutory mitigation failed to include Merck's drinking

[6] 422 So. 2d 833 (Fla. 1982).

on the night of the murder or Merck's long time alcohol abuse." Id. at 298.

Moody v. State, 418 So. 2d 989 (Fla. 1982) is also cited in the State's Brief in support of the standard of review. Moody is also a case in which the witness being sought was both incompetent and claiming her fifth amendment privilege. Id. at 992. ("Bassett. . .was committed to a state mental hospital in Georgia after having been declared incompetent to stand trial upon the charge of first degree murder of her mother").

The State's Brief correctly asserts that State v. Lewis, Frank Lee Smith v. State, 656 So. 2d 1248 (Fla. 1995) provides that orders denying or limiting prehearing discovery on postconviction claims are governed by an abuse of discretion standard of review (at least for pre-Fla. R. Crim. P. 3.852 capital postconviction discovery). State's Brief at 86. Lewis/Smith also asserts a "good cause" threshold for allowing prehearing discovery based on "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." Id. at 1250. Mr. Reaves has consistently maintained that there was good cause for his writ directed to Eugene Hinton and for his motion for forensic testing.

The State's reliance on Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) regarding the standard of review for a motion for discovery in a capital postconviction case pushes the comparisons between the use of a trial court's discretionary power in the family law/domestic arena and the death penalty context too far. Even so, Canakaris points out that there are limits on the court's discretionary power when different results emerge out of similar factual circumstances:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result . The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Id. at 1203. The lower court's denial of Mr. Reaves's writ to transport Eugene Hinton to testify voluntarily at the evidentiary hearing concerning evidence of intoxication that should be heard by a jury was unreasonable in the context of the purpose of the hearing. Hinton's unavailability in prior proceedings is not relevant to his necessary appearance at the

evidentiary hearing.[7] The State would have had ample opportunity to impeach Hinton at the evidentiary hearing with his prior statements and testimony if they chose to do so. The lower court's act took place in circumstances that were very different from those in Bolender and Moody. The prospective witnesses in both of those cases had been found mentally incompetent and were asserting their fifth amendment privilege. Eugene Hinton was prepared to testify at the evidentiary hearing. The lower court's actions in denying the writ and the motion for forensic testing in Mr. Reaves's case are more akin to the actions of the lower court in Merck , where discretion was abused when that court failed to take into account all the circumstances of the case at hand when preparing a sentencing order that ignored the alcohol abuse evidence that had been presented.[8]

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[7] "Mr. Hennis: Well, your Honor, as I, as I stated up front, the purpose of listing Mr. Hinton was to assist in proving prejudice and I believe that the affidavit that you have in front of you goes directly to the prejudice prong in Strickland as to his statements there about intoxication by Mr. Reaves. You've got to remember that Mr. Hinton, according to the State's theory of the case, was the first and probably only person to talk to Mr. Reaves in the period immediately after the offense." T. 704.

[8] PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE, §.9.5 (2004) ("Many cases have restated the general rule that a trial Court decision admitting or excluding evidence is discretionary and therefore reviewable by the abuse of discretion standard. This is, perhaps, too broad a statement of the rule. Most of

All of the relevant and material evidence should have been heard at a full and fair evidentiary hearing on the issues included in this Court's remand. That did not occur below. Actions by the lower court that impeded a full and fair hearing on the performance of trial counsel related to the investigation and presentation of a voluntary intoxication defense were an abuse of discretion because the decisions of the lower court operated to frustrate a full review of the mixed question of fact and law involved in a determination of whether there was ineffective assistance of counsel.

CONCLUSION

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

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the decisions citing the rule are actually limited to situations in which the trial judge had determined logical relevance in the context of an entire trial. While the issue of relevancy is discretionary, many other evidence issues are not. For example, trial judges clearly do not have discretion to admit evidence in violation of a privilege or some other definitive provision of the evidence code. Some of these evidence issues are more like questions of law than questions of discretion").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Debra Rescigno, Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on December 14, 2005.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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