

*****CAPITAL CASE*****

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM REAVES

Petitioner,

vs.

STATE OF FLORIDA.

Respondent.

**On Petition For A Writ of Certiorari To
The Supreme Court of Florida**

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

**DEATH WARRANT SIGNED
EXECUTION SET OCTOBER 20, 2026 at 6:00 P.M.**

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2026 WL 3071534

Only the Westlaw citation is currently available.

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SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

William REAVES, Appellant,

v.

STATE of Florida, Appellee.

William Reaves, Petitioner,

v.

Secretary, Department of Corrections, Respondent.

No. SC2026-1512, No. SC2026-1519

|

October 14, 2026

An Appeal from the Circuit Court in and for Indian
River County, [Anastasia M. Norman](#), Judge, Case No.
311986CF000729AXXXVB

And an Original Proceeding – Habeas Corpus

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Opinion

PER CURIAM.

*1 Forty years ago, William Reaves shot and killed Deputy
Richard Raczkoski. Reaves was sentenced to death for this

crime. After Governor Ron DeSantis signed a warrant calling
for Reaves' death sentence to be carried out, Reaves filed a
successive motion for postconviction relief under [rule 3.851
of the Florida Rules of Criminal Procedure](#). The circuit court
summarily denied the motion. Reaves now appeals that ruling
and separately asks us to grant a writ of habeas corpus. For
the reasons given below, we affirm the circuit court's order,
deny Reaves' habeas petition, and decline to issue a stay.¹

I

Early one morning in September 1986, Deputy Raczkoski was
dispatched to a convenience store in Vero Beach based on a
911 call that Reaves had placed using the store's pay phone.
Upon arrival, Deputy Raczkoski inquired about any existing
warrants on Reaves.

At some point while the two men were talking, a firearm
dropped from Reaves' shorts. Deputy Raczkoski reached for
the firearm. However, after a scuffle, Reaves succeeded in
regaining control of it. Deputy Raczkoski then told Reaves
to give him the firearm. Reaves refused. Deputy Raczkoski
turned and began to move away from Reaves. Reaves shot
him in the back four times, emptying the firearm's clip in the
process. Deputy Raczkoski died later that morning from his
gunshot wounds.

Reaves fled the scene and went to the home of his friend,
Eugene Hinton, where he admitted to shooting an officer.
Reaves subsequently left the state and was arrested in Georgia
shortly thereafter. While in custody in Georgia, Reaves
confessed to police that he had killed Deputy Raczkoski,
stating that he was on cocaine and fearful at the time of the
shooting.

The State charged Reaves with first-degree murder and sought
the death penalty. Following trial, a jury found Reaves
guilty of first-degree premeditated murder, and the circuit
court sentenced him to death in accordance with the jury's
recommendation. However, we reversed, finding that the
prosecutor had a conflict of interest. [Reaves v. State](#), 574 So.
2d 105, 107 (Fla. 1991).

At Reaves' retrial, the State introduced evidence supporting
the facts we recounted above and more. Among other
things, the State presented: (1) Reaves' detailed confession to
police; (2) Hinton's prior testimony from Reaves' first trial
(including that Reaves appeared to have full command of

his faculties); (3) testimony from a witness who both found Deputy Raczkoski on the ground outside the convenience store and observed an individual fleeing from the scene who matched Reaves' description; and (4) evidence about the firearm Reaves used to shoot Deputy Raczkoski (i.e., that a separate trigger pull was necessary for each shot).

Later, during jury instructions, the court informed the jury that voluntary intoxication could negate the element of premeditation. However, the jury rejected this defense and found Reaves guilty of premeditated first-degree murder as charged.

*2 Following the penalty phase, the jury recommended death by way of a 10-to-2 vote. Agreeing with the jury's recommendation, the circuit court sentenced Reaves to death. In its sentencing order, the circuit court found three aggravating factors and concluded that they outweighed Reaves' mitigation, which consisted of three nonstatutory circumstances.²

Reaves appealed. But this time, we affirmed. *Reaves v. State*, 639 So. 2d 1, 6 (Fla. 1994). Although we found insufficient evidence of the HAC aggravator, we concluded that the other aggravators justified the death sentence in light of the relatively minimal mitigation. *Id.*

Reaves then petitioned the United States Supreme Court to review our decision. That request was denied. *Reaves v. Florida*, 513 U.S. 990, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Reaves' murder conviction and death sentence became final at that time. See Fla. R. Crim. P. 3.851(d)(1)(B).

Since then, Reaves has unsuccessfully pursued collateral relief in both state and federal court. See *Reaves v. State*, 826 So. 2d 932 (Fla. 2002); *Reaves v. Crosby*, 837 So. 2d 396 (Fla. 2003); *Reaves v. State*, 942 So. 2d 874 (Fla. 2006); *Reaves v. State*, 27 So. 3d 661 (Fla. 2009); *Reaves v. State*, 91 So. 3d 782 (Fla. 2012); *Reaves v. State*, 241 So. 3d 63 (Fla. 2018); *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886 (11th Cir. 2013); *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137 (11th Cir. 2017), *cert. denied*, 585 U.S. 1020, 138 S.Ct. 2681, 201 L.Ed.2d 1078 (2018).

On September 18, 2026, Governor DeSantis signed Reaves' death warrant. Thereafter, Reaves sought public records from several state agencies, but his requests were denied. He then filed the successive postconviction motion mentioned at the outset of this opinion. In that motion, Reaves raised

three claims. The first challenged various aspects of his clemency process, while another challenged the method of his execution, i.e., Florida's three-drug lethal-injection protocol. Rounding out his claims, Reaves alleged newly discovered evidence regarding police corruption in connection with a State witness.

After holding a *Huff*³ hearing, the circuit court summarily denied all of Reaves' postconviction claims. Reaves now appeals, arguing that the circuit court committed error in denying his clemency and method-of-execution claims. He also asks us to issue a writ of habeas corpus. We begin with Reaves' appeal.

II

We review the summary denial of successive postconviction claims de novo. *Randolph v. State*, 422 So. 3d 166, 172 (Fla.), *cert. denied*, — U.S. —, 146 S. Ct. 819, 223 L.Ed.2d 239 (2025). We affirm where the claims are untimely, procedurally barred, legally insufficient, or refuted by the record. *Sochor v. State*, 434 So. 3d 1251, 1254 (Fla.), *cert. denied*, No. 26-5061, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2026 WL 2028264 (U.S. July 14, 2026). Applying this framework, we reject Reaves' arguments for reversal.

A

In his motion below, Reaves alleged that his clemency procedures were constitutionally infirm because (1) he was not provided with records or filings in connection with his clemency proceeding, (2) his clemency counsel was deficient in various respects, and (3) his hearing difficulties over the years could have adversely affected his ability to participate in the clemency proceeding. The circuit court ruled that Reaves' clemency claim was untimely, procedurally barred, and legally insufficient. We agree that this claim does not warrant relief.

*3 Our precedent acknowledges Justice O'Connor's concurrence in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), as support for the proposition that "some minimal procedural safeguards apply to clemency procedures." See *Rutherford v. State*, 940 So. 2d 1112, 1121 n.4 (Fla. 2006) (emphasis omitted). Even still, our cases have emphasized the unlimited

discretion vested solely in the executive branch, both to decide whether to grant clemency and to establish the procedures governing the clemency process. *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009); *Carroll v. State*, 114 So. 3d 883, 888 (Fla. 2013); *Zakrzewski v. State*, 415 So. 3d 203, 211 (Fla.), *cert. denied*, — U.S. —, 146 S. Ct. 57, 222 L.Ed.2d 1184 (2025); *see also* art. IV, § 8(a), Fla. Const.

In applying these principles, we have rejected the argument that a capital defendant has any entitlement to records relating to his clemency proceeding. *Randolph*, 422 So. 3d at 174; *Bates v. State*, 416 So. 3d 312, 321 (Fla.), *cert. denied*, — U.S. —, 146 S. Ct. 66, 222 L.Ed.2d 1190 (2025); *Heath v. State*, 426 So. 3d 1253, 1265 (Fla.), *cert. denied*, No. 25-6746, — U.S. —, — S.Ct. —, 223 L.Ed.2d 587, 2026 WL 363902 (U.S. Feb. 10, 2026).

Moreover, our precedent does not recognize a constitutional right to the effective assistance of clemency counsel. *Lukehart v. State*, 51 Fla. L. Weekly S139, S142 n.13, 2026 WL 1480328 (Fla. May 27, 2026) (“[U]nder Florida and federal law, a defendant has no constitutional right to effective collateral counsel.” (quoting *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005))), *cert. denied*, — U.S. —, 146 S. Ct. 2697, 225 L.Ed.2d 237 (2026); *Barwick v. State*, 361 So. 3d 785, 791 (Fla. 2023) (same); *see also Bowles v. DeSantis*, 934 F.3d 1230, 1242 n.8 (11th Cir. 2019) (“[G]iven that there is no constitutional right to clemency, there is no constitutional right to effective assistance of counsel in clemency proceedings.” (citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991))); *Banks v. Sec’y, Fla. Dep’t. of Corr.*, 592 F. App’x 771, 773 (11th Cir. 2014) (rejecting argument that clemency counsel’s ineffectiveness was a basis for challenging Florida’s clemency process). Thus, we do not find that Reaves’ criticisms of his clemency counsel offer any meaningful support for his claim.

Additionally, Reaves’ speculation that his hearing issues may have caused him to miss critical information during the clemency hearing cannot support relief. *See Valle v. State*, 70 So. 3d 530, 550 (Fla. 2011) (rejecting claims premised on speculative allegations).

Accordingly, Reaves’ clemency claim fails on the merits.

B

Reaves also advanced a method-of-execution claim, which the circuit court rejected on procedural grounds and on the merits. We agree with the court’s ruling.

Reaves’ claim is untimely under [rule 3.851\(d\)](#). This rule requires that postconviction claims be raised within one year of the judgment and sentence becoming final. In this case, Reaves’ death sentence became final in 1994. Thus, his claim is untimely unless one of [rule 3.851\(d\)\(2\)](#)’s timeliness exceptions applies.

Reaves invokes the exception for claims premised on newly discovered facts, relying on his hearing loss and certain autopsies of executed inmates spanning from 2017 to 2026. Notably, though, these circumstances were known or knowable to Reaves many years before he raised the current claim. Reaves was required to raise his claim within one year of those facts becoming discoverable through due diligence. *See Randolph*, 422 So. 3d at 172 (to meet the timeliness exception for newly discovered evidence, “the claim must still be filed within a year of when th[e] facts became discoverable”). He did not; so his claim is untimely.

*4 Reaves’ claim is also procedurally barred, much for the same reasons identified above. *See id.* at 173 (enforcing procedural bar where claim could have been raised in earlier proceeding, but was not).

Finally, Reaves’ method-of-execution claim fails on the merits. We have upheld Florida’s current three-drug protocol against facial and as-applied challenges, including ones comparable to Reaves’. *See Sochor*, 434 So. 3d at 1254 (collecting cases). Based on that precedent, Reaves’ claim cannot succeed.

In sum, Reaves has not demonstrated any basis for reversing the circuit court. We now turn to his habeas petition.

III

Reaves’ habeas petition contains one claim. In advancing his claim, Reaves details the roughly forty-year history of his case (going back to his initial trial); underscores evidence that he deems favorable to his position; and asserts that errors throughout his case were “incessant” and “destructive.” Ultimately, Reaves asks us to conduct some form of cumulative review unencumbered by any procedural bars and to ultimately award him relief. This claim, which

repeatedly invokes the concept of manifest injustice, does not justify relief.

We have rejected similarly broad habeas claims and refused to allow petitioners, like Reaves, to circumvent procedural bars. See *Duckett v. State*, 435 So. 3d 55, 61 (Fla. 2026) (rejecting habeas petitioner's actual-innocence and cumulative-error claims; enforcing procedural bars).

In short, our precedent forecloses the habeas relief that Reaves seeks.

IV

For the reasons given above, we affirm the circuit court's order denying relief. We also deny Reaves' habeas petition. In light of these holdings, we decline to stay Reaves' execution or grant his request for oral argument. No motion for rehearing will be considered. The mandate shall issue immediately.

It is so ordered.

COURIEL, C.J., and MUÑIZ, GROSSHANS, FRANCIS, BARRIOS, and TANENBAUM, JJ., concur.

LABARGA, J., concurs in result.

All Citations

--- So.3d ----, 2026 WL 3071534

Footnotes

- 1 We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const.
- 2 The aggravating factors were: (1) Reaves had committed prior violent felonies, (2) Reaves murdered Deputy Raczkoski in order to avoid arrest, and (3) the murder was heinous, atrocious, or cruel (HAC). *Reaves v. State*, 639 So. 2d 1, 3 n.2, 6 n.11 (Fla. 1994). As for mitigation, the court found that Reaves had received an honorable discharge from the military, had a good reputation up to the age of sixteen, and was a considerate son and good sibling. *Id.* at 3 n.3.
- 3 *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

WILLIAM REAVES,

Defendant.

FELONY DIVISION

CASE NO. 311986CF000729A

Supreme Court No. SC1960-79575

**EMERGENCY CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
OCTOBER 20, 2026 AT 6:00 P.M.**

**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE
JUDGMENT OF CONVICTION AND SENTENCE
AND MOTION FOR STAY OF EXECUTION**

THIS CAUSE came before the Court on the Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend and the Defendant's Motion for Stay of Execution, filed September 27, 2026, pursuant to Florida Rule of Criminal Procedure 3.851. After conducting a case management conference and *Huff*¹ hearing pursuant to Rule 3.851(h) and reviewing the record, the Court determined that the Defendant's claims for relief could be resolved by a review of the record and as a matter of law without an evidentiary hearing. After consideration of the Defendant's Motions, the State's Responses, the court record, along with the arguments of counsel and relevant legal authority, the Court finds and orders as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On initial direct appeal, the Florida Supreme Court summarized the facts of the case as follows:

In the early morning hours of September 23, 1986, Deputy Richard Raczkowski [sic] of the Indian River Sheriff's Department was dispatched by the 911 operator to a convenience store in response to a call from the store's pay telephone.

¹ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

According to Reaves' confession, when the deputy arrived at the store he spoke to Reaves who explained he had made the 911 call because he had no money to call a taxi cab. The deputy then called the 911 operator and requested a cab be sent to the store.

In his confession Reaves stated that while he and the deputy awaited the cab, a gun fell from the shorts Reaves was wearing. When Reaves tried to pick up the gun, the deputy prevented him from doing so by stepping on his hand. Reaves pushed the deputy's knee and then grabbed him by the throat. Reaves eventually got the gun and declared he would not give it to the deputy. The deputy backed away before turning to run. Reaves then shot the deputy in the back four times, claiming he was frightened because he had been using cocaine and because the deputy had reached for his own gun.

It was later determined that the deputy's gun in fact had been fired three times. After the shooting Reaves went to the home of a friend named Hinton. According to Hinton, Reaves said he was able to retrieve the gun after pushing the deputy in the throat. Reaves pointed the gun in the deputy's face as the deputy attempted to draw his own weapon and stated, "I wouldn't do that if I were you." The deputy began backing away, turned, and ran. Reaves then shot him as he ran away.

Reaves v. State, 574 So.2d 105, 106 (Fla. 1991).

Reaves was first tried in 1987, convicted, and sentenced to death. The Florida Supreme Court reversed because the prosecuting attorney had previously represented Reaves in a prior criminal matter. *Reaves v. State*, 574 So. 2d 105 (Fla. 1991). Following a change of venue, Reaves was retried in Marion County. On February 25, 1992, the jury found Reaves guilty of the first-degree premeditated murder of Deputy Raczkoski, and by a vote of ten to two recommended a sentence of death. On March 31, 1992, the trial court imposed a sentence of death, finding three aggravating circumstances: (1) a prior violent felony conviction; (2) that the murder was committed to avoid or prevent a lawful arrest; and (3) that the murder was especially heinous, atrocious, or cruel (HAC). *See Reaves v. State*, 639 So. 2d 1, 3, n.2 (Fla. 1994), *cert. denied*, 513 U.S. 990 (1994). The trial court found no statutory mitigation, but found non-statutory mitigation as to Reaves's honorable discharge from military service, his good reputation in his community

up to the age of sixteen, that he was a considerate son to his mother, and was good to his siblings. *Id.* at 3, n.3. On direct appeal, the Florida Supreme Court affirmed the conviction and, although it rejected the HAC aggravator, affirmed the death sentence upon determining that the error was harmless given the two remaining strong aggravators and the weak mitigation. *Reaves*, 639 So. 2d at 6.

Reaves thereafter pursued extensive state and federal collateral review. His initial motion for postconviction relief was denied in part and remanded for an evidentiary hearing on a claim of ineffective assistance of counsel relating to a voluntary intoxication defense. *Reaves v. State*, 826 So. 2d 932 (Fla. 2002). The Florida Supreme Court denied his petition for a writ of habeas corpus. *Reaves v. Crosby*, 837 So. 2d 396 (Fla. 2003). After the evidentiary hearing, relief was denied and the denial affirmed. *Reaves v. State*, 942 So. 2d 874 (Fla. 2006). The Florida Supreme Court affirmed the denial of a successive motion raising a public-records claim (the “Mirman letter”), an Eighth Amendment challenge to Florida’s lethal injection protocol, and a separation-of-powers claim. *Reaves v. State*, 27 So. 3d 661 (Fla. 2009). A subsequent successive motion premised on *Porter v. McCollum*, 558 U.S. 30 (2009), was denied and the denial affirmed.

In federal habeas proceedings, the district court twice granted relief and the Eleventh Circuit twice reversed. *See Reaves v. Sec’y, Fla. Dep’t of Corr.*, 717 F.3d 886 (11th Cir. 2013); *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1137 (11th Cir. 2017), *cert. denied*, 585 U.S. 1020 (2018). The Florida Supreme Court thereafter affirmed the denial of Reaves’s successive motion premised on *Hurst v. Florida*, 577 U.S. 92 (2016), holding that *Hurst* does not apply retroactively to Reaves’s sentence, which became final in 1994. *Reaves v. State*, 241 So. 3d 63 (Fla. 2018).

Clemency proceedings were initiated in March of 2023. By letter dated September 18, 2026, the Office of Executive Clemency advised that, after review of the clemency investigation materials in accordance with the Rules of Executive Clemency, the Governor had denied clemency.

On September 18, 2026, Governor DeSantis signed a death warrant scheduling Reaves's execution for October 20, 2026, at 6:00 p.m. That same day, the Florida Supreme Court entered a scheduling order requiring that all postconviction litigation before this Court be completed by October 2, 2026, at 11:00 a.m. The present motion is Reaves's third successive motion for postconviction relief under Rule 3.851 and his fourth overall.

APPLICABLE RULE 3.851 PROCEDURAL LAW

A motion to vacate a judgment of conviction and sentence of death must be filed within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). *Damren v. State*, 397 So. 3d 607, 611 (Fla. 2023). It is the defendant's burden to establish the timeliness of a successive postconviction claim. *Id.* A defendant sentenced to death may file a successive motion for collateral relief outside the one-year limitation only if the motion alleges one of three exceptions: (1) the facts on which the claim is predicated were unknown and could not have been ascertained through the exercise of due diligence; (2) a newly established fundamental constitutional right has been held to apply retroactively; or (3) postconviction counsel, through neglect, failed to file the motion. *See* Fla. R. Crim. P. 3.851(d)(2). *James v. State*, 404 So. 3d 317, 324 (Fla. 2025) (outlining these exceptions in a post-warrant context). A claim raised in a successive motion must be dismissed where it fails to allege new grounds for relief, constitutes an abuse of process, is unsupported by good cause for the failure to raise it earlier, or fails to meet the

time-limitation exceptions of subdivision (d)(2). *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023) (finding that successive postconviction claim of exemption from death penalty due to mental deficiencies was procedurally barred because it was substantially argued at trial or could have been raised previously).

Even where an exception is alleged, a successive claim may be denied as untimely if the defendant delayed in raising it: a claim of newly discovered evidence must be filed within one year of the date the claim became discoverable through the exercise of due diligence. *Damren*, 397 So. 3d at 610; see also *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). All motions filed after a death warrant has been signed are treated as successive motions subject to the content requirements of subdivision (e)(2), and the ordinary time limitations do not apply after a warrant is signed. Fla. R. Crim. P. 3.851(f)(5); (h)(5). In an active-warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred. *Kearse v. State*, 428 So. 3d 75, 80 (Fla. 2026), *cert. denied sub nom. Kearse v. Florida*, 146 S. Ct. 1786 (2026).

A successive motion may be summarily denied, without an evidentiary hearing, where the motion, files, and records in the case conclusively show that the movant is entitled to no relief. Fla. R. Crim. P. 3.851(f)(5). Summary denial is likewise appropriate where a claim is legally insufficient or procedurally barred, or where its allegations are conclusively refuted by the record. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989); *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) (“It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim.”); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (a court may summarily deny a postconviction claim that is procedurally barred).

With this precedent in mind, the Court has reviewed the three claims raised in the Defendant's present successive motion and finds that they are untimely, legally insufficient, procedurally barred, or without merit, and therefore may all be summarily denied. Each claim is addressed individually below.

GROUND ALLEGED FOR POSTCONVICTION RELIEF²

CLAIM I – Newly Discovered Evidence of Corruption and False Testimony

Reaves's first claim asserts that newly discovered evidence undermines confidence in his conviction by establishing that the State's key witness, Erman Eugene Hinton, offered false testimony. The claim rests on an alleged January 2026 disclosure by Jimmy Lee Killings to collateral counsel that a ring of corruption existed within the Indian River County Sheriff's Office (IRCSO), that IRCSO Deputies Sardella and Fafeita accepted bribes from Killings, and that Fafeita influenced Hinton to give or alter his incriminating account of the shooting. Reaves contends that, had the jury learned of this alleged corruption, there is a reasonable probability he would have received a lesser sentence because the State could not have proven premeditation. A review of the record and the totality of the circumstances supports summary denial, as the claim is untimely, legally insufficient, procedurally barred, and without merit.

To be considered newly discovered, the asserted evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence"; and second, the evidence "must be of such nature that it would probably produce an acquittal on retrial." *Damren*, 397 So. 3d at

² Record citations will be identified as: "R1. ____" & "T1. ____" record of 1987 trial on direct appeal; "R2. ____" & "T2. ____" record of 1992 trial on direct appeal; "PCR3. ____" record of 2004 postconviction appeal; "SR4. ____" supplemental record of 1992 appeal.

610. Where, as here, the defendant seeks to vacate a death sentence, the second prong requires that the newly discovered evidence “would probably yield a less severe sentence”, that is, a life sentence. *Id.* The “probably produce an acquittal” requirement is “on par with the ‘more likely than not’ standard of prejudice” and is a higher standard than the “reasonable probability” standard applied to claims of ineffective assistance of counsel or the materiality of undisclosed evidence. *Id.* at 611.

The claim is untimely. Any claim of newly discovered evidence in a death case must be brought within one year of the date the evidence was discovered or could have been discovered through the exercise of due diligence. *Kearse*, 428 So. 3d at 79. Reaves’s own motion establishes that the factual predicate for this claim was discoverable decades ago. Reaves acknowledges that Hinton named Killings to law enforcement in 1986, during the very investigation that led to Reaves’s arrest that same year. Reaves therefore knew, or through the exercise of due diligence could have ascertained, the asserted connection between Hinton, Killings, and the investigating deputies long before 2026. Reaves’s own motion also states that the corruption of Sardella was known to defense back in 1987 when his name was mentioned on a wiretap investigation involving Killings, and Sardella was subsequently arrested. His motion also states that Sheriff Dobeck’s alleged corruption was known by the time of Reaves’s second trial. Where a defendant has been aware of a potentially relevant witness for years, and could have obtained the information through diligence, a claim built upon that witness is untimely. *Suggs v. State*, 421 So. 3d 410, 418 (Fla. 2025), *reh’g denied*, No. SC2024-0660, 2025 WL 2952599 (Fla. Oct. 20, 2025). Reaves has not carried his burden to demonstrate that the facts underlying this claim could not have been discovered earlier, and the claim is untimely.

The claim is legally insufficient. A defendant raising a newly-discovered-evidence claim in a successive motion must satisfy the pleading requirements of Rule 3.851(e)(2)(c), which require the defendant to attach (i) the names, addresses, and telephone numbers of all witnesses supporting the claim; (ii) a statement that each witness will be available to testify under oath at an evidentiary hearing; (iii) copies of all supporting documents, including any affidavits obtained; and (iv) a statement of the reason each witness or document was not previously available. Fla. R. Crim. P. 3.851(e)(2)(C). Reaves has satisfied none of these requirements. He has not provided the name, address, and telephone number of any supporting witness, has not stated that any witness will be available to testify, has attached no affidavit from Killings, Hinton, or any other person, and has not explained why the asserted evidence was not previously available. A successive newly-discovered-evidence claim that fails to meet these pleading requirements is subject to summary denial. *See Damren*, 397 So. 3d at 611 (affirming summary denial of a facially insufficient successive newly-discovered-evidence claim). Additionally, the Court is unable to ascertain from review of Reaves's motion what information Killings revealed to CCRC-South which would constitute the basis for this claim. Reaves states in his motion that Killings disclosed to CCRC-South that "there was a much greater ring of corruption driving IRCISO's need to draw attention away from certain witnesses and officers..." but does not specifically state what Killings said. Rather, the motion goes on to make many unattributed allegations such as that "*both* Sardella and Fafeita were receiving bribes from Killings", without any basis of knowledge as to where that information came from, or whether it came from Killings's new statement.

The claim is procedurally barred. Because the factual predicate for this claim was available to Reaves years ago, it could have been raised in a prior postconviction proceeding. In

an active-warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred. *Kearse*, 428 So. 3d at 80.

The claim is without merit. Even setting aside its untimeliness and pleading deficiencies, the claim fails on the merits. Newly discovered evidence must be admissible to satisfy the second prong of that test. *Suggs*, 421 So. 3d at 416. Reaves alleges that Deputy Fafeita influenced Hinton, but the record reflects that Fafeita did not testify at trial, and Reaves neither alleges what, if anything, Fafeita said to Hinton nor establishes that any such statement would be admissible or that Fafeita would be available at a retrial. Reaves fails to allege the substance of Killings’s new statement to CCRC-South and instead makes vague allegations that a deputy with little involvement³ in Reaves’s case was corrupt. Allegations of unrelated corruption by a non-testifying officer, unsupported by admissible proof, do not constitute cognizable newly discovered evidence and are merely speculative at best. *Id.* at 418.

Nor does Reaves allege that Hinton has recanted the core of his account. At the 1992 retrial, Hinton refused to testify; the trial court found him unavailable, held him in contempt, and his sworn 1987 testimony was read to the jury as substantive evidence of guilt. (T2. 1128-1129). In that testimony, Hinton recounted that Reaves came to his home and said, “I just shot a cop, I just shot a police”; that the deputy begged for his life, saying “don’t shoot me,” and that Reaves responded, “One of us got to go, me or you”; and that when the deputy turned and ran, Reaves “jumped up and started shooting.” (T2. 1167; 1181-83). Reaves identifies nothing suggesting Hinton has since retracted that account. Recantation evidence is inherently unreliable, and a

³ The transcript of Reaves’s trial indicates Fafeita did not testify in the trial and the record shows that Fafeita took Hinton’s first taped statement where Hinton, as he later explained, lied about not knowing anything about the case. (T2. 1187-88; SR4. 1-25).

witness's failure to recant his prior testimony under oath, or his invocation of the Fifth Amendment, is fatal to a newly-discovered-evidence claim that depends on an anticipated recantation. *Bell v. State*, 415 So. 3d 85, 97 (Fla. 2025).

At most, the asserted corruption evidence is impeaching⁴, and it cannot satisfy the demanding materiality standard. Where guilt is established by strong evidence beyond the challenged witness, evidence that is merely impeaching would not probably produce an acquittal on retrial. *Hunter v. State*, 29 So. 3d 256, 270–72 (Fla. 2008). And where independent evidence overwhelms the significance of the challenged witness's testimony, the record conclusively refutes a newly-discovered-evidence claim; merely cumulative impeachment will not satisfy the second prong. *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019). Hinton was extensively impeached at trial with his prior convictions, about lying in the first interview, and his prior inconsistent statements. (T2. 1189-1203). Independent of Hinton's testimony, the trial record established Reaves's guilt. Reaves confessed to the killing in a taped statement given to law enforcement on September 25, 1986⁵. *See State's Response*, Exhibit "A". The medical examiner testified that Deputy Raczkoski suffered four gunshot wounds, with three entrance wounds in the lower left back and one through the left shoulder. (T2. 1073). The State's firearms examiner compared the bullets and casings recovered in the case against rounds test-fired from the .380 semi-automatic pistol Reaves carried when he was arrested and found that they matched. (T2. 1394-1399; 1408-

⁴ As previously stated, the court does not believe this evidence would even be admissible even as impeachment as there is no alleged connection between Fafeita's alleged corruption and any testimony or evidence in this case.

⁵ Reaves's taped confession was played for the jury, *Reaves*, 639 So. 2d at 3 and a copy of the confession from the postconviction appeal (SC2000-0840, pages 984-1026) is attached to the State's Response marked as Exhibit "A".

1409). Even without Hinton’s testimony, the confession and forensic evidence independently established the first-degree murder of the deputy.

The record likewise established the premeditation that distinguishes first-degree murder, a fully-formed conscious purpose to kill that need only exist long enough to permit reflection, and that may be proven by circumstantial evidence, including the nature of the weapon used, the presence or absence of adequate provocation, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. *See Twilegar v. State*, 42 So. 3d 177, 190 (Fla. 2010). The murder weapon was a semi-automatic pistol that required a separate, independent trigger pull for each of seven shots, incorporated a disconnecter that prevented multiple discharges from a single pull, and had two safeties that had to be disengaged before it would fire. (T2. 1424-1427; 1438-1439). Firing multiple, separately triggered shots reflects the repeated, deliberate acts that Florida treats as evidence of premeditation. *See Peterka v. State*, 640 So. 2d 59, 65, 68 (Fla. 1994) (firearm with two safety mechanisms and a required trigger pull of two and one-half to nine pounds of pressure “would have prevented an accidental firing” and supported a finding of premeditation); *Washington v. State*, 432 So. 2d 44, 47 (Fla. 1983) (testimony that the shooting was intentional, “along with the fact that appellant shot the deputy four times, is sufficient evidence to support the jury’s verdict that the murder was committed with premeditation”); *Millian v. State*, 758 So. 2d 1271, 1274–75 (Fla. 4th DCA 2000) (multiple shots from a semi-automatic weapon and “a pause before the shots were fired” support a finding of premeditation); *Brown v. State*, 126 So. 3d 211, 221 (Fla. 2013) (resuming fire after a pause, having had time to reflect, supports premeditation). By Reaves’s own account, Deputy Raczkoski was shot in the back as he fled after the deputy had backed away and was not firing. *See State’s Response*, Exhibit “A”. Shots fired

at a retreating, non-threatening victim after the shooter has had time to reflect, rather than during a struggle, support premeditation. *Twilegar*, 42 So. 3d at 190–91.

Further, Reaves supplied the motive in his own confession: as a convicted felon carrying a concealed firearm, he refused to surrender the gun because he faced a mandatory prison term if arrested. *See* State’s Response, Exhibit “A”. A defendant’s determination not to be imprisoned is probative of premeditation in the killing of a law enforcement officer. *Jackson v. State*, 704 So. 2d 500, 504-505 (Fla. 1997). The Court recognizes that this evidence was contested at trial, Reaves maintained the shooting was a panicked, cocaine-driven reaction, but those competing inferences were for the jury, which resolved them against him, and the conviction was affirmed on direct appeal. The corruption evidence is only new support for a claim Reaves has made for decades: that Hinton’s account of premeditation was false. Newly discovered evidence that merely supplies “different evidence on the same fact” the defendant has long advanced will not probably produce a different result. *Van Poyck v. State*, 116 So. 3d 347, 357-58 (Fla. 2013).

Reaves therefore cannot show that the asserted evidence, which would have at most impeached Hinton’s testimony, would probably produce an acquittal or a life sentence on retrial. *Damren*, 397 So. 3d at 610; and see *Gudinas v. State*, 412 So. 3d 701, 709–10 (Fla. 2025), *cert. denied sub nom. Gudinas v. Florida*, 145 S. Ct. 2833 (2025).

Accordingly, the Defendant's Claim I is summarily denied.

CLAIM II – Denial of Access to the Clemency Process

Reaves’s second claim asserts that he was arbitrarily denied access to the clemency process in violation of the Sixth, Eighth, and Fourteenth Amendments. He alleges that his clemency counsel, Jonathan Hackworth, met with him only briefly before the clemency interview, failed to

prepare him, and never provided him a copy of the written submission filed on his behalf; that the Florida Commission on Offender Review (FCOR) and this Court declined to provide him the submission or a transcript of the proceeding; and that his severe hearing impairment prevented him from meaningfully participating. This claim is untimely, procedurally barred, and without merit.

The claim is untimely and procedurally barred. Reaves acknowledges that his clemency proceeding was held in 2023 and that for more than two years, he unsuccessfully sought a copy of the document Hackworth submitted. The facts underlying this claim have therefore been known to Reaves since 2023, and the claim could have been raised well before the signing of the death warrant. A clemency-related claim raised for the first time long after the clemency determination, when it could have been raised earlier, is untimely under Rule 3.851. *Jennings v. State*, 422 So. 3d 107, 114 (Fla. 2025), *cert. denied sub nom. Jennings v. Florida*, 146 S. Ct. 402 (2025). And in an active-warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred. *Kearse*, 428 So. 3d at 80.

The claim is without merit. Even if timely and not barred, the claim fails as a matter of law. The clemency power is vested solely in the executive branch under article IV, section 8 of the Florida Constitution, and the people of Florida have vested “sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.” *Jennings*, 422 So. 3d at 114–15 (quoting *Zakrzewski v. State*, 415 So. 3d 203, 208 (Fla. 2025)). Because of separation of powers considerations, Florida courts “do not second-guess the executive branch in matters of clemency in capital cases.” *Id.* at 115; *see also Gore v. State*, 91 So. 3d 769, 779 (Fla. 2012) (“Florida Rules of Executive Clemency expressly provide that ‘[t]he Governor has the *unfettered discretion* to deny clemency at any time, for any reason.’”).

The Due Process Clause is not violated where the procedures in question do no more than confirm that the clemency power is committed to the authority of the executive. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). While a death-sentenced prisoner's continuing life interest means that “some minimal procedural safeguards apply to clemency proceedings,” the controlling opinion in *Woodard* identifies only two “extreme” examples in which judicial intervention might be warranted: a scheme whereby a state official flipped a coin to determine whether to grant clemency, or a case where the State “arbitrarily denied a prisoner any access to its clemency process.” *Id.* at 274. *Zakrzewski*, 415 So. 3d at 211; *see also Barwick v. Governor of Florida*, 66 F. 4th 896, 903 (11th Cir. 2023) (Due Process Clause does not require the State to provide standards to govern the clemency decision). Additionally, no specific procedures are mandated in clemency proceedings. *Jennings*, 422 So. 3d at 115.

Reaves was not denied access to the clemency process. He received a full clemency proceeding beginning in 2023, at which he was represented and personally present, and the Governor's determination reflects that executive clemency was considered pursuant to the Rules of Executive Clemency before it was denied. Such proceedings are constitutionally sufficient. *Zakrzewski*, 415 So. 3d at 211. To the extent Reaves complains that his clemency counsel performed inadequately, there is no constitutional right to the effective assistance of clemency or collateral counsel, and such a complaint states no cognizable claim. *Jennings*, 422 So. 3d at 118; *see also Rogers v. State*, 409 So. 3d 1257, 1264 (Fla. 2025) (“[Defendant’s claims] are claims of ineffective assistance of postconviction counsel, to which he acknowledges he has no constitutional right in Florida”).

Reaves’s remaining complaints that his clemency counsel met with him only briefly and

failed to prepare him, and that his hearing impairment prevented him from meaningfully participating, challenge the *sufficiency* of the clemency proceeding and not whether he was afforded access to it. A defendant who concedes that a clemency proceeding was held but challenged only its adequacy states no cognizable claim, because the sufficiency of clemency is committed to the exclusive purview of the executive branch. *Chavez v. State*, 132 So. 3d 826, 831-32 (Fla. 2014). The Florida Supreme Court has previously rejected a materially identical theory. In *Muhammad*, it held that an inmate’s allegations that a medical condition prevented his participation in the clemency interview “do not support a claim that the circumstances surrounding his clemency denied him minimal due process.” *Muhammad v. State*, 132 So. 3d 176, 198-99 (Fla. 2013). The narrow *Woodard* exception on which Reaves relies reaches only the total “arbitrar[y] deni[al of] a prisoner any access to its clemency process”, not a claim that a prisoner who was afforded access was impaired in his participation. *Barwick*, 66 F. 4th at 903-04. To the extent Reaves grounds this claim in the Sixth and Eighth Amendments, it fails for the same reasons as there is no constitutional right to clemency or to the effective assistance of clemency counsel. *Id.* at 904 n. 4; *Jennings*, 422 So. 3d at 118.

To the extent Reaves complains that he, rather than his counsel, was not provided a transcript or a copy of the submission, records relating to the clemency process are confidential and exempt from disclosure, and a request for such records is properly denied where it is not tied to a colorable claim for postconviction relief. *See Muhammad*, 132 So. 3d at 203 (holding a claim for clemency records was properly denied because clemency records are exempt from production in a records request filed in a postconviction proceeding and would not relate to a colorable claim because claims challenging clemency proceedings are meritless). Reaves has not shown an

entitlement to any records or how any withheld record relates to a colorable postconviction claim.

Accordingly, the Defendant's Claim II is summarily denied.

CLAIM III – Eighth Amendment Challenge to the Lethal Injection Protocol

Reaves's third claim asserts that his execution under Florida's current three-drug lethal injection protocol of etomidate, rocuronium bromide, and potassium acetate will constitute cruel and unusual punishment in violation of the Eighth Amendment. He contends that etomidate is short-acting and lacks analgesic effect, so that its effect will wear off and he will consciously experience pulmonary edema and severe air hunger; that the protocol's consciousness check is inadequate and, as applied to him, compromised by his severe hearing impairment; and he offers a single-drug secobarbital protocol and other regimens as alternatives. In support he relies on autopsies of executed inmates and the report of Dr. Joel Zivot, and on the Eleventh Circuit's decision in *Lee v. Commissioner, Alabama Department of Corrections*. This claim is untimely, procedurally barred, insufficiently pled, and without merit.

The claim is untimely and procedurally barred. Florida's current three-drug protocol has remained essentially unchanged since 2017, and the one-year clock for a method-of-execution claim runs from the date the supporting facts became discoverable, not from the signing of the death warrant. *Spencer v. State*, 434 So. 3d 709, 716–17 (Fla. 2026), *cert. denied sub nom. Spencer v. Florida*, 146 S. Ct. 2772 (2026). A facial pulmonary-edema challenge premised on autopsies of executed inmates is untimely because those autopsies “have been discoverable since the first one was conducted in 2017.” *Sochor v. State*, 434 So. 3d 1251, 1254 (Fla. 2026), *cert. denied sub nom. Sochor v. Florida*, No. 26-5061, 2026 WL 2028264 (U.S. July 14, 2026). To the extent the claim is as-applied and premised on Reaves's hearing impairment and other medical conditions, it

is likewise untimely because those conditions have been known for years, and method-of-execution claims are not rendered ripe only upon the signing of a warrant. *Spencer*, 434 So. 3d at 716–717. Method-of-execution claims are procedurally barred unless the method itself changes or new facts about the current method arise during a prior execution. Because Reaves could have raised this challenge earlier and did not, it is procedurally barred. *See Rogers*, 409 So. 3d at 1263 (“[I]n an active warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred.”).

The claim is insufficiently pled and without merit. To prevail on a method-of-execution claim, a defendant must “(1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain.” *Tanzi v. State*, 407 So. 3d 385, 392 (Fla. 2025). This standard derives from and tracks the controlling federal test, which forbids a method of execution only where the inmate demonstrates a substantial risk of serious harm and identifies a known, feasible, and readily implemented alternative that would significantly reduce that risk. *Glossip v. Gross*, 576 U.S. 863, 877 (2015); *Baze v. Rees*, 553 U.S. 35, 52 (2008). That alternative method requirement applies with equal force to an as-applied challenge premised on an inmate’s unique medical condition. *Bucklew v. Precythe*, 587 U.S. 119, 133-36 (2019). The Eighth Amendment “does not demand the avoidance of all risk of pain in carrying out executions” and “does not come into play unless the risk of pain associated with the State’s method is ‘substantial when compared to a known and available alternative.’” *Id.* at 393. Under the first prong, the defendant must show a risk that is “sure or very likely — in other words, a virtual certainty — to cause serious illness and needless

suffering"; speculative and conclusory allegations, including those supported by an affidavit from Dr. Zivot, are insufficient and do not warrant an evidentiary hearing. *Spencer*, 434 So. 3d at 717–18.

The Florida Supreme Court has repeatedly upheld Florida’s lethal injection protocol, including the etomidate protocol, which includes safeguards to ensure the condemned is unconscious throughout the execution. *Tanzi v. State*, 407 So. 3d 385, 393. Reaves’s allegations do not overcome “the well-established fact that the administration of etomidate will render him unconscious likely within one minute,” and the Department of Corrections is entitled to the presumption that it will comply with the protocol, including the consciousness check. *Rogers v. State*, 409 So. 3d at 1268 (citation omitted). The Florida Supreme Court recently reaffirmed each of these points in the etomidate context, holding that once a lethal-injection protocol has been upheld it is “facially constitutional as a matter of law,” that the Department is presumed to comply with the required consciousness check, after which the execution “cannot proceed until [the inmate] is rendered unconscious,” and that the protocol takes account of “the individual physical attributes of each inmate.” *Lukehart v. State*, No. SC2026-0736, 2026 WL 1480328, at *4–5 (Fla. May 27, 2026). Reaves’s contention that his hearing impairment will defeat the consciousness check is thus both speculative and foreclosed by the presumption that the Department will comply with the protocol.

Reaves’s reliance on *Lee* is misplaced. *Lee* addressed Alabama’s use of nitrogen hypoxia, and because Florida’s method of execution materially differs, *Lee v. Comm’r, Ala. Dep’t of Corr.*, No. 26-11864, 2026 WL 1651147 (11th Cir. June 8, 2026) is inapposite. An inference of pulmonary edema drawn from autopsy reports, without more, is speculative and does not establish

the requisite virtual certainty of needless suffering. *Sochor*, 434 So. 3d at 1254 n.6 (“Sochor draws this inference solely from the autopsy reports and related documents. Without an expert affidavit to support his assertion, we find his allegations to be speculative.”)

Reaves’s claim also fails on the second prong. A proposed alternative must be “feasible, readily implemented, and in fact significantly reduce[] a substantial risk of severe pain.” *Tanzi v. State*, 407 So. 3d 385, 393. Reaves has not shown that his proposed secobarbital or other regimens could be readily implemented or would in fact significantly reduce the risk he describes. *Randolph v. State*, 422 So. 3d 166, 173 (Fla. 2025), *cert. denied sub nom. Randolph v. Florida*, 146 S. Ct. 819 (2025); *see also Tanzi*, 407 So. 3d at 393; *Rogers*, 409 So. 3d at 1268. The claim is therefore legally insufficient and without merit.

Accordingly, the Defendant's Claim III is summarily denied.

MOTION FOR STAY OF EXECUTION

A successive motion may be denied without an evidentiary hearing, where “the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” Fla. R. Crim. P. 3.851(f)(5)(B); (h)(6). The standard governing a stay of execution is distinct. A stay on a successive motion for postconviction relief is warranted “only where there are substantial grounds upon which relief might be granted,” and entitlement to an evidentiary hearing does not automatically compel a stay. *Cole v. State*, 392 So. 3d 1054, 1066 (Fla. 2024), *cert. denied sub nom. Cole v. Florida*, 145 S. Ct. 109 (2024) (quoting *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla. 2023)). Through the Defendant's considerable state and federal postconviction proceedings spanning more than three decades, he has been afforded a full and fair opportunity to show that the Constitution prohibits his execution. As determined herein, however, the Defendant’s claims

do not warrant an evidentiary hearing and are untimely, legally insufficient, procedurally barred, or without merit. Accordingly, the Defendant has failed to establish any substantial grounds upon which relief might be granted, and there is no basis for a stay.

To the extent the Defendant requests leave to amend his successive motion, that request is denied. The deficiencies identified in this Order are not curable by more artful pleading. Each claim is untimely, procedurally barred, or legally insufficient as a matter of law and amendment would therefore be futile. The Florida Supreme Court's scheduling order further requires that all proceedings before this Court conclude by October 2, 2026, leaving no occasion for successive amended pleadings.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend and the Defendant's Motion for Stay of Execution are **DENIED**. As to any claim not specifically granted herein, same is **DENIED**.

2. Pursuant to the Florida Supreme Court's scheduling order, and in light of the requirement that all proceedings before this Court be concluded by October 2, 2026, the Defendant shall file any Notice of Appeal in accordance with that scheduling order and Florida Rule of Criminal Procedure 3.851(f).

3. The Clerk of Court shall file the record on appeal, including all warrant filings and complete transcripts of all hearings, with the Florida Supreme Court by **Friday, October 2, 2026, at 4:30 p.m.**, as directed by the Florida Supreme Court. *See also* Fla. R. Crim. P. 3.851(h)(9).

DONE AND ORDERED in chambers in Vero Beach, Indian River County, Florida, on this the 2nd day of October, 2026.

ANASTASIA M. NORMAN
CIRCUIT JUDGE

E-service to:

Florida Supreme Court Clerk, Warrant@flcourts.org; canovak@flcourts.org

Hon. Anastasia M. Norman, Circuit Court Judge IRCJudge3@circuit19.org

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**AGREEMENT BETWEEN
FLORIDA COMMISSION ON OFFENDER REVIEW**

AND

Jonathan Hackworth

This Agreement is entered into between the Florida Commission on Offender Review (FCOR), whose address is 4070 Esplanade Way, Tallahassee, Florida 32399-2450, and Jonathan Hackworth an attorney (Attorney), or a Legal Entity (Legal Entity), whose address is 1818 N. 15th St., Tampa, Florida 33605-3642.

For purposes of this Agreement, the obligations of this Agreement apply equally to an Attorney and to a Legal Entity. The Legal Entity is responsible for ensuring that any attorney in its practice working under this Agreement knows and understands the responsibilities of this Agreement. Any breach of a provision of this Agreement by any attorney under the authority or supervision of Legal Entity shall also constitute a breach of this Agreement by the Legal Entity. If the Legal Entity is appointed, this Agreement is the basis under which the services of the attorney shall be provided.

I. APPLICABLE DEFINITIONS

1. Attorney means any individual attorney who is a member of the Florida Bar in good standing.
2. Legal Entity means any group under the direction of member(s) of the Florida Bar in good standing, such as a law firm or partnership registered with the Florida Department of State to provide legal services.
3. Client means a capital punishment inmate, i.e., an inmate who has previously been sentenced to death and is currently incarcerated on death row.
4. Clemency Board means the Governor and Cabinet sitting as the Board of Executive Clemency.
5. Executive Clemency Coordinator means the person appointed by Clemency Board pursuant to the Rules of Executive Clemency.

II. TERM

1. The term of this Agreement shall be from the date of execution, which is the date of the last signatory, through March 22, 2024, unless terminated sooner as provided herein. In the event the parties sign this Agreement on different dates, the latter date shall be the effective date. If it becomes necessary to replace this Agreement with another Agreement, then the new agreement shall supersede and terminate this Agreement.
2. FCOR may renew this Agreement upon the same terms and conditions of which may not exceed the term of the original agreement, or three (3) years, whichever is longer. Exercise of the renewal option is at the sole discretion of FCOR and

shall be contingent, at a minimum, upon satisfactory performance, subject to the availability of funds and other factors deemed relevant by FCOR.

III. AUTHORITY

Section 940.031, Florida Statutes (F.S.) gives FCOR the authority to contract with an Attorney/Legal Entity to represent a capital punishment inmate for relief by executive clemency.

IV. SERVICES

Attorney/Legal Entity acknowledges that FCOR is a governmental state agency and is bound by state law, rules, and policies, which must be followed by an agency when providing such services. These laws, rules, and policies include, but are not limited to, chapter 947, F.S. (Florida Commission on Offender Review), chapter 287, F.S. (Procurement), chapter 119, F.S. (Public Records) and the Rules of Executive Clemency.

1. Attorney/Legal Entity shall provide legal services for [REDACTED], **Department of Corrections # [REDACTED]** as provided by Florida Statutes and the General Appropriations Act. The capital punishment inmate is deemed to be the Client of Attorney/Legal Entity appointed by the Clemency Board. Attorney/Legal Entity shall represent the Client, throughout the entire clemency review process. Attorney/Legal Entity shall represent the Client until his/her services are no longer required by the Clemency Board. Attorney/Legal Entity's representation of Client includes for any and all sentences of death that have been imposed by the State of Florida.
2. Attorney/Legal Entity shall communicate with the Client to determine how the Client would like to proceed in his/her clemency review process. The communication shall take place prior to the clemency interview and within forty (40) calendar days of the execution of this Agreement. FCOR shall notify Attorney/Legal Entity in writing of the date of the clemency interview. Attorney/Legal Entity may request in writing that the meeting occur past the forty (40) calendar days of the execution of this Agreement and FCOR may approve in writing an alternate date for the meeting. Attorney/Legal Entity shall submit to FCOR by email to clemencycounsel@fcor.state.fl.us a statement advising of the date and means of communication with the Client within fourteen (14) calendar days subsequent to the communication with the Client.
3. Attorney/ Legal Entity shall attend the clemency interview in person, on the date provided in writing to the Attorney/Legal Entity by FCOR, at the correctional institution where the Client is located. Attorney/Legal Entity shall provide legal representation to the Client during the clemency interview. Attorney/Legal Entity shall submit within fourteen (14) calendar days subsequent to the clemency interview to FCOR by email to clemencycounsel@fcor.state.fl.us a statement advising that he/she personally attended the clemency interview and

provided legal representation to the Client.

4. Attorney/Legal Entity shall prepare a written statement, brief, or memorandum on behalf of the Client. The written statement, brief, or memorandum shall be submitted to FCOR within forty-five (45) calendar days subsequent to the clemency interview date, unless otherwise requested in writing by the Attorney/Legal Entity and approved in writing by FCOR. The written statement, brief, or memorandum shall include all information relevant to the Client to the issue of clemency for the Clemency Board's consideration. The Attorney/Legal Entity shall submit one (1) original and three (3) copies of the written statement, brief, or memorandum by U.S. Mail or hand delivery to the Florida Commission on Offender Review, Office of Clemency Investigations, 4070 Esplanade Way, Tallahassee, Florida, 32399-2450.
5. If a clemency hearing is scheduled by the Clemency Board, the Executive Clemency Coordinator will notify the Attorney/Legal Entity in writing. Attorney/Legal Entity shall attend the clemency hearing on the date and time scheduled in Tallahassee, Florida, and shall make an oral presentation on behalf of the Client to the Clemency Board.
6. Attorney/Legal Entity shall personally perform the legal services required for the Client. Attorney/Legal Entity shall at all times comply with all requirements of the federal, state, county, and municipal statutes, ordinances, rules, regulations, and the Rules of Professional Conduct in the performance of Attorney's obligations under this Agreement. Attorney/Legal Entity shall, throughout the term of this Agreement, be a member in good standing with The Florida Bar.
7. Attorney/Legal Entity may not reassign or subcontract any case or portion thereof to another Attorney/Legal Entity. This limitation on subcontracting or reassigning shall include associates or partners of Attorney's law firm regardless of whether the associate or partner is on the private counsel list maintained by the Clemency Board. Attorney/Legal Entity affirmatively waives the right to seek compensation for work performed by any other attorney or other person. Attorney/Legal Entity agrees to be responsible for the management and direction of all legal services pursuant to this Agreement.
8. Attorney/Legal Entity shall provide competent representation and be readily accessible to the Client. Attorney/Legal Entity shall provide to the Client all professional legal services reasonably required related to the clemency review process from the date of the executed Agreement through conclusion or until Attorney/Legal Entity services are no longer required by the Clemency Board. Attorney/Legal Entity agrees to represent the Client throughout the clemency review process, even though said representation may occur beyond the term of this Agreement.

9. The parties agree that this Agreement does not create the relationship of Attorney/Legal Entity and Client between FCOR and Attorney/Legal Entity. This Agreement is not intended to, and shall not be construed to, create the relationship of agent, servant, employee, partnership, joint venture, or association between FCOR and Attorney/Legal Entity. Attorney/Legal Entity is and shall at all times be deemed an independent contractor and shall be wholly responsible for the manner in which Attorney/Legal Entity performs the services required by the terms of this Agreement. Attorney/Legal Entity exclusively assumes responsibility for the acts of Attorney/Legal Entity's employees, agents, and all others acting at the direction of, or on behalf of, Attorney/Legal Entity as they relate to the services to be provided under this Agreement. Attorney/Legal Entity and its agents and employees shall not be entitled to any rights or privileges of employees of the State of Florida including, but not limited to, compensation insurance, malpractice insurance and unemployment insurance, as a result of this Agreement.
10. Nothing in this Agreement shall preclude Attorney/Legal Entity from representing privately retained or contracted clients provided that no private client shall be accepted that is likely to cause a conflict of interest with the Client under this Agreement.
11. Attorney shall notify Executive Clemency Coordinator of any disciplinary action against Attorney/Legal Entity where probable cause has been found. Attorney/Legal Entity shall notify Executive Clemency Coordinator of the cases in which there is a judicial finding or a sanction imposed by the Florida Bar that Attorney/Legal Entity provided ineffective assistance of counsel.
12. All FCOR correspondence shall be sent by email to clemencycounsel@fcor.state.fl.us.
13. All correspondence for the Executive Clemency Coordinator shall be sent by email to clemencycounsel@fcor.state.fl.us.

V. DELIVERABLES

Deliverable	Due Date	Submit To	Payment
A statement advising of the date and means of communication with the Client	Within 14 calendar days subsequent from communication date	FCOR By E-mail	\$2,000.00
A statement advising that Attorney/Legal Entity personally attended the clemency interview and provided legal	Within 14 calendar days subsequent to the clemency interview	FCOR By E-mail	\$5,000.00

representation to the Client			
A written statement, brief, or memorandum (1 Original and 3 copies)	Within 45 calendar days subsequent from the interview date	FCOR By U.S. Mail or hand delivered	\$3,000.00

VI. COMPENSATION

1. Attorney/Legal Entity shall be paid in accordance with Florida Statutes and the General Appropriations Act in effect at the time of Attorney/Legal Entity's date of appointment.
2. Attorney/Legal Entity agrees and acknowledges that the compensation to be paid pursuant to this Agreement shall be the sole, exclusive, and full compensation to which Attorney/Legal Entity shall be entitled for the Client pursuant to this Agreement.
3. FCOR will pay the Attorney/Legal Entity a total compensation under this Agreement an amount not to exceed \$10,000.00 US Dollars.
4. If Attorney/Legal Entity does not fulfill all contractual obligations prior to the full performance of his or her duties through the representation of the Client, FCOR shall presume that the Attorney/Legal Entity is not entitled to full payment and any amount remaining up to the maximum \$10,000.00 US Dollars will be deemed forfeited. Payments shall be made as specified in s. 215.422, F.S.
5. If Attorney/Legal Entity discovers upon receiving information from the Client during the communication with the Client that a conflict exists, Attorney/Legal Entity shall notify FCOR within seven (7) calendar days of the communication from the Client by email to clemencycounsel@fcor.state.fl.us.
6. Attorney/Legal Entity is required to submit their Substitute Form W-9 to Department Financial Services (DFS). Information and the form are available through the DFS web site, <https://www.myfloridacfo.com/division/aa/vendors>. Within fifteen (15) calendar days of execution of this Agreement, Attorney/Legal Entity shall provide written notification to FCOR by email to clemencycounsel@fcor.state.fl.us that they have submitted their Substitute W-9 form. If FCOR does not receive notification of submission of the W-9 form within fifteen (15) days of execution of this Agreement, the Agreement shall be null and void.
7. Attorney/Legal Entity shall not receive payment for services rendered prior to the execution date or after the termination date of this Agreement. The State of Florida and FCOR's performance and obligation to pay under this Agreement are contingent upon an annual appropriation by the Florida Legislature. FCOR

is not liable for payments in excess of the amount appropriated per Client to FCOR by the legislature for this purpose.

8. Attorney/Legal Entity shall designate who shall receive payment from FCOR under this Agreement and that designation shall match the name on the Substitute W-9. Payment by FCOR under this Agreement shall only be made to either Attorney or Legal Entity. Attorney/Legal Entity shall hold FCOR harmless from any and all liability which might arise from any dispute or litigation as a result of a payment by FCOR. This sub-paragraph does not authorize Attorney/Legal Entity to assign duties or responsibilities in representing the Client to any other Attorney/Legal Entity other than who has entered into this Agreement.
9. Attorney/Legal Entity is willing to accept as payment prescribed in s. 940.031, F.S. Attorney/Legal Entity affirmatively waives the right to seek compensation in excess of the payment prescribed in s. 940.031, F.S., and the General Appropriations Act. Attorney/Legal Entity acknowledges that Attorney's ability to participate in the private counsel list, constituting only of attorneys willing to waive compensation in excess of the payment prescribed in s. 940.031, F.S., constitutes adequate and complete consideration for this waiver of the right to seek compensation in excess of the payment prescribed in s. 940.031, F.S.
10. For compensation and tax reporting purposes, payments pursuant to this Agreement shall be made payable only to the holder of the tax identification number. If Legal Entity is appointed to a case and Attorney is assigned to the case, invoices presented by Legal Entity shall be certified by Attorney. Attorney/Legal Entity shall bill under one tax identification number. Attorney/Legal Entity shall execute a new agreement if there are changes to the tax identification number. Any sharing of compensation with prior firms or future firms is the responsibility of Attorney/Legal Entity.
11. Attorney/Legal Entity acknowledges and agrees that agreements between Attorney/Legal Entity and service providers are the sole responsibility of Attorney/Legal Entity. FCOR is not privy to any agreement between Attorney/Legal Entity and service providers and in no way accepts responsibility or liability for quality of service, terms and conditions, or any other aspects of any agreement between Attorney/Legal Entity and service providers. Attorney/Legal Entity acknowledges that service providers retained must be properly licensed pursuant to Florida law.
12. Upon written request by Attorney/Legal Entity, FCOR will provide one copy of the clemency interview transcript to the Attorney/Legal Entity at no cost to Attorney/Legal Entity.
13. Pursuant to s. 28.345, F.S., Attorney/Legal Entity is exempt from all court-related fees and charges assessed by the clerks of the circuit courts. Pursuant

to s. 28.24, F.S., the clerks of the circuit courts shall provide without charge to Attorney/Legal Entity as private Clemency Board appointed counsel access to and a copy of a public record(s). As delineated in s. 57.081 F.S., an indigent shall receive the services of the courts, sheriffs, and clerks, with respect to pending proceedings, despite his or her present inability to pay for these services including filing fees, service of process, certified copies of orders or final judgments, and a single photocopy of any court pleading, record, or instrument filed with the clerk.

14. Attorney/Legal Entity shall not obtain services for his or her Client from service providers or other business entities of which Attorney/Legal Entity or Attorney's spouse or child is an officer, partner, director, or proprietor or in which Attorney/Legal Entity or Attorney's spouse or child, or any combination of them, has a material interest in any form whatsoever. Attorney/Legal Entity shall not solicit or accept anything of value to Attorney, including a gift, loan, and reward, promise of future employment, favor, or service, from a service provider or other business entity who provides services to Attorney/Legal Entity's Client.
15. Attorney/Legal Entity within thirty (30) calendar days of written notification from FCOR that a deliverable has been received and accepted shall bill FCOR in accordance with Exhibit 1. The properly prepared invoice shall include, but not be limited to, a concise and meaningful description of the services rendered, with sufficient detail to enable FCOR to evaluate the services rendered.
16. If an invoice is submitted to FCOR by email to clemencycounsel@fcor.state.fl.us more than ninety (90) calendar days after the Attorney/Legal Entity receives written notification from FCOR that a deliverable has been received and accepted the payment shall be reduced by fifty percent (50%). This reduction is a contractual penalty for failing to submit a bill in a timely fashion. A bill shall not be deemed submitted to FCOR until all documents required have been received by FCOR. A Vendor Ombudsman, established within DFS, may be contacted at (850) 413-5516 if Attorney/Legal Entity is experiencing problems in obtaining timely payment(s) from a State of Florida agency.
17. It is Attorney/Legal Entity's responsibility to verify that all necessary documentation required for payment of an invoice is submitted to FCOR by email to clemencycounsel@fcor.state.fl.us prior to or with the submission of the invoice. Attorney/Legal Entity is also responsible for verifying that the case has reached a billable stage and submitting the invoice in an amount consistent with contractual requirements. Repeated failures to submit invoices that comport contractual requirements constitute good cause for FCOR to terminate this Agreement.

VII. CONTRACT MANAGEMENT

1. FCOR'S Accounting Contact for this Agreement is

Accounting and Budget Administrator
Florida Commission on Offender Review
Division of Administration
4070 Esplanade Way
Tallahassee, FL 32399-2450
Telephone: (850) 921-2815
Email: finance@fcor.state.fl.us

FCOR's Accounting Contact shall review and approve for payment invoices and provide a copy of the voucher to the Capital Punishment Research Specialist.

2. FCOR's Contract Manager for this Agreement is

Capital Punishment Research Specialist
Florida Commission on Offender Review
Office of Clemency Investigations
4070 Esplanade Way
Tallahassee, FL 32399-2450
Telephone: (850) 487-1175
Email: clemencycounsel@fcor.state.fl.us

In his/her capacity as Contract Manager, the Capital Punishment Research Specialist shall perform the following:

- A. Maintain a contract management file to include the agreement, amendments, invoices, deliverables, correspondence (including telephone calls, letters, and emails) with Attorney/Legal Entity, and vouchers for payment;
- B. Serve as the liaison between FCOR and Attorney/Legal Entity;
- C. Verify receipt of deliverables from Attorney/Legal Entity; and
- D. Review, verify, and approve invoices from the Attorney/Legal Entity.

3. FCOR's Executive Clemency Coordinator is

Executive Clemency Coordinator
Florida Commission on Offender Review
Office of Executive Clemency
4070 Esplanade Way
Tallahassee, FL 32399-2450
Telephone: (850) 921-2880
Email: clemencycounsel@fcor.state.fl.us

The Executive Clemency Coordinator shall review and initiate original agreements, amendments, renewals, and/or terminations of agreement(s).

4. Attorney/Legal Entity's Representative

The name, title, address, and telephone number, fax number, and email address of the Attorney/Legal Entity's representative responsible for administration and performance under this Agreement is

Jonathan Hackworth, Attorney at Law
Hackworth Law
1818 N. 15th Street
Tampa, FL 33605-3642
813-280-2911
Fax: 813-569-7990
jhack@bhtampa.com

5. Contract Management Changes

After execution of this Agreement, any changes in the information contained in this Section shall be provided to the other party in writing and a copy of the written notification shall be maintained in the official Contract Manager's file.

VIII. RECORD RETENTION/ INSPECTION

1. Attorney shall keep contemporaneous detailed records to enable FCOR to verify all costs, expenses, and Attorney/Legal Entity's time expended representing the Client under this Agreement. The records shall include supporting documentation necessary to adequately evaluate and substantiate payments made under this Agreement. The Attorney/Legal Entity shall maintain appropriate documentation, including contemporaneous and detailed hourly accounting of time spent representing the Client.
2. These records and documents are subject to review by FCOR, subject to the Attorney/Legal Entity-Client privilege and work-product privilege. Attorney/Legal Entity may redact information from the records and documents only to the extent necessary to comply with the privilege(s). Attorney/Legal Entity shall maintain the records and documents in a manner that enables the Attorney/Legal Entity to redact information subject to a privilege in order to facilitate and not impede FCOR's review of the records and documents.
3. Upon FCOR's issuance of a notice of inspection of records and documents as to the Client, Attorney/Legal Entity shall deliver to FCOR copies of any and all contemporaneous billing records related to the case within a reasonable period of time. This time period for delivery shall not exceed thirty (30) calendar days, unless an extension is granted by in writing FCOR. Attorney/Legal Entity's failure to provide the contemporaneous billing records within a reasonable

period of time shall be deemed a refusal to allow FCOR to inspect the billing records.

4. Attorney/Legal Entity shall maintain all records and documents (including electronic storage media), in accordance with the requirements of Florida Statutes and the Florida Department of State General Records Schedules. Attorney/Legal Entity agrees to make available for inspection and audit at Attorney/Legal Entity's place of business, upon reasonable notice, all books, statements, ledgers, and other financial records, including electronic storage media, in accordance with generally accepted accounting procedures and practices which sufficiently and properly reflect all revenue of funds provided by FCOR relating to services under this Agreement for a period of thirty (30) years from the date of termination of this agreement. Attorney/Legal Entity agrees to provide financial and compliance audit to FCOR or to the Office of the Auditor General and ensure that all related party transactions are disclosed to the auditor. For purposes of this subparagraph, fourteen (14) calendar days shall be deemed reasonable notice. The failure to allow FCOR to inspect such records upon reasonable notice shall be deemed a refusal to allow FCOR to inspect those records.

IX. ELECTRONIC COMMUNICATION AND ELECTRONIC FUNDS TRANSFER

1. Attorney/Legal Entity shall own, possess, or have routine access to a computer, a printer, a fax machine, and a scanner. Attorney/Legal Entity shall maintain sufficient internet capability, including an e-mail account, to communicate with FCOR under this Agreement. Attorney/Legal Entity agrees to accept communications, including a billing audit deficiency, by e-mail.
2. Attorney/Legal Entity shall participate in an Electronic Funds Transfer (EFT) program under which Attorney/Legal Entity authorizes the transfer of funds electronically to an account in the Attorney/Legal Entity's name at a federal-chartered or state-chartered financial institution. Attorney/Legal Entity is required to register for EFT. Information and the forms to register for EFT are available on the DFS web site, <https://www.myfloridacfo.com/division/aa/vendors>. Within fifteen (15) calendar days of execution of this Agreement, Attorney/Legal Entity shall provide written notification to FCOR by email to clemencycounsel@fcor.state.fl.us that they have registered for EFT. If FCOR does not receive notification of EFT registration within fifteen (15) calendar days of execution of this Agreement, payment for services will not be made to the Attorney/Legal Entity.

X. TERMINATION

1. FCOR shall have the right to terminate this Agreement immediately if, in its sole opinion, Attorney/Legal Entity, or its agents or employees fail to comply with the terms of this Agreement. Such failure shall constitute a material breach of this Agreement by Attorney/Legal Entity. In the event of breach,

Attorney/Legal Entity shall not be entitled to payment for work performed.

2. Except as provided in X.1., upon thirty (30) calendar days written notice, FCOR or Attorney/Legal Entity may, without cause, terminate this Agreement. Attorney/Legal Entity is not eligible for any new appointments in the event of termination of this Agreement.
3. Notice of termination of this Agreement by Attorney/Legal Entity must be in writing and sent to FCOR by email to clemencycounsel@fcor.state.fl.us.

XI. GOVERNING LAW AND VENUE

The validity, construction, and interpretation of this Agreement shall be governed by the laws of the State of Florida and the Florida Constitution. Any action arising over any dispute over performance or other terms of this Agreement may only be maintained in Florida state courts. Venue for all equitable or legal actions arising from or related to this Agreement wherein FCOR or the State of Florida is a named party shall be in the appropriate state court in Leon County, Florida. The parties waive any right to jury trial.

XII. SEVERABILITY

The terms and conditions of this Agreement shall be deemed to be severable. If any clause, term, or condition herein shall be held to be illegal or void, such determination shall not affect the validity or legality of the remaining terms and conditions. Notwithstanding any such determination, this Agreement shall continue in full force and effect unless a particular clause, term, or condition held to be illegal or void renders the balance of the Agreement impossible to perform.

XIII. AMENDMENT OF AGREEMENT

This Agreement expresses the understandings of the parties concerning all matters covered. No changes or additions to this Agreement or the terms of this Agreement, whether by written or verbal understanding of the parties, their officers, agents, or employees, shall be valid unless in the form of a written amendment executed by both parties. The term of the Amendment shall be from the date of execution, which is the date of the last signatory, through June 30, 2023, unless terminated sooner as provided herein or extended.

XIV. MISCELLANEOUS PROVISIONS

1. Attorney/Legal Entity shall affix Attorney's name and bar number on all communications addressed to FCOR. Attorney/Legal Entity shall keep FCOR informed at all times of Attorney/Legal Entity's current name, address, telephone and facsimile numbers, email address, and tax identification number. Notification of changes shall be provided in writing to FCOR by email to clemencycounsel@fcor.state.fl.us within five (5) business days of a

change.

2. In executing this Agreement, the Attorney/Legal Entity certifies that it is not listed on either the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to s. 215.473, F.S. Pursuant to s. 287.135(5), F.S., the Attorney/Legal Entity agrees FCOR may immediately terminate this Agreement for cause if the Attorney/Legal Entity is found to have submitted a false certification or if the Attorney/Legal Entity is placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List during the term of this Agreement.
3. Any dispute concerning compliance and/or performance of this Agreement shall be resolved by the Executive Clemency Coordinator, who shall reduce the decision to writing and serve a copy to the Attorney/Legal Entity. Any dispute that cannot be resolved by the Executive Clemency Coordinator shall be reduced to writing and delivered to FCOR's Director of Administration. The Director of Administration shall decide the dispute, reduce the decision to writing, and deliver to the Attorney/Legal Entity, the Contract Manager, the Capital Punishment Research Specialist, and the Executive Clemency Coordinator.
4. Pursuant to s. 20.055(5), F.S., Attorney/Legal Entity understands and agrees to comply with the duty to cooperate with a State of Florida Inspector General in any investigation, audit, inspection, review, or hearing.
5. Confidential/Executive Clemency Records
 - A. Attorney/Legal Entity acknowledges, that pursuant to s. 14.28, F.S., and the Rules of Executive Clemency, all information and all records and documents generated and gathered in the clemency process are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board information, materials, or records and documents, including any contractor, i.e., Attorney/Legal Entity named in this Agreement, has the discretion to allow such records and documents to be inspected or copied or such information to be disclosed. Access to such materials and information, as approved by the Governor, does not constitute a waiver of confidentiality. Pursuant to s. 14.28, F.S., all clemency records are confidential and exempt from the public records provisions of chapter 119, F.S., and s. 24(a), Art I, Fla. Const.

6. Force Majeure

Neither party shall be liable for damages due to any delay or failure to perform its obligations contemplated in this Agreement due directly or indirectly to fire, explosion, strike, freight embargo, act of God, or of the public enemy, war, civil disturbance, act of any government, de jure or de facto, or agency or official thereof, labor shortage, transportation contingencies, unusually severe weather, quarantine restrictions, epidemic, catastrophe, or circumstances beyond either party's reasonable control. Any schedule or time for performance required under this Agreement shall be extended as necessary to overcome the effects of such force majeure.

7. Accuracy

- A. FCOR shall be responsible for the truth and accuracy of information, representations, reports, data, materials, and releases furnished by FCOR for use or release by Attorney/Legal Entity.
- B. Attorney/Legal Entity shall be responsible for the truth and accuracy of information, representations, reports, data, materials, and releases furnished by Attorney/Legal Entity for use or release by FCOR.

8. Third Party Beneficiary

This Agreement is made for the sole and exclusive benefit of Attorney/Legal Entity and FCOR and is not intended to benefit any third party. No third party may claim any right or benefit or seek to enforce any term or provision of this Agreement.

9. Waiver

The failure of either party to insist upon a strict performance of this Agreement, or any of the terms and conditions thereof, shall not be deemed a waiver of any rights or remedies that such party may have and shall not be deemed a waiver of any subsequent breach or default of any such terms or conditions.

10. Discrimination

An entity or affiliate who has been placed on the State of Florida Discriminatory Vendor List may not transact business with any public entity.

11. Nondiscrimination and Compliance

No person, on the grounds of race, creed, color, national origin, age, sex, or disability, shall be excluded from participation in, be denied proceeds or benefits of, or be otherwise subjected to discrimination in performance of this Agreement as prescribed by all applicable state and federal laws and regulations.

Attorney/Legal Entity shall, upon request, show proof of such nondiscrimination. Failure to comply with such state and federal laws will result in the termination of this Agreement.

12. Verbal Instructions

No negotiation, decision, or action shall be initiated or executed by the Attorney/Legal Entity as a result of any discussion with any FCOR employee. Only those communications that are in writing from the FCOR staff identified in Section VII, Contract Management, of this Agreement shall be considered a duly authorized expression on behalf of FCOR. Only communications from the Attorney/Legal Entity's representative identified in Section VII., Contract Management, which are in writing and signed, will be recognized by FCOR as duly authorized expressions on behalf of the Attorney/Legal Entity.

13. Conflict of Interest

The Attorney/Legal Entity shall not compensate in any manner, directly or indirectly, any officer, agent, or employee of FCOR for any act or service that he/she may do, or perform for, or on behalf of, any officer, agent, or employee of the Attorney/Legal Entity. No officer, agent, or employee of FCOR shall have any interest, directly or indirectly, in any agreement or purchase made, or authorized to be made, by anyone for, or on behalf of, FCOR.

XV. ENTIRE AGREEMENT

1. This Agreement supersedes all prior negotiations, correspondence, conversations, agreements, or understandings applicable to the matters contained herein and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, it is agreed that no deviation from the terms of this Agreement shall be predicated upon any prior representations or agreements, whether oral or written.
2. Modifications or amendments of provisions of this Agreement shall only be valid when they have been reduced to writing and duly signed by both parties observing all the formalities of the original Agreement. Changes to the Agreement will be provided to the other party in writing and a copy of the written notification shall be maintained in the official Contract Management file maintained by FCOR.
3. This Agreement constitutes an agreement promulgated by FCOR pursuant to s. 940.031, F.S. This agreement may not be altered, modified, or amended except through a separate agreement executed by Attorney/Legal Entity and an authorized representative of FCOR. If any term of this Agreement is altered, modified, amended, or otherwise changed to deviate from the terms of the agreement promulgated by FCOR, then this Agreement is void in its

entirety, notwithstanding any execution by an authorized representative of FCOR. Alterations, modifications, or amendments include, but are not limited to, any handwritten or typographical change or deviation of any of the terms of this Agreement. Performance by FCOR under this Agreement shall under no circumstances waive this provision.

XVI. INDEMNIFICATION

Attorney/Legal Entity shall hold FCOR harmless from any and all liability which might arise from any malpractice dispute or litigation raised by the Client as a result of the Attorney/Legal Entity's services performed in accordance with this Agreement.

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be executed by their undersigned officials as duly authorized.

ATTORNEY/ LEGAL ENTITY

STATE OF FLORIDA

NAME: Jon Hackworth

Florida Commission on Offender Review

SIGNED BY: Jonathan Hackworth

SIGNED BY: Melinda N. Coonrod

NAME: Jonathan E. Hackworth

NAME: Melinda N. Coonrod

TITLE: Owner of Hackworth Law

TITLE: Chair

DATE: 03/22/2023

DATE: 03/22/23

VENDOR NUMBER: V022154 - 45-4656382

THIS AGREEMENT IS NOT VALID UNTIL SIGNED AND DATED BY BOTH PARTIES.

EXHIBIT 1

**FLORIDA COMMISSION ON OFFENDER REVIEW
INVOICE FOR FIXED PRICE CONTRACT**

SECTION 1:

Attorney Name: _____
Attorney Address: _____
Client Name: _____
Service Address: _____
FEID #: _____

Contract Number: _____
Invoice Number: _____
Invoice Date: _____
Service Period from: _____
Service Period to: _____

SECTION 2:

DELIVERABLE I:

Date of Communication Between Attorney and Client: _____ Date
(Attach a copy of the letter to FCOR)
(Invoice amount not to exceed \$2,000) \$ _____ Amount

DELIVERABLE II:

Date of Representation at the Clemency Interview: _____ Date
(Attach a copy of the letter to FCOR)
(Invoice amount not to exceed \$5,000) \$ _____ Amount

DELIVERABLE III:

Date of Submission of the Written Statement, Brief, or Memorandum
for the Client: _____ Date
(Confirmation of receipt of the original and three copies)
(Invoice amount not to exceed \$3,000) \$ _____ Amount

SECTION 3:

CERTIFICATION:

- I certify that the expenditures incurred under this Agreement are for services, which are necessary, allowable, and allocable, and the expenditures directly relate to the purpose of the Agreement.
- I certify that the services this individual or entity has provided in accordance with the term and conditions specified in the Agreement.
- I certify that this individual or entity, in accordance with the terms and conditions specified in the Agreement, maintains any records, documents and proof of payment supporting the expenditures.

Signature of Attorney

Type or Print Name & Title

Telephone

Date

IN THE SUPREME COURT OF FLORIDA

Case No. SC2026-1519

Lower Tribunal No. 311986 CF 000729A

WILLIAM REAVES,
Petitioner,

v.

RICHARD COMERFORD, Secretary
Florida Department of Corrections,
Respondent.

CAPITAL CASE — DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR OCTOBER 20, 2026,
AT 6:00 P.M.

Petition for Writ of Habeas Corpus

BRIEF OF AMICUS CURIAE
CENTER FOR VETERAN CRIMINAL ADVOCACY
IN SUPPORT OF PETITIONER WILLIAM REAVES

Samuels Parmer Law, P.A.

Marie-Louise Samuels Parmer
Florida Bar No. 0005584
P.O. Box 18988
Tampa, FL 33679
Telephone: (813) 732-3321
marie@samuelsparmerlaw.com

COUNSEL FOR AMICUS CURIAE

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Center for Veteran Criminal Advocacy, based in Ridgewood, New Jersey, assists veterans in the criminal justice system by placing their military service—especially combat service—before the courts, juries, and officials who decide their fate. Its Director, Captain Art C. Cody, U.S. Navy (Ret.), served more than thirty years as an Army and Naval officer, including multiple tours in support of Operation Enduring Freedom (Afghanistan), and has written publicly on the execution of combat veterans. Captain Cody reviewed Mr. Reaves’s military records, interviewed him on July 21, 2023, corresponded with his squadmate Howard Wine, and authored a clemency submission on his behalf. Amicus’s sole interest is ensuring that a combat veteran’s service is weighed before the State takes his life. Amicus files this brief, through undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.370.

SUMMARY OF ARGUMENT

On November 9, 1969, twenty-year-old Private William Reaves arrived in Vietnam. Within days he was caught in an enemy ambush, and during his tour a fellow soldier and friend died in his arms. He served a year-long combat tour as an infantryman in the Central

Highlands and in Cambodia, where, as his squadmate Howard Wine wrote, “That you kill or be Kill[ed].”¹ He turned to drugs in Vietnam, was honorably discharged, and is rated 100% disabled by the Department of Veterans Affairs (“VA”) for Post-Traumatic Stress Disorder (“PTSD”).²

The jury that convicted and condemned Private Reaves never heard the details of his combat training or experience. At the guilt phase, that evidence would have explained why he told police “I panicked,” and why a fellow Vietnam veteran who saw Mr. Reaves flee said he ran crouched, as soldiers did “when you were being shot at.” Mr. Reaves’s behavior points to panic, not the fully formed conscious purpose to kill that premeditation requires—and of which the jury was already in doubt. At the penalty phase, *Porter v.*

¹ Letter from Mr. Howard Wine to Captain Art C. Cody (Aug. 6, 2023). (hereinafter “Wine Letter”). Mr. Wine’s letter is quoted throughout this brief with slight spelling and grammar corrections to assist in understanding. Mr. Wine refers to Private Reaves by his squad nickname, “Phat.” The reader is encouraged to read the two- and one-half page Wine Letter in its entirety to gain a fuller sense of Private Reaves’s experience in Vietnam”

² See August 28, 2003 VA Decision Letter (Attachment A to December 9, 2003 Supplement to February 1999 Fla. R. Crim P. 3.850 Motion. (hereinafter “VA Decision Letter”)).

McCollum, 558 U.S. 30 (2009), recognizes two distinct forms of military mitigation: (1) honorable service to the country and (2) combat's mental and emotional toll. Mr. Reaves has both species, and two jurors voted for life without hearing their substance. Executing him when no sentencer has ever weighed what his war did to him would be a manifest injustice.

ARGUMENT

I. PRIVATE REAVES'S WAR WAS A PERFECT STORM OF COMBAT TRAUMA.

Unlike any other conflict in our nation's history, the war in Vietnam was conducted with drafted young soldiers in a jungle environment, against a well-motivated, unpredictable, and hidden enemy for an uncertain cause and with even more unclear outcome. The war divided the nation, and soldiers such as Privates Reaves were commonly regarded in the United States with indifference, hostility, or thinly veiled contempt. The mental health consequences were understandably pervasive. As José Narosky observed, "[i]n war, there are no unwounded soldiers."³ Private Reaves was placed at the center

³ Johnson, R. S., Graham, D. P., Sikes, K., Nelsen, A., & Stolar, A. (2015). An analysis of sanctions and respective psychiatric diagnoses

of that war.⁴

A. Into the Central Highlands

William Reaves entered basic training at Fort Jackson, South Carolina, in June 1969 at age twenty. He trained as an infantryman (MOS 11B), completing Advanced Individual Training in October 1969.⁵ During that training, as is discussed below, he was taught to react reflexively and decisively to threats.⁶ He qualified on the M-60 machine gun, the weapon he would carry in Vietnam as his squad's machine gunner. Private Reaves was first slated for duty in Panama, a non-combat posting where he could have served out his obligation but asked instead to go to Vietnam. He arrived in Vietnam on November 9, 1969, and was assigned to Company C, 1st Battalion,

in veterans' court. *Journal of the American Academy of Psychiatry and the Law*, 43(2), 171–176. <https://jaapl.org/content/43/2/171>.

⁴ Mr. Reaves is referred to as “Private Reaves” when describing his Army service and as “Mr. Reaves” otherwise. Unless otherwise noted, the account of his service is drawn from his Army and VA records and from Captain Cody’s August 21, 2023 clemency submission.

⁵ Chronological Record of Assignments. *Reaves v. Sec’y, Dep’t of Corr.*, 10-14046-CIV-MIDDLEBROOKS, Evid. Hrg., Ex. A, p. 135-48 (S.D. Fla. Filed Mar. 10, 2014).

⁶ See Argument III(A), *infra*.

22nd Infantry Regiment, 4th Infantry Division, and sent to Camp Radcliff near the village of An Khe.⁷ He served in the infantry, the branch that bore the war's heaviest casualties, in the contested Central Highlands, arriving on the heels of the two deadliest years of the war for American troops.⁸

B. “You Never Hear the Bullet that Kills You”

Early in his tour, an enemy soldier surprised Private Reaves at close range. Within days of his arrival—on November 13, 1969—his company was caught in an ambush near Pleiku while rescuing reconnaissance patrols trapped by enemy forces.⁹ As noted above, during his tour a friend was shot in the throat and chest; Private Reaves tried to save him, but the soldier died in his arms. *Id.* at 4.¹⁰ Mr. Reaves recalls that from that moment, he understood death could

⁷ *Id.*

⁸ *Vietnam War U.S. Military Fatal Casualty Statistics*, NATIONAL ARCHIVES (last updated Aug. 23, 2022), <https://www.archives.gov/research/military/vietnam-war/casualty-statistics>.

⁹ Erwin R. Parson, Ph.D., *Forensic Psychological Report* 4–6 (Jan. 24, 2003) (“Parson Rpt.”).

¹⁰ *Id.*

come at any moment: “you never hear the bullet that kills you.”¹¹ Howard Wine, who served beside him, described the same constant fear: in the jungle “you prays to God everyday to keep you safe from all dangers.”¹² He recalls daily sniper fire and booby traps. In May 1970 his company entered Cambodia, where, Mr. Wine recalls, it was nearly overrun by North Vietnamese regulars until a helicopter gunship arrived.¹³

Private Reaves returned to the United States in November 1970 and was assigned to the 2nd Armored Division at Fort Hood, Texas.¹⁴ He sought help at Fort Hood but was rebuffed as “too far gone” and a “druggie.”¹⁵ He was honorably discharged on June 10, 1971.¹⁶ The VA was similarly ill-prepared to assist Vietnam combat veterans in

¹¹ Interview by Art C. Cody with William Reaves, Union Corr. Inst., Raiford, Fla. (July 21, 2023), *quoted in* Letter from Art C. Cody, Dir., Ctr. for Veteran Crim. Advoc., to Fla. Comm'n on Offender Rev. (Aug. 21, 2023)”(hereinafter, “Reaves Interview”).

¹² Wine Letter, *supra* note 1.

¹³ Parson Rpt., *supra* note 9.

¹⁴ Chronological Record of Assignments.

¹⁵ Parson Rpt., *supra* note 9, at 10-11.

¹⁶ DD-214.

the period prior to the instant offense. As Dr. William Weitz testified at Mr. Reaves's evidentiary hearing, "I think he sought out care at a VA facility. But these were probably in the late 70's early 80's. There was not really anything specific for Vietnam veterans in combat really until the mid '80s."¹⁷ The drug habit Mr. Reaves had formed in Vietnam continued through the night of September 23, 1986. The VA has since rated him 100% disabled by PTSD.¹⁸

C. The Words of the Soldier Who Served Beside Him

No witness at trial described what Private Reaves endured. As discussed above, Howard Wine can. A nineteen-year-old draftee assigned to the same squad, Mr. Wine served beside Private Reaves in the field; Private Reaves was the squad's machine gunner, and Mr. Wine was his assistant gunner. Fifty-four years later, he wrote down what he had spent his life trying to forget:

Speaking from my heart I didn't want to know my comrades names, I wasn't there to make friends and because the less you know of anyone the easier it was to loose them. . . . I was sent to the Nam right after completing advance infantry training where young man was trained and teach to Kill, some called it self

¹⁷ Test. of Dr. William Weitz, Evid. Hr'g Tr. 116 (March 4, 2003) (hereinafter "Weitz Test.").

¹⁸ VA Decision Letter, *supra* note 2.

defense. I was taught to kill any one trying to kill me.
That you kill or be Kill!

. . . We patrolled the central highland area of Plaque and An-kay providences, ours assignment was to search and destroyed, where we were located there were no friendly, the prober term was kill or be kill. . . . [T]he first assault as I will always remember was just moment after the squad was setting up a perimeter for the evening shotting began, and know one know where it was coming from. When we set up for the evening there is no resting because you have to be on guard 24 / 7, and if you value your life you have to placed all your trust in your fellow comrades. We learn to depend on each other. William and I shared a lot together

. . . [H]e and I seen ours brother step on booby track, fall into punji pit, received jungle rot, and leaches sucking blood out of you. . . . [A]ll these things is what a you man had to deal with including someone out to kill you.

. . . While in Combodia we was being over run by the North Viet Nam regular, Gun ship was call in to assist ours company and the gun ship came just that close to killing me. I won't ever forget that, hiding behind a tree, the fire power strip the bark completed of the tree and I soil my pant. Walking through the jungle and seeing the point man blown up by boobie tract, a comrade goes out of the perimeter to defecate and find him dead with his pant below his knees, or someone falling into a punji pit, these were many things, around you that keep you alert and things you want to forget.

. . . Art no matter what I write down trying to paint a picture of what I went through your imagination wouldn't be a 32nd of the experience of actually being there. . . . [O]ut of all the member of my squad,

platoon, and Company Williams Reaves is the only one I remember, That just how close we were in the Nam.¹⁹

No juror ever heard any of this information about what Mr. Reaves experienced.

II. *PORTER V. McCOLLUM* AND THE EIGHTH AMENDMENT REQUIRE THAT COMBAT TRAUMA BE WEIGHED—AND HERE IT NEVER WAS.

The Eighth Amendment requires that a capital sentencer be permitted to consider, as a basis for a sentence less than death, any aspect of the defendant's character or record. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). As *Porter* itself reaffirmed, "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." 558 U.S. at 42 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

Mr. Reaves's case closely parallels *Porter*. George Porter was a Florida death-row prisoner and a veteran "both wounded and decorated for his active participation in two major engagements during the Korean War," whose "combat service unfortunately left him a traumatized, changed man." *Id.* at 30. As was the case in Mr.

¹⁹ Wine Letter, *supra* note 1.

Reaves's trial, Porter's lawyer had never handled a capital penalty phase before, and his jury never learned what combat had done to the man it was sentencing. In both Mr. Reaves's and Porter's cases, this Court struck the heinous, atrocious, or cruel aggravator, yet left the death sentence in place on a record thin in mitigation. The Supreme Court unanimously reversed in *Porter*, holding that the jurors "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability," *id.* at 41, and that this Court "either did not consider or unreasonably discounted" the mitigation. *Id.* at 42. The Court explained:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.

Id. at 43–44 (footnotes omitted). *Porter* thus identifies two independent grounds of mitigation: (1) honorable service under extreme hardship and gruesome conditions and (2) the mental and emotional toll that combat exacts. Each stands on its own; neither

depends on the other. Both are present here, and no sentencer has ever weighed either.

A. Honorable Service Under Extreme Hardship and Gruesome Conditions

The first prong requires no diagnosis. *Porter* recognized that front-line service is itself mitigating, 558 U.S. at 43, and Private Reaves served on the front line. He was an infantryman and his squad's machine gunner in the Central Highlands and Cambodia. He earned the Combat Infantryman Badge,²⁰ awarded only for direct ground combat, and the Air Medal for aerial combat operations from November 1969 to July 1970.²¹ While he was the subject of some disciplinary action, as was George Porter, William Reaves was honorably discharged. In fact, Private Reaves received the most favorable reenlistment possible "RE-1" reenlistment code, indicating that the Army would welcome him to reenlist and no waivers were required.²²

²⁰ DD-214.

²¹ *Id.*

²² *Id.*

B. The Mental and Emotional Toll of Combat

The second prong asks what combat did to the man, and here the answer is clear. Even *without* the Vietcong or North Vietnamese Army, the Vietnam experience was one of a hot steamy jungle and inhabited by poisonous snakes, parasites, and tropical diseases. Overlaid upon this environment was the constant threat of sudden and violent death at the hands of the enemy.

That threat reached fruition for Private Reaves. A friend died in his arms. He came face to face with the enemy. He was caught in ambush. Throughout his tour he lived in an environment under the rule Mr. Wine described—“kill or be kill[ed].” In Vietnam he turned to drugs “to numb fear. ” He was far from alone. An Army survey of soldiers leaving Vietnam in the fall of 1969, as Private Reaves arrived, found that half had used marijuana and roughly one in six had used opium.²³ A later study of Army enlisted men who left Vietnam in September 1971 found that almost half had tried heroin or opium

²³ Lee N. Robins, Darlene H. Davis & Donald W. Goodwin, *Drug Use by U.S. Army Enlisted Men in Vietnam: A Follow-Up on Their Return Home*, 99 Am. J. Epidemiology 235 (1974).

there, and one in five became dependent.²⁴ The addiction persisted until his arrest in 1986; he was under the influence of cocaine on the night of the shooting.²⁵ That is the kind of “struggle[] to regain normality upon his return from war” that the Supreme Court found mitigating in *Porter*. 558 U.S. at 41. A forensic psychologist diagnosed Mr. Reaves with PTSD “secondary to exposure to Vietnam War stressors,”²⁶ and the VA has since rated him **100% disabled by PTSD**. Pet. Supp. to Feb. 1999 Fla. R. Crim. P. 3.850 Mot., Case No. 86-729-CF (19th Circ. Ct. Dec 3, 2001).

An understanding of the implications of that VA rating is critical to assessing the proper penalty in this case. In short, because of his military experiences, the VA, the sole federal agency charged with assessing the degree of a veteran’s combat injury, awarded Mr. Reaves the maximum possible disability—*100% service-connected* disability rating. This service-connected disability evidences that Mr. Reaves ’s condition is *because* of his military service. “Service-

²⁴ *Id.*

²⁵ Parson Rpt., *supra* note 9, at 7-8.

²⁶ *Id.* at 13.

connected means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in the line of duty in the active military, naval, or air service.”²⁷

In my experience, a 100% rating for PTSD is rare even amongst those few veterans who are granted a PTSD related disability. I have seen estimates indicating that only 13% of veterans with a PTSD rating are rated at 100%.²⁸ The underlying reason for the paucity of a 100% rating is the extreme disability criteria that the VA requires for this maximum rating. As the VA set forth in Mr. Reaves’s August 28, 2003, decision letter: ²⁹

An evaluation of 100 percent is assigned from September 17, 2002, the date of your claim. An evaluation of 100 percent is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior;

²⁷ 38 CFR § 3.1.

²⁸ PTSD VA Rating Statistics – The Insider’s Guide (vaclaimsinsider.com).

²⁹ VA Decision Letter, *supra* note 2.

²⁹ VA Decision Letter, *supra* note 2.

persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name

At core, were it not for his service to our country in Vietnam, Mr. Reaves would not have suffered the severe mental disabilities and symptoms that are at the root of the underlying offense.

As with many Vietnam veterans, this disability was not merely a clinician's label but had daily life changing effects upon Mr. Reaves.³⁰ A jury never heard that the VA determined Mr. Reaves's 100% PTSD diagnosis is solely due to his sacrifice to this country. After Vietnam, Mr. Reaves explained, "[I] couldn't sleep inside [a house]"; he carried a mattress to a nearby graveyard, among trees that reminded him of the jungle canopy, because "I was used to sleeping in the graveyards in Vietnam."³¹ This is precisely the

³⁰ Nancy Volkers, *Study Finds Ongoing Mental Health Concerns for Vietnam Veterans*, U.S. DEPT OF VET. AFFAIRS (Mar. 17, 2022), <https://www.research.va.gov/currents/0322-Study-finds-ongoing-mental-health-concerns-for-Vietnam-Veterans.cfm>; VA Décision Letter, *supra* note 2.

³¹ Parson Rpt., *supra* note 9, at 6-7.

“intense stress and mental and emotional toll” that *Porter* holds a jury may find mitigating. 558 U.S. at 44.

C. No Sentencer Has Weighed Either Prong

In 1994, this Court deemed the striking of the heinous, atrocious, or cruel aggravator harmless in light of the “relatively weak” mitigation presented in Mr. Reaves’s case. *Reaves v. State*, 639 So. 2d 1 (Fla. 1994). It was weak because it was never developed at trial. After a limited evidentiary hearing in 2003 on counsel’s handling of intoxication and related expert evidence, at which Dr. Weitz testified, the circuit court denied relief, and this Court affirmed. *Reaves v. State*, 942 So. 2d 874 (Fla. 2006). A federal district court *twice* granted habeas relief—in 2011 for counsel’s failure to present intoxication evidence at the guilt phase, and in 2015 for counsel’s failure to investigate and present Mr. Reaves’s childhood and combat history at the penalty phase—but the Eleventh Circuit reversed each time. *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 717 F.3d 886 (11th Cir. 2013); *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1137 (11th Cir. 2017). This Court declined to revisit the sentence under *Porter*. *Reaves v. State*, 91 So. 3d 782 (Fla. 2012). As a result, no sentencer has ever weighed what his war did to him.

III. THE JURY NEVER HEARD HIS WAR, AND IT WOULD HAVE MATTERED AT BOTH PHASES.

Only about five percent of Americans are veterans.³² Often the only person in a courtroom who knows and understands combat and combat training is the veteran defendant himself.³³

A. Guilt Phase: Evidence of Panic, not Premeditation

Premeditation is “more than a mere intent to kill; it is a fully formed conscious purpose to kill.” *Wilson v. State*, 493 So. 2d 1019, 1021 (Fla. 1986). Although it “may be formed a moment before the act,” it “must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.” *Id.* In *Wilson* itself, this Court distinguished premeditation from a “spontaneous, blind and unreasoning reaction,” asking whether there was time “for any cloud on the [defendant’s] mental faculties to have lifted.” *Id.*

The record of the few seconds preceding the crime here describes a reflex, not a reflection—a combat-born instantaneous

³² U.S. Census Bureau, *Veterans Day 2024: November 11*, Facts for Features (2024).

³³ Art C. Cody, *Mentally Disabled Combat Veterans Should Never Get the Death Penalty*, THE HILL (June 24, 2025)

reaction. As Mr. Reaves told police: “I panicked, I panicked . . . all I remember is I started shooting.” A witness who had himself served in Vietnam saw a man run from the scene in a crouch he had “only seen in my own experience in one other place, and that was when I was in Vietnam, when you were being shot at.”

The threat Mr. Reaves perceived arose seconds earlier when the gun fell and Deputy Raczkoski pinned it. From that moment, as Dr. William Weitz testified, his response was “a reactive, well-conditioned pattern of behavior,” a combat survival response that “was not thought out” and “occurred within seconds.”³⁴ Dr. Erwin Parson likewise concluded that the shooting was “combat-reminiscent reflexive, on-the-spot violence.”³⁵

The jury also never learned how the Army taught Private Reaves to kill. After World War II, the Army accepted S.L.A. Marshall's conclusion that only about a quarter of infantrymen fired at the enemy, and it rebuilt its training to overcome that hesitation to kill.

³⁴ Weitz Test., *supra* note 17, at 115, 135–36.

³⁵ Parson Rpt., *supra* note 9, at 11.

³⁶ Bullseye targets gave way to man-shaped silhouettes that popped up for seconds and had to be hit before they dropped.^[37] By the Vietnam era the Army was teaching "the fast unaimed method of fire called Quick Kill," for moments when "the occasion calls for the speed of reflex reaction as a prerequisite to survival."^[38] A former Army Ranger and West Point psychology instructor has described the result as conditioning: the man-shaped target appears, the soldier fires at once, the target falls, and the sequence repeats until the response is close to automatic.³⁹ A year of combat reinforced that lesson daily. As Dr. Weitz testified, Mr. Reaves's response was "a reactive, well-conditioned pattern of behavior" that "was not thought out" and "occurred within seconds."^[40]

Combat training such as that discussed above taught a soldier to meet a threat with immediate force. Compounded by a night of

³⁶ See Dave Grossman, *On Killing* (rev. ed. 2009).

³⁷ *Id.*

³⁸ United States Army Infantry School (USAIS), U.S Army Training Text 23-71-1 at 1-2(1967).

³⁹ See Dave Grossman, *On Killing* (rev. ed. 2009).

⁴⁰ Weitz Test. 115, 135-36

cocaine use, that training makes a reflexive response more plausible than a “fully formed conscious purpose to kill.”⁴¹ The State’s theory of premeditation rested on Eugene Hinton, who later admitted that Mr. Reaves was “all strung out” and “pretty much out of his head” that night. Even so, the jury deliberated for ten hours, asking about second-degree murder, the definition of premeditation, and what would happen if it could not agree. Evidence of Private Reaves’s combat training and experience would have given that jury a credible explanation for what happened in those seconds—an answer different than a premeditated killing.

B. Penalty Phase: Four votes for a Life Recommendation Even Based on an Incomplete Record

At the penalty phase, the jury never heard the details of Mr. Reaves’s combat experience; the mitigation it heard was, in substance, that he left a good kid and came back a changed man. Dr. Weitz, a psychologist who specialized in combat veterans, was barred from testifying at the guilt phase, and his testimony on “Vietnam

⁴¹ Florida law at the time recognized voluntary intoxication as a defense to specific-intent crimes, including premeditated murder. *Gardner v. State*, 480 So. 2d 91, 92 (Fla. 1985). The defense was abolished prospectively in 1999. § 775.051, Fla. Stat.

Syndrome” was excluded at penalty.⁴² Even on that record, two jurors voted for life. (T2. 2320.) Had the jury heard both kinds of mitigation *Porter* recognizes—a soldier who served in combat and was honorably discharged, and a man who held a dying friend in his arms and was later found totally disabled by PTSD—there is a reasonable probability that at least four more jurors would have chosen life, producing a life recommendation entitled to “great weight.” *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

IV. EXECUTING WILLIAM REAVES WOULD BE A MANIFEST INJUSTICE.

Nothing in this brief diminishes the loss of Deputy Richard Raczkoski, who was trying to help Mr. Reaves get home that night, or his family’s grief. Mr. Reaves confessed, called him the finest officer he had ever met, and profusely apologized to his family.

Capital punishment is reserved for “a narrow category of the most serious crimes” committed by offenders “whose extreme culpability makes them ‘the most deserving of execution.’” *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536

⁴² Weitz Test., *supra* note 17, at 97, 101; (T. 1481, 1533).

U.S. 304, 319 (2002)). And this Court may revisit even settled rulings where adhering to them “would result in a manifest injustice.” *Fla. Dep’t of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001). Every consideration bearing on Mr. Reaves’s culpability points the same way. He went to war, and he came home 100% disabled by it. The jury that sentenced him never heard the substance of that service, even still, two jurors still voted for life; four more would have produced a life recommendation. This Court struck one of the three aggravators, and a federal court twice found constitutional error in his trial. His 10–2 recommendation could not have produced a death sentence under the unanimity requirement in Florida’s statute from 2017 to 2023. This Court has held that rule does not apply to him, *Reaves v. State*, 241 So. 3d 63 (Fla. 2018), but the point bears on whether his sentence is just. Further, Mr. Reaves has accepted responsibility and expressed remorse for four decades, nearly all of them on death row.

The Supreme Court has categorically barred the execution of juveniles and the intellectually disabled because diminished capacity lessens culpability. *Roper*, 543 U.S. at 568-71; *Atkins*, 536 U.S. at 318-21. A combat veteran disabled by PTSD shares that reduced

culpability, and he has a greater claim to mercy because his injury was incurred answering his country's call. Amicus does not ask this Court to adopt a categorical rule, but the principle behind those decisions applies with full force here.

To execute a 100% combat veteran when no sentencer has ever weighed his service would betray the "long tradition of according leniency to veterans" that *Porter* describes. 558 U.S. at 43. That is a manifest injustice.

CONCLUSION

Amicus respectfully urges the Court to stay the execution, reverse the order denying relief, and remand for an evidentiary hearing at which William Reaves's combat service and its effects are finally weighed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished through the Florida Courts E-Filing Portal on October 5, 2026, to: Brittney N. Lacy and Yiitsodirah Final, Capital Collateral Regional Counsel–South, counsel for Petitioner (LacyB@ccsr.state.fl.us; FinalY@ccsr.state.fl.us; cccrpleadings@ccsr.state.fl.us); and Leslie Campbell, Assistant Attorney General, Office of the Attorney General, counsel for Respondent (Leslie.campbell@myfloridalegal.com; capapp@myfloridalegal.com).

/s/ Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045 and the length limitations of Rule 9.370.

/s/ Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584

RULES OF EXECUTIVE CLEMENCY

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RULES OF EXECUTIVE CLEMENCY

1. STATEMENT OF POLICY

Executive Clemency is a power vested in the Governor by the Florida Constitution of 1968.

Article IV, Section 8(a) of the Florida Constitution provides:

Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

The Governor and members of the Cabinet collectively are the Clemency Board. Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or any part of the punishment that the law imposes.

2. ADMINISTRATION

A. These rules were created by mutual consent of the Clemency Board to assist persons in applying for clemency. However, nothing contained within these rules can or is intended to limit the authority or discretion given to the Clemency Board in the exercise of its constitutional prerogative.

B. The Office of Executive Clemency was created to assist in the orderly and expeditious exercise of this executive power.

C. The Governor, with the approval of at least two members of the Clemency Board, appoints a Coordinator who hires all assistants. The Coordinator and assistants comprise the Office of Executive Clemency. The Coordinator must keep a proper record of all proceedings and is the custodian of all records.

3. PAROLE AND PROBATION

The Clemency Board will neither grant nor revoke parole or probation.

4. CLEMENCY

The Governor has the unfettered discretion to deny clemency at any time, for any reason. No applicant has a right to a clemency hearing. The Governor has the unfettered discretion to require at any

time that an individual matter be treated under other provisions of these rules, whether or not the person satisfies the eligibility requirements of a particular rule. The Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to grant, at any time, for any reason, the following forms of clemency:

I. Types of Clemency

A. Full Pardon

A Full Pardon unconditionally releases a person from punishment and forgives guilt for any Florida convictions. It restores to an applicant all of the rights of citizenship in the State of Florida possessed by the person before his or her conviction, including the right to own, possess, or use firearms.

B. Pardon Without Firearm Authority

A Pardon Without Firearm Authority releases a person from punishment and forgives guilt. It restores to an applicant all of the rights of citizenship in the State of Florida possessed by the person before his or her conviction, except the specific authority to own, possess, or use firearms. It restores to an applicant who is not a citizen of the United States such rights enjoyed by him or her, under the authority of the State of Florida, which were lost as a result of a conviction of any crime that is a felony or would be a felony under Florida law, except the specific authority to own, possess, or use firearms. However, restoration of these rights shall not affect the immigration status of the applicant (i.e., an Executive Order evidencing a Pardon Without Firearm Authority under Florida Law shall not be a ground for relief from removal proceedings initiated by the United States Immigration and Naturalization Service).

C. Pardon for Misdemeanor

A Pardon for a Misdemeanor Conviction releases a person from punishment and forgives guilt.

D. Commutation of Sentence

A Commutation of Sentence may adjust an applicant's penalty to one less severe but does not restore any civil rights, and it does not restore the authority to own, possess, or use firearms. (See also

Rule 15 on commutation of death sentences.)

E. Remission of Fines and Forfeitures

A Remission of Fines or Forfeitures suspends, reduces, or removes fines or forfeitures. The Clemency Board will not consider requests to suspend, reduce, or remove victim restitution.

F. Specific Authority to Own, Possess, or Use Firearms

The Specific Authority to Own, Possess, or Use Firearms restores to an applicant the right to own, possess, or use firearms, which were lost as a result of a felony conviction. Due to federal firearms laws, the Clemency Board will not consider requests for firearm authority from individuals convicted in federal or out-of-state courts. In order to comply with the federal laws, a Presidential Pardon or a Relief of Disability from the Bureau of Alcohol, Tobacco and Firearms must be issued in cases involving federal court convictions. A pardon or restoration of civil rights with no restrictions on firearms must be issued by the state where the conviction occurred.

G. Restoration of Civil Rights in Florida

The Restoration of Civil Rights, automatically upon processing and without a hearing pursuant to Rule 9, or with a hearing pursuant to Rule 10, restores to an applicant all of the rights of citizenship in the State of Florida possessed by the person before his or her felony conviction—including the right to vote if not already restored by Amendment 4,¹ the right to serve on a jury, and the right to hold public office—except the specific authority to own, possess, or use firearms. However, the Restoration of Civil Rights does not relieve an applicant from the obligation to pay his or her outstanding legal financial

¹ The Voting Restoration Amendment known as Amendment 4 restores voting rights to felony offenders, except those convicted of murder or a felony sexual offense, “upon completion of all terms of sentence including parole or probation.” Art. VI, § 4(a), Fla. Const. (2020); § 98.0751, Fla. Stat. (2020). A person convicted of murder as defined in § 98.0751(2)(c), Fla. Stat. (2020), or a felony sexual offense as defined in § 98.0751(2)(b), Fla. Stat. (2020), is not qualified to vote pursuant to Amendment 4. A person convicted of a crime other than murder or a felony sexual offense is not qualified to vote pursuant to Amendment 4 unless he or she has completed all terms of sentence as defined in § 98.0751(2)(a), Fla. Stat. (2020), arising from the person’s felony conviction or convictions. A clemency application is not required for the Restoration of Voting Rights pursuant to Amendment 4. Qualifying to vote under Amendment 4 does not restore any other civil rights—including the right to serve on a jury or to hold public office—or the specific authority to own, possess, or use firearms to a person convicted of a felony.

obligations or relieve an applicant from the registration and notification requirements or any other obligations and restrictions imposed by law upon sexual predators or sexual offenders. A clemency application is required for the Restoration of Civil Rights.

II. Conditional Clemency

All of the preceding forms of clemency may be granted subject to various conditions. If the conditions of clemency are violated or breached, such clemency may be revoked by the Clemency Board, returning the applicant to his or her status prior to receiving the conditional clemency.

5. Eligibility

A. Pardons

A person may not apply for a pardon unless he or she has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020), arising from the applicant's felony conviction or convictions.

The Clemency Board acknowledges that a term of sentence—including any legal financial obligation owed by an applicant—shall be deemed completed if a court of competent jurisdiction modifies or converts the original sentencing order to no longer require completion of such term pursuant to § 98.0751(2)(a), Fla. Stat. (2020), or any similar law applicable to an out of state court or federal court sentence. The Clemency Board also acknowledges that a person may submit a plea for relief to a court of competent jurisdiction pursuant to § 98.0751(2)(a), Fla. Stat. (2020), or any similar law applicable to an out of state court or federal court sentence.

All durational periods arising from the applicant's felony conviction or convictions must have been completed for a period of no less than ten (10) years. The applicant may not have pending outstanding detainers or pending criminal charges. The applicant may not have any pecuniary penalties or liabilities which total more than one thousand dollars (\$1,000.00) and result from any misdemeanor criminal conviction or criminal traffic infraction. In addition, the applicant may not have any outstanding victim restitution, including, but not limited to, restitution pursuant to a court order or civil judgment, or

obligations pursuant to Chapter 960, Florida Statutes.

If the person applying for a pardon is not a citizen of the United States, he or she must be domiciled in the State of Florida at the time the application is filed, considered, and acted upon. All currently filed Restoration of Alien Status cases will be processed under Rule 5(A).

Persons who had adjudication of guilt withheld and were not convicted may apply for a pardon if they otherwise meet the eligibility requirements of Rule 5(A).

B. Commutations of Sentence

A person may not be considered for a commutation of sentence unless he or she has been granted a Request for Review pursuant to Rule 8 or has had his or her case placed upon a Clemency Board agenda pursuant to Rule 17.

C. Remission of Fines and Forfeitures

A person may not apply for a remission of fines and forfeitures unless he or she has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020)—other than any legal financial obligations—arising from the applicant’s felony conviction or convictions.

D. Specific Authority to Own, Possess, or Use Firearms

A person may not apply for the specific authority to own, possess, or use firearms unless he or she has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020), arising from the applicant’s felony conviction or convictions. All durational periods arising from the applicant’s felony conviction or convictions must have been completed for a period of no less than eight (8) years. The applicant may not have pending outstanding detainers or pending criminal charges. The applicant may not have any pecuniary penalties or liabilities which total more than one thousand dollars (\$1,000.00) and result from any misdemeanor criminal conviction or criminal traffic infraction. In addition, the applicant may not have any outstanding victim restitution, including, but not limited to, restitution pursuant to a court order or civil judgment, or obligations pursuant to Chapter 960, Florida Statutes. Persons convicted in a federal, military, or out-of-state court are not eligible to apply.

E. Restoration of Civil Rights under Florida Law

1. Restoration of Civil Rights under Florida Law Without a Hearing for Felons Who Have Completed All Terms of Sentence Pursuant to Amendment 4 as Defined in § 98.0751(2)(a), Fla. Stat. (2020)

A person who meets the requirements of Rule 9 shall have his or her civil rights immediately restored upon processing without a hearing by automatic approval of the Clemency Board. Restoration of civil rights under Rule 9 includes all rights of citizenship possessed by the person before his or her conviction, except the specific authority to own, possess, or use firearms.

If the person was convicted in a court other than a court of the State of Florida, he or she must be a legal resident of the State of Florida at the time the application is filed, considered, and acted upon.

Notwithstanding any provision of Rule 5(E), an individual who has previously had his or her civil rights under Florida law restored under Rule 9 and is subsequently convicted of another felony offense shall be ineligible for restoration of civil rights under Florida law for a period of no less than seven (7) years after completing all non-financial terms of sentence as defined in § 98.0751(2)(a), Fla. Stat. (2020), arising from the subsequent felony conviction.

2. Restoration of Civil Rights under Florida Law With a Hearing for Felons Who Have Not Completed All Terms of Sentence Pursuant to Amendment 4 as Defined in § 98.0751(2)(a), Fla. Stat. (2020)

Persons who do not qualify for restoration of civil rights without a hearing under Rule 9, including indigent felons, may continue to be processed with a hearing pursuant to Rule 10 if the person has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020)—other than any legal financial obligations—arising from the applicant’s felony conviction or convictions; has no pending outstanding detainers or pending criminal charges; and has met the requirements of Rule 10. Restoration of civil rights under Rule 10 includes all rights of citizenship possessed by the person before his or her conviction, except the specific authority to own, possess, or use firearms.

Notwithstanding any provision of Rule 5(E), an individual who has previously had his or her civil

rights under Florida law restored under Rule 10 and is subsequently convicted of another felony offense shall be ineligible for restoration of civil rights under Florida law for a period of no less than seven (7) years after completing all non-financial terms of sentence as defined in § 98.0751(2)(a), Fla. Stat. (2020), arising from the subsequent felony conviction.

6. Applications

A. Application Forms

All correspondence regarding an application for clemency should be addressed to Coordinator, Office of Executive Clemency, 4070 Esplanade Way, Tallahassee, Florida, 32399-2450. Those persons seeking clemency shall complete an application and submit it to the Office of Executive Clemency.

Persons seeking Restoration of Civil Rights must submit an application. Application forms will be furnished by the Coordinator upon request or they may be downloaded from the clemency website at www.fcpr.state.fl.us. All applications for clemency must be filed with the Coordinator on the form provided by the Office of Executive Clemency.

B. Required Supporting Documents

Each application for clemency shall have attached to it: (1) a certified copy of the charging instrument (indictment, information, or warrant with supporting affidavit) for each felony conviction, or misdemeanor conviction if seeking a pardon for a misdemeanor, and (2) a certified copy of the judgment and sentence for each felony conviction, or misdemeanor conviction if seeking a pardon for a misdemeanor, which may include an order of community control or order of probation for each felony conviction, felony charge for adjudication of guilt withheld, or misdemeanor conviction or charge. The applicant may obtain various documents from the applicable clerk of court free of charge pursuant to § 940.04, Fla. Stat. (2020). (Note: The Office of Executive Clemency or Florida Commission on Offender Review may assist in preparation of applications in unique situations.)

C. Optional Supporting Documents

Each application for clemency may include character references, letters of support, a statement,

and any other documents that are relevant to the application for clemency. Documents not relevant to the application for clemency will not be retained.

D. Applicant Responsibility

It is the responsibility of the applicant to answer all inquiries fully and truthfully and to keep the Office of Executive Clemency advised of any change in the information provided in the application, including change of address and phone number.

E. Failure to Meet Requirements

If any application fails to meet the requirements of the Rules of Executive Clemency, the Coordinator may return it without further consideration.

F. Notification

Upon receipt of a completed application that meets the requirements of the Rules of Executive Clemency, the Florida Commission on Offender Review shall make reasonable attempts to notify the victims of record, the respective State Attorney's Office, the Office of the Statewide Prosecutor, if applicable, and the Office of the Attorney General, Bureau of Advocacy and Grants.

7. Applications Referred to the Florida Commission on Offender Review

Every application which meets the requirements of these Rules may be referred to the Florida Commission on Offender Review for an investigation, report, and recommendation.

All persons who submit applications shall comply with the reasonable requests of the Commission in order to facilitate the investigation of their cases. Failure to comply with such requests by the Commission, without adequate explanation, may result in closure of the application without further consideration.

8. Commutation of Sentence

A. Request for Review

An applicant who applies for commutation of sentence under Rule 5(B) may do so only if he or she has a sentence of imprisonment of five (5) years or longer and has completed a minimum of at least

one third of the durational period of imprisonment imposed by the sentencing court in conjunction with an adjudication of guilt arising from the applicant's felony conviction or convictions, or, if serving a minimum mandatory sentence, has completed at least one half of the durational period of imprisonment imposed by the sentencing court in conjunction with an adjudication of guilt arising from the applicant's felony conviction or convictions, or, if serving a life sentence, has completed at least twenty (20) years of the durational period of imprisonment imposed by the sentencing court in conjunction with an adjudication of guilt arising from the applicant's felony conviction or convictions.

Individuals eligible for commutation of sentence consideration may receive a "Request for Review" form by contacting the Office of Executive Clemency or it may be downloaded from the clemency website at www.fcor.state.fl.us. Upon receipt of the Request for Review form, clemency application, and any other required and optional supporting documents relevant to the application for clemency, the Coordinator shall forward copies of the documents to the Florida Commission on Offender Review. Documents not relevant to the application for clemency will not be retained. The Commission shall review the documents and make a report and recommendation to the Clemency Board.

If the Commission recommends that a Request for Review be granted, the Request for Review shall be deemed granted and the Coordinator may place the applicant's case on an agenda to be heard by the Clemency Board after a full investigation is completed by the Commission.

If the Commission recommends that a Request for Review be denied, the Coordinator shall issue to the Clemency Board members a preliminary review list of applicants to be denied a Request for Review without a hearing. If no member of the Clemency Board objects to the denial of an applicant's Request for Review without a hearing within 60 days of issuance of the preliminary review list, the case will be summarily denied and the Coordinator shall inform the applicant that the Clemency Board has denied his or her Request for Review.

An objection to the denial of a Request for Review by preliminary review list merely indicates

that a member of the Clemency Board believes that a case should be considered by the Clemency Board at a meeting. It does not indicate whether the Clemency Board member is inclined to vote to grant or deny the underlying application for commutation of sentence.

Notification of receipt by the Office of Executive Clemency of a Request for Review shall be provided as indicated under Rule 6. Rule 17 may also be invoked by any member of the Clemency Board.

B. Referral to the Florida Commission on Offender Review

Upon receipt by the Coordinator of notification invoking Rule 17, the Coordinator may refer a Request for Review to the Florida Commission on Offender Review for a full investigation and place the case on an agenda to be heard by the Clemency Board.

The Coordinator may also refer a Request for Review to the Commission for a full investigation and place the case on an agenda to be heard by the Clemency Board if the Commission recommends that the Request for Review be granted, or if a Request for Review is not denied by preliminary review list under Rule 8(A).

C. Notification

The Coordinator shall attempt to provide individuals seeking a request for commutation of sentences, and the respective prosecuting authority, with approximately 20 days' notice prior to any such request being heard by representatives of the Clemency Board.

D. § 944.30 Cases

All remaining § 944.30, Florida Statutes, cases will be processed under this Rule.

E. Domestic Violence Case Review

Domestic violence cases that meet the criteria adopted by the Clemency Board on December 18, 1991, as amended, will be processed as requests for review.

9. Automatic Restoration of Civil Rights under Florida Law Without a Hearing for Felons Who Have Completed All Terms of Sentence Pursuant to Amendment 4 as Defined in § 98.0751(2)(a), Fla. Stat. (2020)

A. Criteria for Eligibility

A person shall have his or her civil rights under Florida law immediately restored upon processing by automatic approval of the Clemency Board, including the right to vote, the right to serve on a jury, and the right to hold public office but excluding the specific authority to own, possess, or use firearms, without a hearing, if the following requirements are met:

1. The person has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020)—including any legal financial obligations—arising from his or her felony conviction or convictions;
2. The person has no outstanding detainers or pending criminal charges;
3. The person has paid all restitution pursuant to a court order or civil judgment and obligations pursuant to Chapter 960, Florida Statutes;
4. The person has never been convicted of one of the following crimes:
 - a. Murder as defined in § 98.0751(2)(c), Fla. Stat. (2020);
 - b. A felony sexual offense as defined in § 98.0751(2)(b), Fla. Stat. (2020);
 - c. Any offense committed in another jurisdiction or under Federal law which would constitute one of the foregoing offenses if committed within the criminal jurisdiction of Florida; and
5. The person must be a citizen of the United States; and if convicted in a court other than a Florida court, the person must be a legal resident of Florida.

B. Action by Clemency Board

The Florida Commission on Offender Review shall accept and retain the records of individuals released by the Department of Corrections by expiration of sentence, including terms of imprisonment or from community supervision. In a manner approved by the Board of Clemency, the Commission may provide individuals released by the Department of Corrections with a written explanation of the Rules

determining eligibility to apply for restoration of civil rights.

The Commission shall review the applications of individuals who have applied for restoration of civil rights pursuant to Rule 6. If an individual meets all requirements under Rule 9(A), then the Coordinator shall provide that information to the Clemency Board and, if the individual is not removed from the preliminary review list by the Governor within 60 days of issuance of the list, pursuant to executive order, issue a certificate that grants the individual restoration of civil rights under Florida law in the State of Florida, without the specific authority to own, possess, or use firearms. Article IV, Section 8 of the Florida Constitution provides that an executive order granting clemency requires the signature of the Governor and two members of the Florida Cabinet. A person who is not eligible for automatic restoration of civil rights without a hearing under Rule 9 may continue to be processed with a hearing pursuant to Rule 10.

C. Out-of-State or Federal Convictions

If the person has been convicted in a court other than a court of the State of Florida, a request for the restoration of civil rights under Florida law must be submitted in accordance with Rule 6. Such request shall be reviewed by the Florida Commission on Offender Review to determine if the requirements under Rule 9(A) are met. If the Commission certifies that all of the requirements in Rule 9(A) are met, the Coordinator shall follow procedures for the restoration of civil rights as enumerated herein.

10. Restoration of Civil Rights under Florida Law With a Hearing for Felons Who Have Not Completed All Terms of Sentence Pursuant to Amendment 4 as Defined in § 98.0751(2)(a), Fla. Stat. (2020)

A. Criteria for Eligibility

An individual who does not qualify for restoration of civil rights without a hearing under Rule 9 must comply with Rule 6 by filing an application to have his or her civil rights under Florida law restored, excluding the specific authority to own, possess, or use firearms, with a hearing. An individual is eligible to apply only if the following requirements are met:

1. The person has completed all terms of sentence under Amendment 4 as defined in § 98.0751(2)(a), Fla. Stat. (2020)—other than any legal financial obligations—arising from the applicant’s felony conviction or convictions;

2. The person must be a citizen of the United States; and if convicted in a court other than a Florida court, the person must be a legal resident of Florida.

B. Out-of-State or Federal Convictions

If the person has been convicted in a court other than a court of the State of Florida, a request for the restoration of civil rights under Florida law must be submitted in accordance with Rule 6. Such request shall be reviewed by the Florida Commission on Offender Review to determine if the requirements under Rule 10(A) are met. If the Commission certifies that all of the requirements in Rule 10(A) are met, the Coordinator shall follow procedures for the restoration of civil rights with a hearing as enumerated herein.

11. Hearings by the Clemency Board on Pending Applications

A. Action by Clemency Board

The Florida Commission on Offender Review shall review the applications of individuals who have applied for clemency pursuant to Rule 6 and make a report and recommendation to the Clemency Board, except that applications under Rules 8 and 9 shall be handled in accordance with those Rules.

If the Commission recommends that an application be granted, then the Coordinator may place the applicant’s case on an agenda to be heard by the Clemency Board after a full investigation is completed by the Commission.

If the Commission recommends that an application be denied, then the Coordinator shall issue to the Clemency Board members a preliminary review list of applicants to be denied clemency under Florida law without a hearing. If no member of the Clemency Board objects to the denial of an applicant’s clemency application without a hearing within 60 days of issuance of the preliminary review list, the case will be summarily denied and the Coordinator shall inform the applicant that the Clemency Board has denied his or her application.

An objection to the denial of clemency by preliminary review list merely indicates that a member of the Clemency Board believes that a case should be considered by the Clemency Board at a meeting. It does not indicate whether the Clemency Board member is inclined to grant or deny the underlying application for clemency.

B. Cases on the Agenda

After the Florida Commission on Offender Review completes any investigation, report, and recommendation conducted under Rule 7, the Coordinator may place upon the agenda for consideration by the Clemency Board at its next scheduled meeting:

1. Timely applications that meet the eligibility requirements under Rule 5 that the Commission recommends be granted under Rule 8(A) or Rule 11(A);
2. Timely applications that meet the eligibility requirements under Rule 5 that are not denied by preliminary review list under Rule 8(A) or Rule 11(A); and
3. Cases in which Rule 17 has been invoked.

C. Distribution of Agenda

The Coordinator shall prepare an agenda which shall include all cases that qualify for a hearing under Rule 11(B). A preliminary agenda shall be distributed to the Clemency Board at least 10 days before the next scheduled meeting.

D. Failure of Applicant to Comply With Rules

An applicant's failure to comply with any rule of executive clemency may result in refusal, without notice, to place an application on the agenda for consideration.

12. Hearings Before the Clemency Board

A. Scheduled Meetings

The Clemency Board will meet in the months of March, June, September, and December of each year, or at such times as set by the Clemency Board. The Governor may call a special meeting at any time for any reason.

B. Notice of Appearance

While applicants are not required to appear at the hearing, the Clemency Board encourages applicants to attend. The applicant, or any other person intending to speak on behalf of the applicant, must notify the Office of Executive Clemency at least 10 days prior to the scheduled meeting of the Clemency Board.

C. Time Limits

Any person making an oral presentation to the Clemency Board will be allowed no more than five (5) minutes. All persons making oral presentations in favor of an application shall be allowed cumulatively no more than ten (10) minutes. All persons making oral presentations against an application, including victims, shall be allowed cumulatively no more than ten (10) minutes.

D. Filing of Executive Orders

Subsequent to the hearings of the Clemency Board, the Coordinator shall prepare executive orders granting clemency as directed and circulate them to the members of the Clemency Board. After the Executive Orders are fully executed, the Coordinator shall certify and mail a copy to the applicant. The original executive order shall be filed with the custodian of state records. The Coordinator shall send a letter to each applicant officially stating the disposition of his or her application. A seal is not used by the Office of Executive Clemency.

13. Continuance and Withdrawal of Cases

An applicant or their attorney may apply for a continuance of a case if the continuance is based on good cause. The Governor will decide if the case will be continued.

The applicant may withdraw his or her application by notifying the Office of Executive Clemency at least 20 days prior to the next scheduled meeting of the Clemency Board. A request to withdraw a case made within 20 days of the hearing on the application will be allowed if the Governor or the Coordinator for the Office of Executive Clemency determines that there is good cause. Cases that are withdrawn from the agenda will not be considered again until the application is re-filed.

14. Reapplication for Clemency

Any otherwise eligible person who has been granted or denied any form of executive clemency other than a Restoration of Civil Rights may not reapply for further executive clemency for at least two (2) years from the date that such action became final. Any person who has been denied a Rule 8 commutation of sentence may not apply for another request for at least five (5) years from the date the prior request was denied.

15. Commutation of Death Sentences

Rule 15 applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency, except Rules 1, 2, 3, 4, 15 and 16, are inapplicable to cases where inmates are sentenced to death.

A. Confidentiality

Notwithstanding incorporation of Rule 16 by reference in cases where inmates are sentenced to death, the full text of Rule 16 is repeated below for clarification: Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality.

B. Florida Commission on Offender Review Investigation

In all cases where the death penalty has been imposed, the Florida Commission on Offender Review may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board. The investigation shall include, but not be limited to: (1) an interview with the inmate, who may have clemency counsel present, by the

Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; (3) an interview, if possible, with the presiding judge; and (4) an interview, if possible, with the defendant's family. The Commission shall provide notice to the Office of the Attorney General, Bureau of Advocacy and Grants, that an investigation has been initiated. The Office of the Attorney General, Bureau of Advocacy and Grants, shall then provide notice to the victims of record that an investigation is pending and at that time shall request written comments from the victims of record. Upon receipt of comments from victims of record or their representatives, the Office of the Attorney General, Bureau of Advocacy and Grants, shall forward such comments to the Commission to be included in the final report to the Clemency Board.

C. Monitoring Cases for Investigation

The investigation by the Florida Commission on Offender Review shall begin at such time as designated by the Governor. If the Governor has made no such designation, the investigation shall begin immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the Eleventh Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor. An investigation shall commence immediately upon any failure to timely file the initial motion for postconviction relief in state court, and any appeal therefrom, or the initial petition for writ of habeas corpus in federal court, and any appeal therefrom. The time frames established by this Rule are not tolled during the pendency of any petition for rehearing or reconsideration (or any similar such motion for clarification, etc.), request for rehearing en banc in the Eleventh Circuit Court of Appeals, or petition for writ of certiorari in the United States Supreme Court. Failure to conduct or complete the investigation pursuant to these rules shall not be a ground for relief for the death penalty defendant. The Commission's Capital Punishment Research Specialist shall routinely monitor and track death penalty cases beyond direct appeal for this purpose. Cases investigated under previous administrations may be reinvestigated at the Governor's discretion.

D. Florida Commission on Offender Review Report

After the investigation is concluded, the Commissioners who personally interviewed the inmate shall prepare and issue a final report on their findings and conclusions. The final report shall include: (1) any statements made by the defendant, and defendant's counsel, during the course of the investigation; (2) a detailed summary from each Commissioner who interviewed the inmate; and (3) information gathered during the course of the investigation. The final report shall be forwarded to all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor.

E. Request for Hearing by any Clemency Board Member

After the report is received by the Clemency Board, the Coordinator shall place the case on the agenda for the next scheduled meeting or at a specially called meeting of the Clemency Board if, as a result of the investigation, or final report, any member of the Clemency Board requests a hearing within 20 days of transmittal of the final report to the Clemency Board. Once a hearing is set, the Coordinator shall provide notice to the appropriate state attorney, the inmate's clemency counsel, the victim's rights coordinator in the Executive Office of the Governor and the Office of Attorney General, Bureau of Advocacy and Grants. The Office of the Attorney General, Bureau of Advocacy and Grants, shall then notify the victims of record of the hearing.

F. Request for Hearing by Governor

Notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board.

G. Transcript of Interview

Upon request, a copy of the actual transcript of any statements or testimony of the inmate relating to a clemency investigation shall be provided to the state attorney, the inmate's clemency counsel, or victim's family. The attorney for the state, the inmate's clemency counsel, the victim's family, the

inmate, or any other interested person may file a written statement, brief, or memorandum on the case within 90 days of initiation of the investigation under Rule 15, copies of which will be distributed to the members of the Clemency Board. The person filing such written information should provide five (5) copies to the Coordinator of the Office of Executive Clemency.

H. Time Limits

At the clemency hearing for capital punishment cases, the inmate's clemency counsel and the attorneys for the state may make an oral presentation, each not to exceed fifteen (15) minutes collectively. Representatives of the victim's family may make oral statements not to exceed an additional five (5) minutes collectively. The Governor may extend these time frames at his or her discretion.

I. Distribution and Filing of Orders

If a commutation of a death sentence is ordered by the Governor with the approval of at least two members of the Clemency Board, the original order shall be filed with the custodian of state records, and a copy of the order shall be sent to the inmate, the attorneys representing the state, the inmate's clemency counsel, a representative of the victim's family, the Secretary of the Department of Corrections, and the chief judge of the circuit where the inmate was sentenced. The Office of the Attorney General, Bureau of Advocacy and Grants, shall inform the victim's family within 24 hours of such action by the Clemency Board.

16. Confidentiality of Records and Documents

Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality.

17. Cases Proposed by the Governor or Members of the Clemency Board

In cases of exceptional merit, any member of the Clemency Board may place a case on an upcoming agenda for consideration.

18. Collection of Statistics and Evaluation of Clemency Action

The Office of Executive Clemency, in conjunction with the Florida Commission on Offender Review and Department of Corrections, shall collect and submit to the Clemency Board an annual written report.

19. Effective Dates

History. - Adopted September 10, 1975, Rule 6 (formerly Rule 9), effective November 1, 1975; Rule 7 adopted December 8, 1976; Rule 6 revised December 8, 1976, effective July 1, 1977; revised September 14, 1977; Rule 12 revised October 7, 1981; revised December 12, 1984; revised January 8, 1985; revised July 2, 1985; Rule 12 revised September 18, 1986; Rules revised December 18, 1991, effective January 1, 1992; Rule 10 and Rule 15 revised June 22, 1992; Rules revised December 29, 1994, effective January 1, 1995; Rules revised January 7, 1997, effective January 15, 1997; Rule 4 and Rule 9 revised October 28, 1999, effective January 1, 2000; Rules revised June 14, 2001, effective June 14, 2001; Rules revised March 27, 2003, effective March 27, 2003; Rules revised June 20, 2003, effective June 20, 2003; Rules revised December 9, 2004, effective December 9, 2004; Rules revised April 5, 2007, effective April 5, 2007; Rules revised March 9, 2011, effective March 9, 2011; Rules revised January 21, 2020, effective January 21, 2020; Rules revised March 10, 2021, effective March 10, 2021.



KeyCite Red Flag - Severe Negative Treatment

Reversed and Remanded by [Reaves v. Secretary, Florida Department of Corrections](#), 11th Cir.(Fla.), September 28, 2017

2015 WL 13657202

Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

William REAVES, Petitioner,

v.

Julie L. JONES, Secretary, Florida

Department of Corrections,¹ Respondent.

CASE NO. 10-14046-CIV-MIDDLEBROOKS

Signed 03/03/2015

Attorneys and Law Firms

[Craig Joseph Trocino](#), University of Miami Law School, Miami, FL, [Michael Chance Meyer](#), [Neal Andre Dupree](#), [William McKinley Hennis, III](#), [Rachel Lawrence Day](#), Office of the Capital Collateral Regional Counsel-South, Fort Lauderdale, FL, for Petitioner.

[Leslie T. Campbell](#), Attorney General Office, West Palm Beach, FL, for Respondent.

ORDER GRANTING § 2254 PETITION AS TO PENALTY PHASE

DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE

*1 “You can tell a true war story by the way it never seems to end. Not then, not ever.”² The essential question presented by this case is whether it would have made a difference had the jury known, as the Department of Veterans Affairs has determined, that William Reaves had [Post-Traumatic Stress Disorder](#) (“PTSD”) stemming from combat in Vietnam when he shot Sheriff’s Deputy Richard Raczkowski.

The jury never learned of Mr. Reaves’ mental disorder because his counsel’s conduct undermined the adversarial process. Counsel did not investigate and present compelling mitigating evidence consistent with a coherent defense, and

failed to object to inadmissible and inflammatory opinion and unreliable, speculative, and untrue testimony.

The state court’s summary rejection of Mr. Reaves’ claim of ineffective assistance of counsel involved an unreasonable application of [Strickland v. Washington](#), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, Mr. Reaves’ habeas petition filed pursuant to § 2254 is granted as to the penalty phase of his capital trial.

I. BACKGROUND

In the early morning on September 23, 1986, Williams Reaves dialed 911 from a convenience store pay phone in an attempt to get a taxi. Sheriff’s Deputy Richard Raczkowski was dispatched to investigate, and after obtaining Mr. Reaves’ identification and finding no outstanding warrants, asked the dispatcher to request a cab for Mr. Reaves.

While the men waited, a .38 caliber pistol slipped from the waistband of Mr. Reaves’ pants and fell to the ground. There was a struggle, Mr. Reaves grabbed the gun, and as the Deputy turned to run, Deputy Raczkowski was shot several times.³ Deputy Raczkowski died later that morning.

Confession

Mr. Reaves fled but was arrested in Georgia not quite two days later. He gave police a taped confession that was played at trial. (DE 87). The detailed statement is 53 minutes in duration. Mr. Reaves waived his rights, answered all questions, and drew a diagram of the scene of the shooting.

Mr. Reaves said, on the night of the shooting, he had been smoking cocaine and watching a football game at his girlfriend’s house. Out of cocaine and tired of waiting for her to return, he walked to a nearby convenience store. Given change by a hitchhiker, he called a taxi company twice asking for a cab. Each time he was told a cab was on the way. “Coked up,” Mr. Reaves said he got impatient and called emergency—the 911 operator—but hung up before the call was answered.

*2 Deputy Raczkowski pulled up and asked for Mr. Reaves’ identification. “He ran a check on me, everything was clean.” “I never met a finer officer.” Because he had no more change, Mr. Reaves asked the Deputy to call for a cab and the Deputy agreed.

Mr. Reaves recounted that, as they stood talking, the pistol fell out of Mr. Reaves' waistband. As Mr. Reaves tried to pick it up, Deputy Raczkowski stepped on his hand; Mr. Reaves says he pushed the Deputy's knee aside, and retrieved the gun.

Deputy Raczkowski told Mr. Reaves to give him the gun. Mr. Reaves responded, "I'm not going to give you my gun. I just want to go home." Raczkowski started to back up, reached for his weapon, and started running around the back of the patrol car. Mr. Reaves said that as the Deputy started to run and was reaching for his weapon, "I started shooting." According to Mr. Reaves, he emptied his clip but was unsure how many bullets he had. He was also unsure of how many times the Deputy was hit. According to Mr. Reaves, "I panicked, I panicked ... all I remember is I started shooting."

When asked why he shot, Mr. Reaves responded: "I had no reason to shoot that man ... I was influenced by cocaine, I panicked, paranoid ... I am an ex-felon, I had a hot gun, I got for 2 or 3 rocks on the street ... I was scared and paranoid...."

The Deputy fell, rolled over, and fired his weapon. The Deputy shot twice, once hitting a trash dumpster. Mr. Reaves said he did not know what to do, considered calling for help, but then saw another person and ran.

Mr. Reaves also detailed everything that occurred after the shooting until his arrest in Georgia: each person he spoke with, each meal he ate, the hotel where he stayed, and the store where he purchased the clothing he was wearing.

The 1987 Trial

Mr. Reaves was originally tried in 1987, convicted of first-degree murder, and sentenced to death. The Florida Supreme Court reversed that conviction because the state prosecutor had represented Mr. Reaves as a public defender in a previous case. See *Reaves v. State*, 574 So.2d 105, 106-08 (Fla. 1991).

The 1992 Trial

Pretrial. Shortly after being appointed to represent Mr. Reaves, Jonathan Kirschner filed a Motion on Legal Necessity for co-counsel. He did so because he was "overwhelmed by the *Reaves* case." (DE 80 at 11, Kirschner testimony). Mr. Kirschner testified that to proceed to trial

without assistance in a case of this nature would be "prima facie ineffective." (A-R1 at 127).⁴ Mr. Kirschner argued: "No mitigating evidence other than the defendant's testimony was presented at the first trial. In order to adequately prepare for a penalty phase, undersigned counsel must indulge in substantial additional investigative efforts, with dozens of witnesses, in order to prepare for same." (A-R16 at 2381) (Motion to Appoint Counsel). Mr. Kirschner had never tried a capital case: Mr. Reaves' defense was his first and last.⁵

Despite the fact that the State was represented by multiple lawyers, the prosecution objected to appointment of co-counsel. Though he stated "I see a very genuine concern on the part of Mr. Kirschner that he may not be able to provide a perfect defense," the trial judge denied the request for co-counsel, finding that "[t]here has been no showing, either by Mr. Kirschner's affidavit, or his testimony, that he will be, or intends to be ineffective." (A-R1 at 197).

***3 Guilt Phase.** The trial began on February 18, 1992. In his opening, the prosecutor told the jury that Mr. Reaves had confessed and recounted the events that had transpired at the convenience store. The prosecutor also told the jury that Eugene Hinton would testify and tell them that Mr. Reaves appeared at his home on the morning of the shooting; that he was sweating and had scratches all over his arms and legs. Mr. Hinton was going to testify that Mr. Reaves told him, "I done fucked up. I done fucked up. I just shot a cop. I just shot a police. I just shot a cracker." (A-R5 at 728). Further, the State stated Mr. Hinton would testify that Mr. Reaves told him that the Deputy begged him not to shoot, raised both of his hands in the air, and started walking backwards when Mr. Reaves said "one of us has got to go; me or you" and shot seven times at the Deputy as he retreated. (*Id.* at 731, 104 S.Ct. 2052).

In his opening statement, Mr. Kirschner told the jury that "[w]hat happened on that night was a tragic accident and it was a horrible accident and it was certainly an unnecessary accident, but it was accidental." (*Id.* at 742, 104 S.Ct. 2052). Mr. Kirschner apprised the jury of the definition of "excusable homicide" in Florida and argued that "[i]f there is one thing that is patently clear, that is there was an accident that occurred that night. The gun dropped out of his pants, undeniable. The gun fell down. There was undeniably heat of passion. Gunshots were exchanged." (*Id.* at 743, 104 S.Ct. 2052). Mr. Kirschner then described the "provocation," which was not the fact that the Deputy drew his gun but was "the perception of William Reaves as to that provocation." (*Id.* at 745, 104 S.Ct. 2052). Mr. Reaves, it was argued, "indulged

in something called survivor behavior.” (*Id.*). Mr. Reaves learned this behavior “where a lot of other people learned it,” in the Republic of Vietnam. (*Id.* at 752, 104 S.Ct. 2052). Also, “the evidence will be clear that the survivor behavior in conjunction with his use of narcotics contributed to this accidental killing.” (*Id.* at 753, 104 S.Ct. 2052). Mr. Kirschner concluded that “[t]he evidence is going to show that this killing was the result of accident and misfortune in the heat of passion upon sudden and sufficient provocation” and that the jury must follow the law and find Mr. Reaves not guilty, which was, admittedly, going to be difficult “given the emotions in this case.” (*Id.* at 754, 104 S.Ct. 2052).

In addition to playing Mr. Reaves' 53-minute confession, the State called 28 witnesses. Mr. Kirschner conducted no cross-examination of 11 of those witnesses and minimal cross-examination of the others.

While the Eleventh Circuit described his testimony as “[t]he single most damaging piece of evidence presented,” 717 F.3d at 904, the jury did not have an opportunity to listen to Eugene Hinton or see him testify. Rather, Mr. Hinton's testimony from the first trial was read into the record.

The State rested. Before the defense began its case, the prosecution objected to any evidence of diminished capacity. Mr. Kirschner argued that he was not intending to put on a diminished capacity defense; rather, Mr. Reaves' defense was an affirmative defense—excusable homicide. (A-R10 at 1469). In support of this defense, Dr. Weitz was retained to examine Mr. Reaves and then testify regarding a condition known as “Vietnam Syndrome.” (*Id.* at 1474, 1480). However, the trial court determined that Dr. Weitz's testimony would not be admissible because Mr. Reaves had not put on a defense of insanity. (*Id.*). Mr. Kirschner made a proffer to the court and renewed the motion to permit this testimony. Mr. Kirschner argued that Dr. Weitz's testimony would show that due to Mr. Reaves' experiences in Vietnam, when the Deputy reached for his firearm, a sudden and sufficient provocation resulted, which constituted excusable homicide. After a proffer of Dr. Weitz's testimony, the trial court denied the motion, refusing to allow his testimony in front of the jury. (*Id.* at 1533).

*4 This should not have come as a surprise to Mr. Kirschner. On January 16, 1992, approximately a month before trial started, the State filed a motion to prohibit testimony of abnormal mental condition not constituting legal insanity. (A-R2 at 208). During argument, the State clarified to the court

that “[w]hat we are trying to avoid is some post-traumatic stress syndrome, having the doctor get on the stand and say, that, well, you know, he served in Vietnam, and—.” (*Id.* at 212). The court agreed, “[t]hey can't—I'm not going to allow them to do that.” (*Id.*).

With the exclusion of Dr. Weitz, Mr. Kirschner was left with two witnesses. The defense's first witness was a tape analyst who had analyzed the master 911 tape in this case. (A-R10 at 1539). The analyst testified that the initial call from the Deputy to the 911 operator requesting City Cab to pick up Mr. Reaves began at 3:12:19 and ended at 3:12:43. (*Id.* at 1545-46). The next call came 2 minutes and 39 seconds later advising that there was an emergency (3:15:22). The defense's second and final witness was a retired police officer who testified regarding the standard trigger pull on a government issue Colt 45. (*Id.* at 1556-65).

The testimony of the two defense witnesses encompasses less than thirty pages of the trial transcript. None of it supported the statements made by Mr. Kirschner in his opening.

The last minute changes to any theory of defense were starkly exposed during the charge conference. First, the defense waived justifiable homicide as a defense. (*Id.* at 1577). Then, the defense excluded paragraphs one and three of the excusable homicide instruction. Mr. Kirschner then asked the court to instruct the jury on excusable homicide but to use the reasonable doubt instruction from the justifiable homicide model instruction. (*Id.* at 1615). The court denied the request. (*Id.* at 1617). In the moments before closing arguments were to begin, *the judge*, not defense counsel, raised the issue of a voluntary intoxication instruction, pointing out that it had been given in the first trial. (*Id.* at 1635). After discussion, Mr. Kirschner asked for it to be given. The court, while finding that voluntary intoxication had “surely not been raised as a defense” in this case, agreed to give the instruction to the jury, in part, because the State did not object. (*Id.* at 1636). In fact, the prosecutor stated, “Judge, if he wants to raise it at this point, I have no objection because that's not what they told the jury in opening statement and that's not what they have maintained. But if they want to do it, that's fine, because I have a perfect argument for that one.” (*Id.*).

The State began its closing argument with the prosecutor explaining, in a meticulous fashion, the definition of first-degree premeditated murder. (A-R11 at 1649). He methodically walked through the elements and the evidence and how the State proved each of the statutory requirements

for first-degree murder in Florida. The State then used Mr. Kirschner's ill-conceived defense against Mr. Reaves:

Think back to the opening statements in this case. The defense counsel told you the defense was this was a mistake, accident, misfortune.

Don't allow them to shift now and tell you that the defense is really voluntary intoxication because there was no evidence that the Defendant was ever intoxicated in any point of this, certainly not to any degree that he didn't know what he was doing.

(*Id.* at 1672). The State proceeded to discredit any and all claims that Mr. Reaves was intoxicated at the time of the murder by pointing out that this had not been his defense all along. "Don't allow the Defendant to tell you one thing in opening statement and then shift to you today, say 'Gees, you know, he said he was intoxicated in his statement so, ladies and gentlemen, you've got to believe it.' " (*Id.* at 1676).

*5 In his closing argument, Mr. Kirschner responded by telling the jury essentially that it was logical for Mr. Reaves to have fled to Georgia, "[o]f course, it shows consciousness of guilt. Of course he ran. He just shot a police officer." (*Id.* at 1696). While illustrating the veracity of Mr. Reaves' statement to the police in Georgia, Mr. Kirschner told the jury that "[h]e said, yeah, he tried to blame it on cocaine. Yeah, he said I think 16 times throughout that thing, 'I don't know what happened. I just panicked.' " (*Id.* at 1709). Mr. Kirschner then went on to argue unsupported facts about Mr. Reaves' military experience as a justification for his actions and why the crime was not premeditated. Mr. Kirschner concluded with the following:

Yes, we care about our law enforcement officers. No, we don't like to see them killed. Yes, this was a senseless, needless kind of tragedy where plenty of people were hurt and are still hurting. But it doesn't make it a premeditated murder and that's all I'm asking you to find. Thank you.

(*Id.* at 1732). The State's rebuttal consisted mostly of pointing out that Mr. Kirschner's arguments were unsupported by the record. The prosecutor repeatedly hammered the absurdity of finding excusable homicide when an armed person kills a police officer in the line of duty. (*Id.* at 1738). "Mr. Kirschner wants to argue that this is a panic shooting, panic shooting, and therefore, it's excusable, not guilty, walks free." (*Id.* at 1751).

Despite the lack of any meaningful defense, the jury had questions before rendering their guilt phase verdict:

Please give a clear explanation of second degree murder, specifically page nine, lines four and five. The Defendant carried or possessed a firearm during the commission of the "offense" in quotes. What offense is being referred to? Is the "offense" in quotes, "referring to secondary offense as in a robbery or is the reference to the crime before us?"

* * *

If a hung jury, will there be a retrial?

* * *

Could he be found guilty of first-degree murder or explain first-degree premeditated murder.

(*Id.* at 1791-99).

After approximately ten hours of deliberations, the jury found Mr. Reaves guilty of first-degree murder. The penalty phase began less than 48 hours later before the same jury.

Penalty Phase—Presentation of Witnesses. At the penalty phase, the State presented five witnesses in its case in chief and four rebuttal witnesses. The State's argument for a death sentence was that Mr. Reaves "has used guns before in acts of violence," has an anti-social personality disorder who "commits crimes over and over and over again, and doesn't learn from the consequences." (A-R15 at 2275, 2277). The prosecutor belittled Mr. Reaves' service to his country by arguing that "[t]he defendant served one year in Vietnam. He did not have a distinguished record to any degree. He received the medals anyone else would have received for simply going there." (*Id.* at 2291-92).

The defense called seven witnesses during the penalty phase. Most of it was very brief. The defense case lasted less than half a day. Three people who grew up with Mr. Reaves testified he was happy and likeable as a young man but changed when he returned from Vietnam and became involved in drugs. The pastor of the church Mr. Reaves had attended growing up testified. Mr. Reaves' sister testified that Mr. Reaves was gentle and caring as a young man but was not the same person when he came back from Vietnam; he was anxious, tense, and hated people creeping up on him. (A-R13 at 1940-49).

The defense also called two witnesses who had served with Mr. Reaves in Vietnam. Hector Caban served in Vietnam in the Fourth Infantry Division and was in the "Charlie Platoon" with Mr. Reaves. (*Id.* at 1949). Mr. Reaves was with Mr.

Caban's squad from November 1969 to September 1970. (*Id.* at 1979). During direct examination, Mr. Caban was able to identify Mr. Reaves in photographs that he identified as being taken in Vietnam. (*Id.* at 1950). In one photograph, Mr. Caban pointed out that Mr. Reaves was wearing a hat that belonged to a ranger patrol team because Mr. Reaves' squad helped save that particular team and afterwards Mr. Reaves asked one of the rangers for his hat. (*Id.* at 1960). Mr. Caban explained that his squad's missions were typically to "search and destroy." (*Id.* at 1967). Mr. Reaves' squad would typically encounter snipers shooting at them; they would not know that snipers were in the area until the "person in front of them got shot." (*Id.* at 1969). Mr. Caban recounted a specific experience where his squad encountered a U-Shape ambush, meaning that his squad was ambushed from three directions while the squad was entering an open field. (*Id.* at 1969-71). As a result of this incident, half of the members of their squad were shot. (*Id.* at 1973). Mr. Caban testified that when Mr. Reaves first arrived, he was quiet, nice, and got along with everyone. (*Id.* at 1980). However, towards the end of his time with the squad, Mr. Reaves began using heroin. (*Id.* at 1981). Along with serving in Vietnam, their squad also served time in Cambodia and experienced combat action there. (*Id.* at 1986-87). During their time together, Mr. Reaves and Mr. Caban experienced around 6-8 firefights (combat situations). (*Id.* at 1988).

*6 Mr. Caban also described an encounter where, when he was on patrol with Mr. Reaves, a soldier Mr. Reaves was close to was shot in the back with the bullet ripping through the stomach. (*Id.* at 1990). They carried the injured man to a clearing where a helicopter could land. (*Id.* at 1991). "We knew the guy was going to die because no matter how we wrapped him all his insides were coming out..." (*Id.* at 1991). Although he was told he would get into trouble, and was in fact later reprimanded, Mr. Reaves jumped onto the helicopter and held the **wounded** soldier, who was pronounced dead on the flight. (*Id.* at 1991-92).

William D. Wade also served in Vietnam with Mr. Reaves in the same platoon. Mr. Wade was the squad leader. (*Id.* at 2005). Mr. Wade testified about a specific six-week period when he and Mr. Reaves were involved in a U-shaped ambush. (*Id.* at 2007). According to Mr. Wade, their point man was killed by a shot to the head, another suffered a relatively minor **wound** but died of shock, and their sergeant was hit in the hip and pelvis and, although he survived, was permanently out of action. (*Id.* at 2008-09). Mr. Wade also testified to the close combat in very tough conditions that the

platoon experienced during the war. (*Id.* at 2009). During his six weeks with Mr. Reaves' platoon, Mr. Wade estimated they had eight or nine combat situations. (*Id.* at 2014).

The most important testimony, both because of what he said and also what he did not, came from William Allen Weitz, Ph.D., a psychologist at the Department of Veterans Affairs. (*Id.* at 2027). Dr. Weitz was appointed in 1986 to evaluate Mr. Reaves' sanity, competency, and involuntary hospitalization. At that evaluation, which was conducted on January 24, 1987, he examined Mr. Reaves' background information, conducted a clinical interview, and performed psychological tests (Cornell Medical Index, MMPI, and questionnaires regarding military service). (*Id.* at 2039). Dr. Weitz again evaluated Mr. Reaves on October 4, 1991. (*Id.* at 2040). At this evaluation, he diagnosed Mr. Reaves with drug abuse (first cocaine only, then poly-drug abuse) and anti-social personality disorder. (*Id.* at 2041, 2043). He also testified that he believed Mr. Reaves suffered from "Vietnam Syndrome," which is not in the Diagnostic and Statistical Manual for Mental Disorders (DSM III). (*Id.* at 2044). Dr. Weitz testified that at the time of the crime, Mr. Reaves was experiencing psychological effects of serving in combat in Vietnam, in addition to experiencing the effects of cocaine use and anti-social personality disorder. (*Id.* at 2044-46). He testified that, in his opinion, Mr. Reaves did not run from the Deputy initially because the officer had been helping him. (*Id.* at 2047). However, as soon as the gun fell out and the Deputy would not allow Mr. Reaves to retrieve it, Dr. Weitz believes that Mr. Reaves, based on his combat experience in Vietnam, felt that his life was in danger and that he had been put in a dangerous situation where he could end up dead. (*Id.* at 2048). In Dr. Weitz's opinion, based on Mr. Reaves' prior military experience, Mr. Reaves was acting under the impression that he should shoot or he would be killed. (*Id.* at 2048-49).

The defense rested.

The State's first rebuttal witness was Robert Ressler, a retired FBI Agent, who had previously served in the military but never in Vietnam or Cambodia. (A-R14 at 2145-47). Without objection from Mr. Kirschner, Mr. Ressler was qualified as an expert in military records. (*Id.* at 2154-55). This so-called "expert" opined that Mr. Reaves' Combat Infantryman Badge, the National Defense Service Medal, the Vietnam Service Medal with two bronze stars, and Air Medal were "automatically" given to everyone who was in Vietnam and "had no significance to valor or exemplary service." (*Id.* at 2167). Then, again without objection, Mr. Ressler opined that

Mr. Reaves, who was honorably discharged from the Army but had received a disciplinary report in connection with a stolen radio, would not have received an honorable discharge except for the winding down of the Vietnam war.⁶ (*Id.* at 2168-69).

*7 The State next called Lt. Colonel Joseph Cinquino, who had served as a platoon leader in Vietnam for a portion of the time Mr. Reaves was there. He testified about an ambush of Mr. Reaves' unit and that only two soldiers were killed and a half dozen wounded. (*Id.* at 2189). He also testified that none of the men in his company suffered from PTSD and that he was unaware of anyone in his years of military experience suffering from PTSD. (*Id.* at 2197). Despite being almost certainly untrue, this testimony went unchallenged by Mr. Kirschner.⁷

The next witness was Henry Alexander Norring, who was a platoon leader in Vietnam. (*Id.* at 2211). He also testified about an ambush of Mr. Reaves' platoon, stating that it lasted 2-3 hours, one or two people died, and two or three were wounded. (*Id.* at 2216). He testified that the sister company had 20 or 30 casualties.⁸ (*Id.* at 2219). Mr. Norring also testified that he never had a situation where he had to "have the Chaplain or move William Reaves from that situation because of any stress of combat." (*Id.* at 2222).

The State's final rebuttal witness was Dr. McKinley Cheshire. Dr. Cheshire is a psychiatrist (*id.* at 2223), and was designated as an expert in psychiatric medicine (*id.* at 2228). Dr. Cheshire never met or examined William Reaves. (*Id.* at 2231). Dr. Cheshire testified that, although the diagnostic manual recognized "Post-Traumatic Stress Syndrome" as a mental disorder, "Vietnam Syndrome" was not. (*Id.* at 2230). "I think that [Dr. Weitz] is inventing some concept that he is trying to get other people to believe." (*Id.* at 2239). Based solely on the documents he reviewed, Dr. Cheshire testified that his opinion was that Mr. Reaves was not suffering from a psychiatric illness at the time he shot Deputy Raczowski. (*Id.* at 2237). Without objection, Dr. Cheshire then testified that the Deputy was "executed by a drug dealer to cover up the possibility of his going back to jail, and he was motivated to be selfish, to protect himself, and to do away with the witnesses." (*Id.* at 2231). "My opinion is that this man was executed while begging for his life and making an attempt to stay alive." (*Id.* at 2243).

Penalty Phase—Closing Arguments. In closing argument, the prosecutor methodically reviewed the statutory

aggravating factors. (A-R15 at 2271). First, he pointed out Mr. Reaves' previous felonies involving the use or threat of violence: a conspiracy to commit robbery in Stuart; a robbery in Vero Beach; and an assault on a corrections officer. (*Id.* at 2279). He argued that Mr. Reaves had committed the murder to prevent a lawful arrest and disrupted or hindered the lawful exercise of a government function. (*Id.* at 2279). He contended the crime was especially heinous, atrocious, or cruel (*id.* at 2282-84) and finally that the victim of the crime was a law enforcement officer engaged in official duties (*id.* at 2284-85).

The prosecutor then anticipated the arguments of Mr. Kirschner:

*8 [Mr. Kirschner] will tell you that you have heard a lot of testimony about cocaine and that the defendant is a drug user and is on cocaine.

* * *

I submit to you the logic of that should not be accepted by you. Why give a benefit to an individual that has elected to violate the laws of society by taking illegal drugs, then committing the crime of first-degree murder, and saying: Well, you know, I was on drugs, which I voluntarily took, but give me the benefit because if I was on drugs I should not be punished as badly.

* * *

... Mr. Kirschner is going to get up here and he is going to take all these photographs of the defendant in Vietnam. And you are going to hear a lot about Vietnam. About the defendant's conduct in Vietnam. Defendant's service in Vietnam should all be used as a mitigating aspect.

* * *

The defendant served one year in Vietnam. He did not have a distinguished record to any degree. He received the medals that anyone else would have received for simply going there.

* * *

What the defendant did have in Vietnam was not a distinguished record, but the opposite. Violations of orders. Article 15, where he was reprimanded and punished and court martialed in Vietnam for stealing and other offenses.

* * *

Mr. Kirschner may argue that he has developed a personality disorder as a result of combat experience in Southeast Asia. Well, if you believe Dr. Weitz's testimony about Vietnam Syndrome, that may be an acceptable mitigating circumstance.

* * *

Remember, I spent a lot of time on him and I was showing him the book, "DSM-III-R" the Diagnostic Manual. I said: "Where does it say that post-traumatic stress people come back and commit crimes as criminals?" That's not in there.

* * *

Where is Vietnam Syndrome? Well, it's not in there either. They ain't in there for a reason, because they aren't recognized by the best psychologists and psychiatrists across the country. That's why it's not in there.

(*Id.* at 2287-96).

Mr. Kirschner's closing was brief, comprising less than 14 pages of transcript, half that of the prosecutor. He first conceded "that [Mr. Reaves] has been previously convicted of a violent felony is something that should carry a lot of weight. I don't deny that." (A-R15 at 2301).

He then argued that a murder while avoiding arrest, disrupting or hindering the lawful exercise of a government function, and killing a law enforcement officer were "three different ways of describing the same thing ... [a]nd if there are three that are all the same thing, then don't count it as three. Count it as one." (*Id.* at 2302).

Mr. Kirschner then took issue with whether the crime was heinous, atrocious, or cruel. (*Id.*). While acknowledging that "all murders, by their very nature, are heinous, atrocious and cruel," Mr. Kirschner argued that "[t]he only way that you could believe that the crime was tortuous is if you believed beyond any reasonable doubt that Eugene Hinton told the absolute truth, because that's the only evidence there is that the deputy begged for his life." (*Id.* at 2303).⁹

*9 Having conceded at least two aggravating factors, Mr. Kirschner turned to mitigation:

If you find as a result of his combat experiences that he was unable to overcome ordinary judgment and that his inability to overcome ordinary judgment resulted in the killing, you could consider that a mitigating factor.

If you find that as a result of his combat experiences in Southeast Asia that he had an inability to reflect upon what he was doing, you could find that as a mitigating factor.

If you find that he is a Vietnam veteran and that as a result of his service in this country he was less able to control himself on that night than he would have been, you could use that as a mitigating factor.

The fact that he was a positive influence on other people in his neighborhood, that can be a mitigating factor.

(*Id.* at 2306). Mr. Kirschner continued:

Let's look for a minute at what the evidence of the last two days showed us. What the prosecutor showed us was that William Reaves, in 1973 and up to the present period or about twenty years, was a violent criminal.

But there was—that's one 20-year period. But there was another 20-year period in William Reaves' life—and you saw that through some of the people who live in Gifford, who came in here and talked to you about what kind of a guy he was growing up.

What we basically learned was that there was nothing terribly extraordinary about him. He was a nice enough guy. He stayed out of trouble. He was good to his parents and to his brothers. He went to church a lot. He played sports. He got along with the kids. He didn't get into a lot of fights.

* * *

We know from '48, when he was born, until 1968, when he went away to war, he was a nice kid. And we know from '71, when he got back, until now, he has been an antisocial violent guy.

I submit to you there must be some explanation for that. And the only explanation that I can think of for that change is that something happened while he was in Southeast Asia. (*Id.* at 2307-08).

Mr. Kirschner concluded:

What I am suggesting to you is there are two different William Reaves. There was the William Reaves that went over there, and there was the Williams Reaves that came home.... I submit to you William Reaves never came home ... something was taken from him, or something was

lost by him. Some essence, some part of his soul. Whatever it is that makes people good people.

* * *

Well, what he lost in Vietnam we can't give back to him. And whatever essence disappeared while he was in Vietnam—that changed him from that boy to the nasty guy who did robberies. We can't replace that, either. You can't give anything back.

What I'm asking that you do is—that you give him a cell, let him live out his life in a cell at the Florida State Prison. I think we owe him.

That's all, Your Honor.
(*Id.* at 2309, 2311-12).

Sentencing Order. The jury's recommendation for a death sentence was 10-2. One week later, the trial court conducted a *Spencer*¹⁰ hearing. When the court was scheduling the hearing, Mr. Kirschner advised he was not sure if he would be presenting statements or testimony but that he would be ready in one week. (A-R15 at 2323). At the hearing, Mr. Kirschner did not call any additional witnesses, but Mr. Reaves spoke to the court and apologized to the victim's family. (A-R16 at 2329). The trial court found that “no statutorily defined mitigating circumstances have been reasonably established” and only three non-statutory mitigating factors were established and they were “of little significance when weighed against the aggravating [factors] present in this case.” (A-R19 at 2332).¹¹ The trial court found strong aggravation in support of the death sentence, including that Mr. Reaves was “previously convicted of another capital felony or felony involving use or threat of violence to a person, [t]he capital felony was committed for the purpose of preventing a lawful arrest or effecting an escape from custody, and [t]he capital felony was especially heinous, atrocious or cruel.” (*Id.* at 2331-32).

Direct Appeal

*10 On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. *Reaves v. State*, 639 So.2d 1 (Fla. 1994). The Court rejected the aggravating factor that Mr. Reaves' offense was especially heinous, atrocious or cruel, but found the error harmless in light of the other two aggravating factors and the “relatively weak mitigation.” (*Id.* at 6).

The Court also found the prosecutor's reference to Mr. Reaves as a “cocaine seller” to be error and further held that the references to the attempted sale of cocaine in Mr. Reaves' confession should have been redacted. (*Id.* at 5). Nevertheless, the Court held admission of this evidence and the prosecutor's argument to be harmless because “it was not made a feature of the trial....” (*Id.*).

State Collateral Proceedings

Mr. Reaves' motion for post-conviction relief filed pursuant to [Florida Rule of Criminal Procedure 3.850](#) was summarily denied without hearing. Mr. Reaves argued that Mr. Kirschner's failure to investigate, obtain and prepare experts, and present evidence concerning his consumption of drugs and alcohol, his combat experience in Vietnam, and [Post-Traumatic Stress Disorder](#) constituted ineffective assistance of counsel at both the guilt and penalty phases of his trial.

The State Rule 3.850 Petition. Through counsel, Mr. Reaves filed a timely amended Petition for Post-Conviction Relief pursuant to [Fla. R. Crim. P. 3.850](#) and requested an evidentiary hearing. Among other grounds, the Petition sought relief pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and alleged:

- Despite his request for co-counsel, defense counsel was placed in the untenable position of litigating Mr. Reaves' case alone, without support staff, and after a change of venue, hours away from his office. “He was overwhelmed and exhausted by the state prosecution that had the unlimited funds and benefit of two attorneys on the case.” According to the ABA Guidelines for Selection and Performance of Appointed Counsel in Death Cases, capital defendants should be represented by two attorneys. (C-PCR1-4 at 453) (Amended Petition, Claim III ¶¶ 5, 6).
- “The record of Mr. Reaves' trial confirms the lack of preparation and investigation conducted by his attorney.” Without a reasonable tactic or strategy, defense counsel failed to object to the introduction of inflammatory and improper evidence and failed to present adequate arguments to the jury. (*Id.* at Claim III ¶ 7).
- Defense counsel failed to adequately investigate Mr. Reaves' mental health problems and failed to present evidence of his intoxication at the time of the offense and its effect in conjunction with [post-traumatic stress disorder](#). (*Id.* at Claim III ¶ 15).

- Had counsel investigated, numerous independent sources of information regarding Mr. Reaves' severe substance abuse problem would have been discovered. Family members, friends, and acquaintances could have provided information about Mr. Reaves' substance abuse problem and his attempts to get help. Military records would have reflected that Mr. Reaves was undergoing drug treatment just prior to his release from the military. This evidence was not developed for the jury or for consideration of a mental health expert. (*Id.* at Claim III ¶ 29).

- Counsel failed to obtain the testimony of expert witnesses who could have explained how Mr. Reaves' conduct at the time of his offense was motivated by his chronic substance abuse and [Post-Traumatic Stress Disorder](#) stemming from his involvement in the Vietnam War. Such an expert could explain the effects of substance abuse combined with PTSD, the duration of PTSD, and its effects in stressful situations. (*Id.* at Claim III ¶ 32).

*11 • Mental health experts, who were available and would have testified at the time of trial, have concluded that Mr. Reaves suffers from PTSD, brain damage, and a severe addiction to drugs. The combination of PTSD and severe drug use affected Mr. Reaves' conduct and his ability to make judgments. It has also been determined that the previous diagnosis of anti-social personality disorder is wrong. Had counsel been effective, the previous expert would have been given the right tools to make a proper diagnosis. (*Id.* at Claim III ¶ 32, Claim V ¶ 6).

- Defense counsel failed in his duty to provide effective legal representation for his client at the penalty phase. There was a wealth of mitigation that defense counsel never presented because his inadequate investigation failed to discover it. What information he did know was never presented. (*Id.* at Claim XXII ¶ 2).

- Defense counsel failed to obtain the assistance of an expert in addictionology, psychopharmacology, neuropsychology, or psychiatry. (*Id.* at Claim XXII ¶ 2).

- Defense counsel failed to explain how poly substance abuse in conjunction with war trauma was related to the offense. (*Id.* at Claim XXII ¶ 3).

- Defense counsel failed to adequately challenge the prosecution by failing to object to the testimony of Robert Ressler as an expert in military records, or the lack of qualification of Joseph Cinquino, a platoon leader of Mr.

Reaves' unit for only a month, who testified he had never seen anyone suffering from PTSD, a claim almost certainly untrue in light of the incidence of PTSD in the Vietnam Era. (*Id.* at Claim XXII ¶¶ 21, 44).

- Defense counsel failed to adequately prepare Dr. Weitz and provide him basic background materials such as the taped confession Mr. Reaves gave law enforcement immediately after the offense, statements from other soldiers who served with Mr. Reaves in the military, and Veterans Administration records and other records from Washington, D.C. (*Id.* at Claim III ¶ 27 n.4, Claim XXII ¶ 44).

- Counsel's errors were cumulative. The sheer number and types of errors involved in the trial, *when considered as a whole*, resulted in an unreliable conviction and sentence. (*Id.* at Claim XXII ¶ 48).

3.850 Petition—Summary Denial Without Evidentiary

Hearing. Despite stating he was “aware that a determination of reasonable trial strategy is best made after an evidentiary hearing,” the judge decided “in this case, counsel's trial strategy is apparent from the face of the record.”¹² (C-PCR1-7 at 1099). “The Defendant's claims either are procedurally barred, or the motion and the record conclusively demonstrate no entitlement to relief. Therefore, no evidentiary hearing is required.” (*Id.* at 1103).

With respect to the claim that counsel failed to obtain expert witnesses to explain “the effects of substance abuse or a diagnosis of [post-traumatic stress disorder](#), (iv) the duration of [post-traumatic stress disorder](#), and the consequences of the syndrome, and (v) the effects of chronic substance abuse on the ability to form a specific intent,” the court found that the claim was:

conclusory and legally insufficient. The Defendant fails to explain a prejudicial effect of these alleged omissions. Furthermore, the Florida Supreme Court upheld the trial court's refusal to admit evidence of “Vietnam Syndrome,” and found that “even if this evidence's exclusion was error, it was harmless. There is no reasonable possibility that it would have affected the jury's verdict.”

*12 (*Id.* at 1093).

With respect to the claim that “counsel should have obtained an expert to do a neuropsychological examination” and that petitioner “has hired a neuro-psychologist to present additional mitigating circumstances,” the court stated: “The

defendant does not identify either expert, or what conclusions and opinions the experts could relate, other than the psychologist will testify that Reaves suffers from [post-traumatic stress disorder](#). This claim is also conclusory and legally insufficient.” (*Id.* at 1093-94).

As to the claim that Mr. Kirschner failed to investigate and discover evidence of Mr. Reaves' intoxication, including evidence found at his girlfriend's home where he was before the shooting, testimony of friends and family that he had a long-standing history of drug abuse, and military records about drug treatment, the court once again relied on the record. Particularly, the court cited to Mr. Kirschner's cross examination of the cab driver who picked up Mr. Reaves the day after the shooting and Hinton's testimony that Mr. Reaves smoked marijuana after the shooting. (*Id.* at 1093). Despite its finding that investigation was unnecessary, the court then said, “[t]he assertions and affidavits attached to the motion, which allege that Mr. Reaves had a long-standing history of drug abuse, do nothing to establish that Mr. Reaves was under the influence of drugs or alcohol at the time of the murder.” (*Id.*).

In response to the allegations specific to the penalty phase—(1) failure to investigate; (2) failure to obtain the assistance of experts in addictionology, psychopharmacology, neuropsychiatry or psychiatry; (3) failure to explain how substance abuse and war trauma were related to the offense; (4) failure to provide essential information to Mr. Weitz; (5) failure to object to the testimony of Robert Ressler as an expert in military records or the qualification of Joseph Cinquino to testify that he had never seen anyone in Vietnam suffering from PTSD, and (6) failure to present an effective closing argument—the court again thought the claims were refuted by the trial record:

[The failure to seek other experts] is conclusory. The Defendant fails to identify to what [*sic*] other experts would have testified, and how his attorney's alleged failure resulted in prejudice.

This claim also is refuted by the record. Dr. Weitz, the defense expert, testified that Reaves suffered from poly-substance abuse, and an anti-social personality disorder.¹³ Weitz also testified that he believed Reaves suffered from “Vietnam Syndrome,” at the time of the murder. His ultimate conclusion was that the Defendant committed the murder while he was under the influence of an extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of the law was impaired.

Kirschner was successful in obtaining instructions on both these mitigation factors.

* * *

The record demonstrates that Kirschner's argument to the jury was reasonable under the circumstances.

*13

* * *

Any of the proposed additional evidence would have been either irrelevant or cumulative. The record demonstrates that Kirschner presented the testimony of two soldiers who served with Reaves' platoon.

The state presented rebuttal witnesses. The testimony of these witnesses contradicted much of the evidence presented by the defense. Reaves was not a sniper in Vietnam, his records did not indicate that he was in “high combat,” Reaves platoon had small contact with the enemy once a week or so, and at no time did the company lose 25 soldiers. However, Lieutenant Colonel Cinquino did admit that the platoon was engaged in dangerous engagements. Cinquino stated that the danger was constant and everyone should have been afraid all of the time. Ample and significant evidence concerning the Vietnam War and Reaves' part in the war, was presented to the jury. (*Id.* at 1099-1100) (citations omitted).

Appeal of Summary Denial. In its review of the trial court's order, the Florida Supreme Court explained its standard of review for a summary denial of a post-conviction motion:

[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record.* We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

[Reaves v. State](#), 826 So.2d 932, 936-37 (Fla. 2002) (citations omitted, emphasis added). The Supreme Court divided its opinion into several sections, including “A. Guilt Phase

Ineffective Assistance of Counsel” and “B. Penalty Phase Ineffectiveness.”

The portion of the opinion on penalty phase ineffectiveness is as follows:

Reaves also asserts that his trial counsel was ineffective in the penalty phase. To establish prejudice during the penalty phase, Reaves must show that “there is a reasonable probability that, absent trial counsel’s error, ‘the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’ ” *Cherry v. State*, 781 So.2d 1040, 1048 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

Reaves first contends that counsel unreasonably failed to introduce various mitigating circumstances, like Reaves’s [sic] impoverished childhood, his military background, his drug addiction, his sister’s death which occurred shortly after he returned from Vietnam, and his giving assistance to a jail guard in 1973. The trial court denied this claim, finding that “[a]ny of the proposed additional evidence would have been either irrelevant or cumulative.” We agree. Defense counsel presented numerous witnesses who discussed Reaves’ childhood in detail and further testified as to his drug addiction when he returned home from Vietnam. Two men who served with Reaves also testified as to the conditions of fighting the war in Vietnam, including drug usage. A review of the record supports the trial court’s finding that the evidence which he now seeks to introduce is cumulative. The only evidence identified in Reaves’ postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a [venereal disease](#), that one of his sisters died shortly after he returned from Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances. The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer.

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* * *

Reaves also includes a one-sentence laundry list of other acts which he asserts constitute ineffective assistance of counsel, including counsel’s “failure to provide Dr. Weitz with records from Washington, D.C.; failure to object to qualification of retired FBI agent Robert K. Ressler as an expert in military records; failure to object to the court rushing proceedings and denial of due process; [and] failure to object to the introduction of prejudicial and inflammatory testimony.” These allegations are legally insufficient as Reaves has failed to describe these claims with any particularity and has failed to assert how these actions prejudiced his defense. Conclusory allegations are insufficient to meet a defendant’s burden of establishing a prima facie case that he is entitled to postconviction relief. *Freeman*, 761 So.2d at 1061. Accordingly, we affirm the trial court’s ruling on this issue.

Id. at 941-42 (footnotes omitted).

However, the Florida Supreme Court held that Mr. Reaves was entitled to a hearing regarding whether counsel was ineffective in failing to present a voluntary intoxication defense during the guilt phase:

The record shows that during the guilt phase, the State introduced Reaves’ confession-evidence which could have supported a voluntary intoxication defense since Reaves claimed to be “coked up” when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which supported voluntary intoxication despite the fact that there was other evidence that supported this theory. During the jury charge conference, the trial judge noted that during Reaves’ first trial the jury was informed of this defense, and it was decided that such a jury instruction should be given again. Notwithstanding this fact, Reaves’ counsel never mentioned voluntary intoxication during closing arguments, and never discussed how the evidence could have supported this theory on how cocaine affected the user. During the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional evidence that Reaves was on drugs at the time of the crime. Moreover, numerous witnesses testified that Reaves had a history of serious drug abuse dating back to the Vietnam War, that he became involved in “heavy drugs” towards the end of his service in Vietnam, and that his prior convictions were drug-related.

Id. at 937. The Supreme Court remanded the case to the trial judge for an evidentiary hearing on the claims related to whether counsel was ineffective for failing to raise a voluntary

intoxication defense. The Court held that his argument that he was entitled to relief based on cumulative error was moot in light of its decision to remand the case for an evidentiary hearing. *Id.* at 941, 944.

The State Evidentiary Hearing On Voluntary Intoxication. On March 4-6, 2003, the trial court held an evidentiary hearing on Mr. Reaves' claim of ineffective assistance of counsel during the guilt phase for failing to put on a voluntary intoxication defense. During that hearing, Mr. Reaves offered the testimony of several expert witnesses regarding his alleged intoxication and his mental status.

*15 Dr. William Weitz testified that he had diagnosed Mr. Reaves with a poly substance disorder. (E-PCR2-3A at 99). Dr. Weitz testified that, although he had been retained and was planning to testify regarding Mr. Reaves and Vietnam Syndrome (in support of an excusable homicide defense), he also could have testified as to a voluntary intoxication defense. (*Id.* at 103). Dr. Weitz concluded that Mr. Reaves had a severe cocaine problem that would have impaired his ability to form specific intent. Dr. Weitz testified that Mr. Reaves told him that he had “smoked and snorted one and three quarter grams of cocaine” on the day of the murder. (*Id.* at 132-33). Dr. Weitz previously testified during deposition that he was not asked by defense counsel to consider if Mr. Reaves was able to form specific intent until later in the proceedings for possible mitigation. (*Id.* at 129).

Dr. Richard Dudley, a clinical and forensic psychiatrist, testified that he reviewed a variety of materials and met personally with Mr. Reaves. He opined that Mr. Reaves was suffering from “poly substance abuse, a poly substance dependance [*sic*]. Also from [post-traumatic stress disorder](#), and that on the night of the crime, he was intoxicated with cocaine.” (*Id.* at 165-66). In support of his diagnosis, Dr. Dudley referenced psychological testing from 1976 which showed that Mr. Reaves was suffering from psychiatric problems, including substance abuse problems. (*Id.* at 181-82). Dr. Dudley concluded that Mr. Reaves was “acutely intoxicated with cocaine on September 23, 1986, at the time of the offense.” (*Id.* at 191). He also concluded that Mr. Reaves was unable to form the intent to kill Deputy Raczowski. (*Id.*) Finally, Dr. Dudley testified that he would have testified to this conclusion had he been called to testify at the re-trial in 1992.

Dr. Barry Crown, a neuropsychologist, testified that he was retained to conduct a neuropsychological evaluation of Mr.

Reaves. Dr. Crown reviewed three volumes of background materials and a prior neuropsychological report conducted on Mr. Reaves, and personally interviewed Mr. Reaves. (E-PCR2-3B at 242). Dr. Crown concluded that Mr. Reaves has organic brain damage, primarily anterior and bilateral. (*Id.* at 243). Dr. Crown opined that the interaction between Mr. Reaves' underlying brain damage and cocaine use resulted in a phenomenon called “cocaine kindling.” (*Id.* at 246). This process causes a person to have disrupted reasoning, judgment, particularly short-term memory, and to become impulsive and paranoid. (*Id.* at 247). Dr. Crown concluded that Mr. Reaves was unable to form specific intent on the night of the murder due to his brain damage aggravated by substance abuse. (*Id.* at 250). Dr. Crown testified that he was available in 1992 to testify in this case. (*Id.* at 247).

Dr. Deborah Mash, a neuropharmacologist, testified that she reviewed other experts' reports regarding Mr. Reaves, Mr. Reaves' military records, witness statements, trial testimony, and affidavits, and interviewed Mr. Reaves. (*Id.* at 276-77). Dr. Mash's testimony outlined a long history of substance abuse by Mr. Reaves. Dr. Mash concluded that, on the night of the murder, Mr. Reaves was “altered, markedly altered. He was in a markedly altered state of intoxication. My expert opinion is that he was paranoid and fully delusional. This was due to the effects of a severe amount of cocaine abuse.” (*Id.* at 286). She further concluded that she would have testified in 1992 that Mr. Reaves “was in the state of voluntary intoxication and would not have been able to form the intent to commit murder.” (*Id.* at 292-93).

Dr. Irving Parsons, a clinical psychologist, testified that he reviewed expert reports, listened to Mr. Reaves' confession, and read the affidavits of witnesses. Dr. Parsons also personally interviewed Mr. Reaves on three separate occasions. (*Id.* at 342). Dr. Parsons found that Mr. Reaves was “suffering from the symptoms of chronic substance abuse.” (*Id.* at 355). It was his opinion that Mr. Reaves was not malingering during testing nor did he have an [antisocial personality disorder](#). Dr. Parsons ultimately concluded that a “combination of [post-traumatic stress disorder](#), substances, dissociation, the numbing effect, combined to negate any intent to kill....” (*Id.* at 388).

*16 Dr. Thomas Hyde, a behavioral neurologist, testified that he interviewed Mr. Reaves extensively and performed a full neurological evaluation. (*Id.* at 459). Dr. Hyde concluded that Mr. Reaves “had major recurring depression, poly substance abuse, probably met the criteria for cocaine

dependence and alcohol dependence under the general term for poly substance abuse. He certainly had strong elements for [post traumatic stress disorder](#), and he had a post concussive [brain injury](#).” (*Id.* at 465).

Also during the hearing, Mr. Reaves proffered evidence from Eugene Hinton. Mr. Hinton provided the defense with an affidavit that stated, among other things, that “Fat [Mr. Reaves] 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....” (*Id.* at 426). This affidavit contradicted his 1987 trial testimony, which was read into the record at the 1992 retrial. In advance of the state evidentiary hearing, Mr. Reaves filed a motion for a writ of habeas corpus ad testificandum seeking to have Mr. Hinton appear and testify. “The motion was denied, but the trial court allowed Hinton’s affidavit to be used and argued.” [Reaves v. State](#), 942 So.2d 874, 881 (Fla. 2006).

Mr. Kirschner also testified regarding the presentation of an excusable homicide defense. (E-PCR2-3A at 13). Mr. Kirschner testified he did not question any of Mr. Reaves’ family and friends about any recent drug use. (*Id.* at 37). Mr. Kirschner did not request funds to retain any other experts who could have testified how drugs might have affected Mr. Reaves. For Mr. Reaves’ defense, Mr. Kirschner retained only one expert, Dr. Weitz; the same expert who had previously evaluated Mr. Reaves prior to his initial trial in 1987. Mr. Kirschner did not remember if he ever spoke with Dr. Weitz about the interactive effects of Vietnam Syndrome and drugs. (*Id.* at 38). In advance of trial, Mr. Kirschner knew that Dr. Weitz was not going to testify that Mr. Reaves had PTSD; rather, Dr. Weitz was going to testify that Mr. Reaves had Vietnam Syndrome, which was “a subset of the clinical criteria, but not a discrete diagnosis in the DSM.” (*Id.* at 44). Mr. Kirschner knew that Dr. Weitz had testified that he did not meet the criteria because “Mr. Reaves denied that prevalence of flashbacks.” (*Id.* at 48). Mr. Kirschner also testified that “not being able to get in evidence from Dr. Weitz, if it didn’t gut that defense, it damaged it a lot.” (*Id.* at 51). Nonetheless, this was the defense that Mr. Kirschner presented during the guilt phase. Likewise, Mr. Kirschner knew that excusable homicide was a complete defense to murder such that it does not lessen the charge from first-degree to second, but rather the jury must return a not guilty verdict. (*Id.* at 66).

Mr. Kirschner agreed that his training and preparation for trial indicated that going into the penalty phase of a capital

trial, “you want to take with you as much credibility as possible.” (*Id.* at 73). It is important, Mr. Kirschner testified, to “not be perceived by the panel as being disingenuous.” (*Id.* at 74). However, Mr. Kirschner was hopeful for an acquittal based on the excusable homicide defense. Despite the fact that the transcript shows that the trial judge initially raised the voluntary intoxication instruction because one was given in the first trial, Mr. Kirschner testified that, although he did not present a voluntary intoxication defense, he did request (and was granted) a jury instruction on voluntary intoxication. (*Id.* at 53). Mr. Kirschner testified that he requested the instruction as a “fall-back position.” (*Id.*). He opined that this was because “[s]ometimes there are defenses that you don’t suggest, that you let the jury reach through their own logic, you have them available.” (*Id.* at 61-62).

***17 Supplement to 3.850 Petition—Department of Veterans Affairs 100% PTSD Disability Determination.**

On December 10, 2003, Mr. Reaves’ post-conviction counsel filed with the state court the determination by the Department of Veterans Affairs indicating Mr. Reaves had been approved for monetary benefits based upon a finding that he was 100% disabled due to PTSD related to his military service. (E-PCR2-2 at 281-82).

The decision indicates it was based on the following evidence: (1) service medical records from June 11, 1969 through June 10, 1971; (2) DD Form 214, Armed Forces of the United States Report of Transfer or Discharge; and (3) Treatment Reports, Drs.’ Crown, Hyde, Dudley, Mash, and Parson. (*Id.* at 289).

The Reasons for Decision are stated as follows:

Service records show receipt of the Combat Infantryman Badge which is accepted as conclusive evidence of in service stressors.

Most recent medical evidence identifies symptoms of high levels of autonomic arousal and depression; deficits in concentration, attending, and memory problems; presence of bizarre sensory experience (associated with intrusive PTSD symptomatology); hypervigilance; social avoidance and social isolation; fear of intimacy and social relations in general and intense fear of crowds; feelings of hostility, anxiety, and tension; intrusion and arousal symptoms; shame and guilt; mental confusion; persistent nightmares; hyperarousal, irritability, sleep disturbance, and rage reactions. There was no evidence that you are incompetent to handle financial affairs. GAF was reported at 45. Global

Assessment of Functioning (GAF) score is used to report overall functioning and is to be estimated with respect only to psychological, social, and occupational functioning. This scale while not binding, is taken into consideration in determining the severity of disability for evaluation purposes.

An evaluation of 100 percent is assigned from September 17, 2002, the date of your claim. An evaluation of 100 percent is assigned whenever there is evidence of total [occupational and social impairment](#), due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for [names](#) of close relatives, own occupation, or own name. (*Id.* at 289).

Trial Court's Denial After Evidentiary Hearing. After the evidentiary hearing on voluntary intoxication on remand, the trial court found that Mr. Kirschner's decision to use voluntary intoxication defense as a "fail-back" defense was reasonable strategy and Mr. Kirschner rendered effective representation in that regard. (E-PCR2-2 at 307). As to the "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 court noted the changing law in Florida as to "[t]he ability to offer evidence of the combined effect of intoxication and a mental defect." (*Id.* at 308). Because the court found Mr. Kirschner could not be expected to predict a change in Florida law, the court determined he was not ineffective. (*Id.* at 308-09). Further, the court found that because Mr. Kirschner made a strategic decision not to pursue a voluntary intoxication defense, he "cannot be ineffective for failing to retain experts to testify regarding a defense he chose not to utilize." (*Id.* at 309). Accordingly, the trial denied Mr. Reaves' postconviction motion.

***18 The Florida Supreme Court.** The Florida Supreme Court affirmed the trial court's order denying Mr. Reaves' motion for post-conviction relief, "agree[ing] that counsel rendered reasonably effective representation." *Reaves v. State*, 942 So.2d 874, 878 (Fla. 2006). The Supreme Court stated, "Other than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense." *Id.* at 879. "Importantly, although the mental health experts opined at the evidentiary hearing

that Reaves was intoxicated, they did not have any objective evidence to support their conclusions." *Id.*

The Court found "competent, substantial evidence supporting the trial court's conclusion that trial counsel provided reasonably effective assistance of counsel." *Id.* at 880. "Without the distorting effect of hindsight," the court said, "trial counsel's strategic choice of excusable homicide as a defense over involuntary intoxication was reasonable under the facts of the case and the law at the time." *Id.* at 880-81.

In describing the "law at the time," the court said:

In *Chestnut [v. State]*, 528 So. 2d 820 (Fla. 1989)], this Court held that an abnormal mental condition not constituting legal insanity was inadmissible for the purpose of proving that an accused did not or could not form the specific intent to commit an offense. See *Chestnut*, 538 So.2d at 820. Dr. Weitz diagnosed Reaves as having an anti social personality disorder, [polysubstance abuse](#) (particularly cocaine), and Vietnam Syndrome. This diagnosis did not rise to the level of legal insanity, and trial counsel would have known that it could not support a voluntary intoxication defense at the time.

Id. at 881 (footnote omitted).¹⁴

Justice Harry Anstead dissented, pointing out that counsel's explanation of his actions was utterly absurd:

[D]efense counsel testified that he believed there was a basis for the voluntary intoxication defense but he viewed it as a secondary or fall-back defense that he would leave completely to the jury to figure out without his assistance. This was essentially his only explanation for not investigating or presenting the defense, and this explanation is patently unreasonable and inadequate in light of the facts and circumstances we outlined in our remand opinion and the additional facts and circumstances developed at the postconviction hearing.

* * *

As this Court explicitly detailed in our prior opinion, on this record, with its bizarre facts, voluntary intoxication jumps out as an explanation for the defendant's bizarre and deadly actions. And, while even that defense could not have exonerated the defendant from responsibility for the death of the officer, it could have resulted in a jury finding of guilt of a lesser degree of homicide. In a very real sense, the advancement of this defense represented a chance to save

the appellant's life. It is simply not enough for counsel, as he admitted below, to leave it to the jury to figure out such an important defense on its own.

942 So.2d at 884.

II. STANDARD

Mr. Reaves' federal claim is governed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Recognizing that "[s]tate courts are adequate forums for the vindication of federal rights ..., AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, — U.S. —, 134 S.Ct. 10, 15-16, 187 L.Ed.2d 348 (2013). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

*19 Under AEDPA, if a petitioner's habeas claim "was adjudicated on the merits in State court proceedings," a federal court may not grant habeas relief unless the state decision (1) "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).¹⁵

Moreover, in *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011), the Supreme Court held that a federal court must determine the threshold question of whether a habeas petition has satisfied § 2254(d) based only on "the record that was before the state court that adjudicated the claim on the merits." The Supreme Court explained:

Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Id.

Claims of ineffective assistance of counsel are considered under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail under *Strickland*, a defendant must show that his counsel's deficient performance prejudiced him. To establish deficiency, he must show his "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

AEDPA requires "deference to a state court's determinations on both *Strickland* prongs—performance and prejudice—so long as the state court reached the merits of the petitioner's claim, and reached both prongs of the *Strickland* analysis." *Ferrell v. Hall*, 640 F.3d 1199, 1224 (11th Cir. 2011). Section 2254(d) applies even where there has been a summary denial. *Cullen v. Pinholster*, 131 S.Ct. at 1403. *See also Harrington*, 562 U.S. at 99, 131 S.Ct. 770. "It must be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." ' *Ferrell*, 640 F.3d at 1224 (quoting *Harrington*, 562 U.S. at 99, 131 S.Ct. 770). For example, there would be an indication to the contrary if the state court denied a claim on only one prong of the *Strickland* test and in such an instance the prong the state court never reached would be reviewed *de novo*. *Id.*

III. ANALYSIS

With respect to the penalty phase, the trial court concluded that the requested evidentiary hearing was not necessary because either the allegations of the petition were conclusory or the proposed additional evidence would be cumulative to the evidence presented at trial. The Florida Supreme Court began its penalty phase discussion with a citation to *Strickland's* prejudice prong. "To establish prejudice during the penalty phase, Reaves must show that there is a reasonable probability that, absent trial counsel's error, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Cherry v. State*, 781 So.2d 1040, 1048 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052)." *Reaves v. State*, 826 So.2d at 941 (internal quotation marks omitted). The Supreme Court expressly agreed with the trial court that "[a]ny of the proposed additional evidence would have been either

irrelevant or cumulative.” *Id.* (internal quotation marks omitted).

*20 The performance prong at the penalty phase was neither discussed nor decided. No inquiry was undertaken into the investigation conducted by counsel or whether strategy dictated any decision not to investigate. No one ever had an opportunity to ask what Mr. Kirschner actually did to prepare for the penalty phase and when he did it. The state courts did not examine whether his investigation was objectively reasonable under prevailing professional norms.

Because the state courts did not adjudicate *Strickland*'s performance prong at the penalty phase, I decide this prong *de novo*. See *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). And because the state court did not hold an evidentiary hearing, I felt it was necessary to do so.¹⁶ (DE 40, Order Granting Evidentiary Hearing as to Penalty Phase Ineffectiveness). Moreover, because the penalty phase performance prong was not adjudicated by the state courts, my *de novo* review is not subject to § 2254(d), and I am permitted to consider the evidence presented at the federal evidentiary hearing, my findings with respect to that evidence, and the entire state court record.¹⁷

The prejudice prong at the penalty phase was adjudicated by the state courts, albeit in summary fashion, and therefore § 2254(d) is applicable to that prong. In deciding whether the state court's determination was unreasonable, I am limited to the record in the state courts. That includes the full record before the Florida Supreme Court when it finally decided Mr. Reaves' *Strickland* claim. See *Cullen v. Pinholster*, 131 S.Ct. at 1403 n.12 (assuming without deciding that in considering an ineffectiveness claim, it would review “all of the evidence that Pinholster ever submitted in state habeas,” including the evidence he submitted during both rounds before the state supreme court). See also *Ferrell v. Hall*, 640 F.3d at 1226 n.16.

*21 The Florida Supreme Court reversed the trial court's summary denial on the guilt phase involuntary intoxication issues.¹⁸ 826 So.2d at 944. Following the evidentiary hearing, the state trial court found that Mr. Kirschner's decision to use the defense of voluntary intoxication as only a fail-back position and not to directly suggest voluntary intoxication to the jury, but to allow the jury to draw its own conclusion based upon the evidence presented was a reasonable trial strategy. (E-PCR 2-2 at 307). The state trial judge did not discuss *Strickland*'s prejudice prong at the guilt phase. The Florida Supreme Court found that “there is competent,

substantial evidence in the record supporting the trial court's conclusion that trial counsel provided reasonably effective assistance of counsel.” 942 So.2d at 880. The Florida Supreme Court concluded: “Because counsel's performance was not deficient, we need not address the prejudice prong.” *Id.*

I previously found Mr. Reaves' counsel ineffective at the guilt phase. Convinced that Mr. Reaves had not established guilt phase prejudice, the Eleventh Circuit vacated my Order granting relief stating: “we need not decide whether the district court failed to afford the required deference to the Florida Supreme Court's decision that there was no deficient performance.” *Reaves v. Secretary*, 717 F.3d 886, 900 (11th Cir. 2013). As explained in section III(A)(3) of this Order, I remain convinced that Mr. Kirschner's performance was deficient at the guilt phase and that his deficiency prejudiced Mr. Reaves with respect to penalty. Although the state court's determination as to the prejudice prong at the penalty phase is subject to deference under § 2254(d) and my review is limited to the state court record, because the Florida Supreme Court never addressed the combined impact of counsel's errors, that claim must be examined *de novo*.¹⁹ (C-PCR1-4 at 453) (Amended Petition, Claim XXII ¶ 48) (counsel's errors in the trial, when considered as a whole, resulted in an unreliable conviction and sentence).

In summary, I analyze counsel's performance at the penalty phase *de novo* (considering evidence from the federal hearing), as well as counsel's performance during the guilt phase to the extent it affected the penalty phase (limited to the state court record). After finding counsel's performance was deficient at the penalty phase (and impacted by counsel's deficiencies during the guilt phase), I analyze whether the state court's determination (limited to the state court record) as to penalty phase prejudice was unreasonable under § 2254(d). After concluding the state court was unreasonable under § 2254(d), I then determine whether counsel's deficient performance prejudiced Mr. Reaves at sentencing.

A. Performance

*22 In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Prevailing norms of practice as reflected in American Bar Association standards

are guides in determining what is reasonable. *Id.* As the Supreme Court said in *Strickland*:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052. *Accord Wiggins v. Smith*, 539 U.S. 510, 527-28, 123 S.Ct. 2527, 156 L.Ed.2d 471 (1984) (“finding ineffective assistance where counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible”); *Ferrell v. Hall*, 640 F.3d at 1227 (“trial counsel conducted a profoundly incomplete investigation, and its judgment to so sharply limit its inquiry fell far outside the wide range of professional competence”); *Ford v. Hall*, 546 F.3d 1326, 1334 (11th Cir. 2008) (holding that in evaluating the reasonableness of an investigation into mitigating circumstances, “a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”) (citations and quotation marks omitted).

(1) In Law, Like Medicine, the Right Diagnosis Makes All the Difference

You know, the fact that it's in a book listed as a discrete diagnosis in the DSM, there's nothing magical about that—PTSD didn't exist before 1986. Does that mean that we didn't have battle fatigue after World War II? The books change. They have a big meeting of psychiatrists and psychologists and they vote and compromises are made. And so whether or not it's in the book or not doesn't mean that much to me.

—Jonathan Kirschner (DE 80 at 76).

Ignorance is not a strategy nor is it a foundation for competent representation. For a lawyer not to care whether a mental disorder is recognized by experts in the field is like a doctor expressing a lack of concern about whether stomach

pain is caused by indigestion or [cancer](#). As the prosecution hammered home, over and over again, PTSD is a recognized mental disorder—“Vietnam Syndrome” is not.

Although the stakes were high, the case was not that complicated, even if it was your first capital case. Mr. Reaves had confessed in a 53-minute recording to shooting a law enforcement officer. The only issues to be decided were premeditation and mitigation. Did combat trauma or drug use contribute to the killing of Deputy Raczkowski? And, if so, how can the advocate make the jury understand?

At the time of Mr. Kirschner's appointment as Mr. Reaves' counsel, the impact of trauma on Vietnam veterans and its consequences were well documented.²⁰ In the 1970s, President Carter and his Veterans Affairs (“VA”) Administrator Max Cleland established the Readjustment Counseling Service within the Veterans Administration to meet the needs of Vietnam veterans. The Service was renewed by Congress in 1981 and 1983, and Congress subsequently directed the creation of the National Center for PTSD under the Department of Veterans Affairs.

***23 Post-Traumatic Stress Disorder** is an anxiety disorder induced by exposure to a traumatic event.²¹ Although the psychological effects of combat had long been recognized in previous wars, the symptoms now associated with PTSD were known as “shell shock” or “battle fatigue.” The American Psychiatric Association codified PTSD as a separate mental disorder in 1980.²²

In 1983, Congress mandated the National Vietnam Veterans Readjustment Study (NVVRS) and directed that it establish “the prevalence and incidence of [post-traumatic stress disorder](#) (PTSD) and other psychological problems in readjusting to civilian life” among Vietnam veterans. Completed in November 1988, the NVVRS has been described as “the most far-reaching and ambitious national mental health epidemiological study ever attempted with any population.”²³

For a lawyer representing a combat veteran accused of a serious crime occurring under unusual circumstances, the NVVRS data demonstrates (1) the importance of a PTSD diagnosis; (2) a roadmap for mitigation; and (3) the means to show the falsity of the prosecution rebuttal.

Incidence of PTSD. According to the two witnesses called to testify by the prosecutor about Vietnam, none of the men under their command suffered from PTSD. This was almost certainly untrue. According to NVVRS data, 15.2% of male Vietnam veterans (479,000 of the estimated 3.14 million men who served) were suffering from full blown cases of PTSD during 1986-1988. NVVRS, *supra* note 7, at 266. The prevalence of PTSD was significantly, often dramatically, higher among those with high levels of exposure to combat. Vietnam theatre veteran men exposed to high levels of war zone stress exhibited significantly higher rates of psychiatric disorder than other Vietnam era veterans. *Id.* at 270. For example, men who served in the army (16.2%), men who served in I Corps (22.5%), and men who received any combat medal (almost one in four) were more likely to have PTSD. *Id.* at 54, 130 S.Ct. 447. Among men who served in the Vietnam theatre, substantial differences in PTSD prevalence rates were found by minority status. The current (1986-1988) prevalence of PTSD was estimated to be 27.9% among Hispanics, 20.6% among Blacks, and 13.7% among Whites/Others.²⁴ *Id.* at 85, 267, 130 S.Ct. 447.

Violence and Criminal Behavior. Those Vietnam veterans exposed to high war zone stress were

- twice as likely to have committed 13 or more violent crimes in the past years (14.4% v. 7.6%);
- one and a half times more likely to have been arrested or jailed (39.1% v. 27.7%); and
- three times more likely to have been convicted of a felony (8.8% v. 2.8%)

than those experiencing moderate low levels of war stress. *Id.* at 186. Male Vietnam veterans with PTSD were also more prone to violent behavior than those without PTSD. *Id.* For example, those with PTSD averaged 13.1 violent acts in the past year compared to 3.54 acts for those without PTSD. *Id.* Of male Vietnam veterans with PTSD, almost 50% had been arrested or jailed more than once, compared to only 11% of men without the disorder. *Id.* at 187.

***24 Alcohol and Drug Abuse.** The use of alcohol and drugs in individuals with PTSD often reflects attempts at self-medication in an effort to increase denial and numbing, damp down nightmares and flashbacks, and diminish symptoms of chronic hyperarousal, including irritability, hypervigilance, and startle reactions. *Id.* at 46, 130 S.Ct. 447. Male Vietnam theatre veterans with PTSD are two to six times more likely

to abuse alcohol or drugs than those without the disorder. *Id.* at 274.

Discipline. Thirty percent of veterans serving in the Vietnam era received some form of disciplinary action (court martial or nonjudicial punishment) while on active duty—32% for all Vietnam era men. Men serving in Vietnam were more than twice as likely as other era veteran men to have received a court martial. *Id.* at 24-25.

It is apparent that, at the time of Mr. Reaves' trial, the combat-related problems of Vietnam veterans and the incidence of PTSD among veterans had been well established. The question becomes why was it not presented to the jury during the penalty phase of the trial. I find that Mr. Kirschner's failure to present PTSD, as well as the connection between drug abuse and PTSD, to the jury was a result of lack of focus and preparation on the part of a well-intentioned, but overwhelmed and ineffective lawyer.

His failures were, to some extent, predictable. Mr. Kirschner was inexperienced and had never tried a capital case. He requested co-counsel when “it became clear to me that I was overwhelmed.” (DE 80 at 10-11, Kirschner testimony). It is reprehensible that the State, represented by multiple lawyers, opposed the request.²⁵

But Mr. Kirschner's failure to recognize the significance of the distinction between a recognized mental disorder and “Vietnam Syndrome” cannot be explained by lack of experience. His claim that “there's nothing magical” about whether a mental disorder is in the diagnostic manual relied upon by experts is simply stunning.

He inherited Dr. Weitz as an expert from previous counsel. Dr. Weitz had good qualifications and experience and I found him an effective witness. Yet, Mr. Kirschner was aware that Dr. Weitz had not diagnosed Mr. Reaves with PTSD because a critical criteria of the DSM manual, recurring nightmares and dreams of combat situations, did not appear to have been met. (DE 79 at 104, Weitz testimony).

***25** However, in the files obtained by Mr. Kirschner from previous counsel were witness statements from Mr. Reaves' mother, brother, and sister, as well as statements by Mr. Reaves himself, that would have, according to Mr. Weitz, satisfied that missing criteria and allowed him to diagnose PTSD. (*Id.* at 119, 135). For example, one of the investigative summaries found in Mr. Kirschner's files from the investigator

that had been hired by Mr. Reaves' former counsel was from an interview with Mr. Reaves' brother, Byron Reaves. Byron shared a bedroom with Mr. Reaves and told the investigator that his brother had dreams of combat situations that would wake him during the night and did most of his sleeping during the day because he could not sleep at night. Mr. Kirschner testified: "Again, I don't remember ever talking to Byron Reaves. And, you know, that's part of the mystery to me as to why I didn't follow through on some of these things. And I can't—I don't have a good answer for that." (*Id.* at 72, 130 S.Ct. 447).

Dr. Weitz was never provided the information by Mr. Kirschner, who acted as his sole source of information.²⁶ (*Id.* at 80-84, 130 S.Ct. 447); (Kirschner testimony at 39). Dr. Weitz was not provided an opportunity to talk directly with family members or Investigator Perron. (Weitz testimony at 93); (DE 79 at 235, Perron testimony); (Kirschner testimony at 39). Likewise, Mr. Perron, who was trying to find combat veterans who served with Mr. Reaves, did not know that Mr. Weitz had a list of people Mr. Reaves was closest to in Vietnam. (Perron testimony at 243).

Without communication and preparation, an expert cannot be an effective witness. The PTSD diagnosis was crucial to Mr. Reaves' case and the fact that Mr. Kirschner had information in his files and readily available that would allow it to be made, but failed to recognize the importance of a diagnosis and failed to provide it to his only expert, was a major error.

Dr. Weitz also testified that, in his 15 years working with the Veterans Administration, he found that 80-85% of combat veterans had concurrent drug and alcohol abuse. "They used it in country. They used it coming back." (Weitz testimony at 110). Mr. Kirschner, at least at one point, recognized the importance of the issue and considered retaining an expert in addiction. (Kirschner testimony at 32-33). His notes reflect that he even spoke by phone with the head of the Center for Addiction studies at Harvard, yet he never followed through. (*Id.* at 78, 130 S.Ct. 447). His excuse? He was expensive. "I didn't think the judge would approve it." (*Id.* at 78-79, 130 S.Ct. 447). He continued: "What I don't understand is why I didn't say, okay, let's get closer to home. Check Jupiter. Check Hope Sound. Check—you know, see if there's anybody closer to home that charges a lot less than I can run a motion and maybe get someone appointed. And that never happened." (*Id.* at 79, 130 S.Ct. 447). Mr. Kirschner was directly asked: "there was one inquiry with one expert who you thought was too expensive, was that any reason not

to look further?" (*Id.* at 88, 131 S.Ct. 770). Mr. Kirschner's response was telling:

No, and perhaps I'm not making myself clear. But there's a number—there exists a number of areas that I started, that I picked up on and carried through on, and there are a number of areas that I didn't or that I abandoned in midstream for no apparent rational explanation.... Getting back to the question which is why didn't I follow through on these things is because I don't think I was as measured or as methodical or as thorough or as detailed as you would be ten years later. It was pretty early in my career and I didn't have a whole lot of trials.

(*Id.* at 88-89).²⁷

*26 Dr. Weitz concurred. "The amount of time and energy and effort that was spent in the mitigation section was far less, far less in terms of time and far less in terms of preparation." (Weitz testimony at 114). "[T]hen we spent some time with mitigation but by that time we were pretty exhausted and beat." (*Id.* at 129).

Perhaps the Eleventh Circuit case most instructive to the facts here is *Johnson v. Secretary*, 643 F.3d 907 (11th Cir. 2011). Irrate over a dispute about redeeming a pistol he had pawned, Johnson decided to rob the pawnbroker/owner of a tavern, and in the course of the robbery, shot and killed the bar owner and a customer who happened to be present. *Id.* at 911-12. Johnson had a severe drinking problem and, as a child, had been subject to extreme physical and emotional abuse, including suicide attempts by his mother and beatings by his father. *Id.* at 912-14.

Sparse information was provided at the penalty phase because Johnson's lawyer waited until the eleventh hour to do minimal investigation of his client's background, and failed to talk with family members who could have and would have provided background information to the psychologist he did call. *Id.* at 931.

While Johnson's lawyer said he was familiar with the law of voluntary intoxication—"since it seemed to be the only possible defense"—he did not remember if he had read any cases that would have indicated that he was entitled to an instruction on the defense; "in any event [he] decided not to pursue that defense." *Id.* at 918. At the time the trial took place, the lawyer "knew [alcoholism] was an addiction," but did not know it was a disease. *Id.* at 918 n.4. Had he known it was a disease, he "would have had persons who were experts

in the field of alcoholism testify at the mitigation portion of the trial, the advisory portion of the trial, regarding the effects of long-term alcoholism and how it can impair someone's judgment.' ” *Id.*

Writing for the Eleventh Circuit, Judge Carnes noted that given the evidence against the defendant, including his confession, counsel “knew well before the guilt stage began that he had little or no chance of prevailing at that stage, and that it was highly likely that there would be a capital sentence hearing at which his client's fate would be determined.” *Id.* at 919 (citing *Strickland* and *Wiggins*). Judge Carnes explained the principal concern is not whether counsel should have presented mitigation evidence, but rather whether the investigation supporting counsel's decision not to introduce mitigating evidence of the defendant's background was itself reasonable. *Id.* at 931. “Given the overwhelming evidence of guilt, any reasonable attorney would have known, as [counsel] testified he actually did know, that the sentence stage was the only part of the trial in which Johnson had any reasonable chance of success. Even though the only stage at which he had any hope of saving his client from execution was the sentence stage, [counsel] waited until the eleventh hour to begin preparing for it and then, not surprisingly, failed to adequately do so.” *Id.* at 932.

Like Mr. Johnson's lawyer, Mr. Kirschner waited too late to begin to prepare. He failed to educate himself about PTSD, failed to retain an expert and prepare available testimony about the impact of Mr. Reaves' addiction to drugs and alcohol, and failed to talk with Mr. Reaves' mother and brother who knew about his flashbacks to Vietnam, nightmares, and erratic behavior. He failed to recognize that there was crucial information having a bearing on a diagnosis of PTSD in Mr. Reaves' previous counsel's files. While he says he deluded himself into thinking it would never get to the sentencing stage, after hearing his testimony and that of Dr. Weitz, it is apparent to me that he was simply overwhelmed by his first capital trial, worn out, and too inexperienced to realize that the penalty phase was Mr. Reaves' only real hope.²⁸

(2) Just Showing Up Isn't Enough

**27 First, I didn't think it was going to go to a Phase 2. I might have been delusional but I thought that we might be able to get away with a second or, who knows, maybe they would go for excusable homicide.*

-Jonathan Kirschner (DE 80 at 35).

“The Sixth Amendment ... envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland*, 466 U.S. at 685, 104 S.Ct. 2052. “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.” *Id.*

It is not only what Mr. Kirschner failed to present at the penalty phase. His lack of investigation left him unprepared to defend.²⁹ There were ugly moments in Mr. Reaves' trial that were simply shameful.

To disparage Mr. Reaves' combat experience, the prosecutor called Robert Ressler, “in private practice as a criminologist.” (A-R14 at 2144). Mr. Ressler was a retired FBI agent. Prior to joining the FBI, Mr. Ressler spent two years in the Army as an enlisted man and eight years (1962-1970) as a military police officer. At the time of trial, he was a Colonel in the Army Reserves. His “qualifications” went as follows:

Q. Turning to the area of your experience in dealing with military records: Tell the jury your experience dealing with military records.

A. The two years of my enlisted time, when I performed as an army personnel specialist. I had two years of actual “hands on” work with military records. My primary duty was to maintain the officer's qualification from and the enlisted D.A. Form 20, which is the enlisted qualification form.

And to maintain them within the unit that I was in and doing other specialty work in Personnel as well. Beyond that, as an officer for the other eight years I routinely handled records of people in my unit.

* * *

Q. Has your knowledge of military records assisted psychiatrists and psychologists in referencing—and juries—and understanding the area of post-traumatic stress disorder?

A. Yes, it has.

* * *

Q. Could you explain to the jury how your knowledge of military records affects a jury's ability to understand whether post-traumatic stress disorder exists or not?

A. Well, military records are rather complicated and they are somewhat cryptic, I guess you may say. To a non-military reader, it would be very difficult to just pick up a record and read through it to understand what really is going on in the person's life that is the subject of those records.

The basic words of interest are the D.A. Form 20, which is the enlisted qualification record, and the D.D. Form 214, which is a separation record. Then beyond that you have a number of orders, special orders and documents in the record that then can be matched to the 214 and the Form 20.

***28** Q. What is your total years of experience with the Military, sir?

A. Actually, including my Reserve time, thirty-five years. I will have thirty-five years next month.

Prosecutor: Your Honor, at this point the State would tender the Colonel as an expert in military records.

The Court: Do you wish to Voir Dire?

Mr. Kirschner: As long as it is limited to military records, no sir. We take no position.

The Court: He is being qualified as an expert in military records?

Prosecutor: Yes, sir.

The Court: All right. Then he will testify as an expert ... (*Id.* at 2153-55). Without objection, the "records expert" testified that Mr. Reaves' combat-related awards and decorations "were rather unremarkable and very routine for a person performing in Vietnam." (*Id.* at 2163).

The "records expert" said that any suggestion that the Combat Infantryman Badge ("CIB") was awarded "for some sort of heavy combat action that he was involved in" was unwarranted. "The Combat Infantryman's Badge is awarded to any infantryman assigned to a combat unit performing missions in Vietnam.... But again, every infantryman in those units would receive those. And they are not for any meritorious or exemplary duty." (*Id.* at 2166). "[T]he C.I.B. is a routine award." (*Id.*).

But the U.S. Army Human Resources Command, Awards, and Decorations Branch indicates that the CIB, established in 1943, is only granted to infantrymen "engaged in active

ground combat."³⁰ The operative word "in active" connotes actual combat. "U.S. Army Vietnam regulations went so far as to require documentation of the type and intensity of enemy fire encountered by the Soldier." *Id.* As the U.S. Army's website explains:

For award of the CIB a Soldier must meet the following three requirements:

- (1) Be an Infantryman satisfactorily performing infantry duties.
- (2) Assigned to an infantry unit during such time as the unit is engaged in active ground combat.
- (3) Actively participate in such ground combat. Campaign or battle credit alone is not sufficient for award of the CIB."

Id.

Again without objection, the "records expert" then told the jury that the Army Air Medal was not "for landing in 'hot' zones under fire-fights." (A-R14 at 2166). "It's for anybody in the Military performing where they are flying in combat zones." (*Id.* at 2167). "Many soldiers in Vietnam received Air Medals. The criteria was twenty-five flights, twenty-five missions in a combat zone. The entire Vietnam area was a combat zone." (*Id.*). "It was a very common award. It has no significance to valor or exemplary service." (*Id.*).

But, according to the Army, the Air Medal, initially authorized by President Roosevelt, "is awarded to any person who, while serving in any capacity in or with the armed forces of the United States, shall have distinguished himself by meritorious achievement while participating in aerial flight."³¹ "Awards may be made to recognize single acts of merit or heroism or for meritorious service." *Id.* As the Army explains:

***29** Examples of personnel whose combat duties require them to fly include those in the attack elements of units involved in air-land assaults against an armed enemy and those directly involved in airborne command and control of combat operations. Involvement in such activities, normally at the brigade/group level and below, serves only to establish eligibility for award of the Air Medal; the degree of heroism, meritorious achievement or exemplary service determines who should receive the award. Awards will not be made to individuals who use air transportation

solely for the purpose of moving from point to point in a combat zone.

Id.

Not content with disparaging the medals Mr. Reaves had been awarded, the so-called expert opined that a soldier “involved in heavy combat or doing anything of valor would have awards above and beyond what he had.” (A-R14 at 2167). This testimony lacks any foundation, and is utterly intolerable.³² Yet no objection was made.

Then, the following exchange occurred:

Prosecutor: You stated that the defendant was honorably discharged from the Army. How can that be, when was Article 15? He was court-martialed for his conduct there, he didn't receive any of these medals for even good conduct. How could he be discharged honorably?

A. In a peacetime army, he may not have been. Chances are, he would not have been. In the Vietnam Army, they turned so many soldiers through the system that many of these infractions were forgiven if, in fact, they performed and completed their service. And apparently that is the case ... So I mean, at the point that he did complete his service, he terminated after a two-year period and was given an Honorable Discharge, as many soldiers were that served less than exemplary.

(*Id.* at 2168-69). This is simply disgraceful. I am amazed that this happened in an American courtroom. If support for our troops is anything more than an empty slogan on a license plate, this should not be allowed to stand.

As its last rebuttal witness in the penalty phase, the State called Dr. McKinley Cheshire. Dr. Cheshire had never examined or spoken with Mr. Reaves. After questioning Dr. Cheshire about his education, experience, and credentials, including the fact that he had testified as an expert in psychiatry “probably 200 times,” the State tendered him as an expert in the field of psychiatry. (*Id.* at 2223-28).

Offered an opportunity for *voir dire*, Mr. Kirschner asked only a few questions: where International University, a school where Dr. Cheshire had taught as an adjunct professor, was located; what year he received his medical degree; and when he obtained his psychiatric specialty. The trial judge then, without objection, declared Dr. Cheshire an expert. (*Id.* at 2227-28).

*30 The prosecutor first established that Dr. Cheshire had reviewed the deposition and report of Dr. Weitz, as well as “police reports, statements, various items along those lines.” (*Id.* at 2228). The prosecutor then asked Dr. Cheshire to describe [Post-Traumatic Stress Disorder](#) to the jury. Dr. Cheshire agreed that it was a psychiatric illness “recognized by both the psychiatrics and psychological experts within the field and listed in the Diagnostic and Statistical Manual of Mental Disorders known as the DSM-III-R, that I am holding.” (*Id.* at 2230). The prosecutor asked:

Q. Now, Dr. Weitz has talked about Vietnam Syndrome. Is there such a thing recognized within this book?

A: No, sir.

(*Id.* at 2230). The prosecutor then asked:

Q. Do you have any opinions as to the defendant's mental status at the time of the offense on September 23, 1986, when the defendant shot Deputy Sheriff Rackoski four times in the back?

* * *

A. From the documents—I have never examined this person, but from the documents and the sworn statements it's my opinion that he was experiencing anxiety at the time. It's my opinion that he was not incompetent. It's my opinion that he understood right from wrong and understood the nature and consequences of his behavior.

And he, in my opinion, was really not suffering from a psychiatric illness.

Q. Why then, did the defendant from a psychological viewpoint, shoot Deputy Sheriff Raczkowski?

A. I should tell you that we have a diagnosis in psychiatry that is called Adult Antisocial Behavior. Which is different from anti-social behavior disorder.

You asked the question: Why did he shoot this man. This man was executed by a drug dealer to cover up the possibility of his going back to jail, and he was motivated to be selfish, to protect himself, and do away with the witnesses. It was a judgment call and he judged and then carried out the execution based on his judgment.

(*Id.* at 2231).

This was not medical testimony but a prosecutor's closing disguised as such, an improper one at that. But, Mr. Kirschner sat silently in abdication of his role as counsel.

And on redirect, Dr. Cheshire went even further in the last testimony heard by the jury before recommending death:

A. My opinion is that this man was executed while begging for his life and making an attempt to stay alive.

I do not believe the discussion that has been held on the fear—that he saw fear in this man's eyes and therefore he had to do something to protect himself. I think he saw a man acting normally in a state of emergency and to defend himself.

I do not believe this explanation that is given here for this man's behavior, other than he is a criminal who was about to be interrogated by a policeman, and he exposed himself as being a felon with a weapon.

He wanted to avoid being arrested again and going to prison.

(*Id.* at 2243).

Mr. Kirschner's penalty phase closing was ineffective, even harmful. The argument—“William Reaves in 1973, and up to the present period or about twenty years, was a violent criminal” that “lost some part of his soul, whatever it is that makes people good people”—was unlikely to be met with success. No evidence had been introduced to explain how Vietnam had affected Mr. Reaves and the crime he had committed, or why his life should be spared. Eloquence is rarely a substitute for evidence but this was not even eloquent. “He was once nice enough, but now my client is a monster” is argument that falls well below an objective standard of reasonableness.

(3) Hoping the Jury Figures It Out on Their Own is Not a Strategy

**31 Sometimes there are defenses that you don't suggest, that you let the jury reach through their own logic, you have them available.*

-Jonathan Kirschner (E-EPCR2-3A at 62).

The stage was set for the failed penalty phase as early as the guilt proceeding and it stemmed from the same cause: lack of investigation and preparation.

The Eleventh Circuit has said that in reviewing a habeas petition, “[a] piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of

these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution.” *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983).

When, as here, the same jury considered guilt and punishment, the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable. *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (granting habeas relief from death sentence because counsel's deficient guilt-phase performance prejudiced penalty phase), *superseded by statute on other grounds*; see also *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (granting evidentiary hearing on trial ineffectiveness claim because counsel's failure to impeach witness during guilt phase “may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial”). “This court has likewise assessed guilt-phase errors, including prosecutorial misconduct and evidentiary error, for prejudicial impact on subsequent capital sentencing proceedings.”³³ *Cargle v. Mullin*, 317 F.3d 1196, 1208 (10th Cir. 2003).

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in effect at the time of Mr. Reaves' trial provide: “As the investigations mandated by Guideline 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.” ABA Guidelines 11.7.1(A), *supra* note 25.

The only chance to save Mr. Reaves' life was to challenge premeditation: to show that Mr. Reaves' split-second decision to shoot the Deputy as he turned away following the struggle over the fallen pistol was a result of confusion and paranoia induced by the combination of cocaine and PTSD. That challenge should have begun at the guilt phase, and if unsuccessful at avoiding a first-degree conviction, should have continued at the penalty phase to explain why the circumstances did not warrant death.

**32* Mr. Kirschner “chose” to argue what he admits was a long shot—excusable homicide. If you lined up a handful of experienced criminal defense lawyers and told them their client had described in a 53-minute recorded confession how he shot a police officer as the officer turned away, not one would argue excusable homicide.

Was the “choice” informed? Did it follow a reasonable investigation into the defenses available? Was it a defense that would be effective through both phases of a capital case?

In its first post-conviction decision, the Florida Supreme Court identified the problem:

[T]he State introduced Reaves' confession—evidence that could have supported a voluntary defense since [Reaves](#) claimed to be ‘coked up’ when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which would have supported this theory.... Reaves' counsel never mentioned voluntary intoxication during closing arguments and never discussed how the evidence could have supported this theory or how cocaine affects the user.

[826 So.2d at 937](#). The Court ordered an evidentiary hearing because “[v]oluntary intoxication was an available defense ... and the record is inconclusive as to why counsel did not advance the defense.” *Id.* [at 939](#).

At the evidentiary hearing, six medical experts testified that the combination of cocaine and PTSD impacted Mr. Reaves' ability to form the specific intent necessary for first degree murder. However, without ever analyzing Mr. Kirschner's duty to investigate available defenses, the state habeas trial judge “determine[d] that Mr. Kirschner's decision to use the defense of voluntary intoxication as only a fall back position and not to directly suggest voluntary intoxication to the jury, but to allow the jury to draw its own conclusion based upon the evidence presented was a reasonable trial strategy.” (E-PCR2-2 at 307). As to the experts, the court said: “trial counsel cannot be ineffective for failing to retain experts to testify regarding a defense he chose not to utilize.” (*Id.* [at 309](#), [83 S.Ct. 745](#)).

The potted plant theory of advocacy.³⁴ If this were not so serious, it would be laughable. If the jury can figure it out on their own, why do we even need lawyers, or evidence? What need is there to investigate?

Voluntary intoxication was raised for the first time during the charge conference and by the trial judge, not Mr. Kirschner. It was only at that point that he asked for the instruction. Characterizing Mr. Kirschner's “decision” as a “back up” strategy is an after-the-fact rationalization of counsel's failure to investigate a viable defense and an unreasonable application of *Strickland*. See *Wiggins*, [539 U.S. at 526-27](#), [123 S.Ct. 2527](#) (“[T]he ‘strategic decision’ the

state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.”).

*33 In denying guilt phase relief on the prejudice prong, one of the Eleventh Circuit's reasons was that “with the possible exception of some limited parts of Dr. Weitz's testimony, the opinions of Mr. Reaves' experts would, as a matter of Florida law, have been inadmissible to demonstrate that he was incapable of forming the premeditated design to kill that is required for first-degree murder.” [717 F.3d at 904](#). That is because some of the experts premised their opinions not on cocaine use alone but the combination of cocaine use and PTSD.

The guilt phase prejudice decision has been decided and I do not seek to reargue it. But as the Eleventh Circuit pointed out, the Florida law it cited was not part of the [Reaves](#) decision, which simply made reference to “the law in Florida at the time” of Mr. Reaves' trial in 1992. The cases the Eleventh Circuit cited were decided in 2004, 2003, and 1994, years after Reaves' trial.

As the state trial judge said in his order, it was not until 1995 in *State v. Bias*, [653 So.2d 380 \(Fla. 1995\)](#), that the Florida Supreme Court fully articulated and established that evidence of the combined effect of intoxication and a mental disorder was admissible. (E-PCR 2-2 at 308). At the time of Mr. Reaves' trial, the two Florida Supreme Court cases addressing the issue were: *Chestnut v. State*, [538 So.2d 820 \(Fla. 1989\)](#) (holding that an abnormal mental condition not constituting legal insanity was inadmissible for the purpose of proving a defendant could not entertain the specific intent to commit a crime) and *Gurganus v. State*, [451 So.2d 817 \(Fla. 1984\)](#) (“When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant.”). In 1995, the Florida Supreme Court “synthesize[d]” its decisions in those two cases, and two cases that followed Mr. Reaves' trial, *Dillbeck v. State*, [643 So.2d 1027 \(Fla. 1994\)](#) and *Bunney v. State*, [603 So.2d 1270 \(Fla. 1992\)](#), to say that if it is “the expert's opinion that the defendant has a mental disease or defect which has a recognized diagnosis and acts in combination with the given quantity of alcohol, the entire basis for the expert's opinion should be admitted.” *State v. Bias*, [653 So.2d at 383](#).

Again, I do not seek to revisit the appellate courts' guilt phase decision based on prejudice. I don't say all of Mr. Reaves' expert opinions would have been admitted at the guilt phase. The state of Florida law at that time was less than clear. However, the voluntary intoxication defense was expressly allowed and the facts supporting the defense and at least some of the expert testimony was certainly admissible at that stage.

All of the expert testimony, however, was admissible at the penalty stage. If the groundwork had been laid at the guilt phase, there would have been a coherent theory of defense, consistent through both phases of the trial, and the jury would not have been left to figure it out themselves.

B. Prejudice

Prejudice “requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. As explained above, the inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* In the context of a sentence of death, the question is whether “there is a reasonable probability that [the judge and jury] would have returned with a different sentence.” *Wiggins v. Smith*, 539 U.S. 510, 536, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). “To assess that probability, we consider the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.” *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)) (internal quotation marks omitted) (alteration in original). “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

*34 Because the state courts adjudicated the prejudice claim on the merits, albeit without an evidentiary hearing, AEDPA governs my review. “AEDPA ‘imposes a highly deferential standard for evaluating state court rulings’ and ‘demands that state-court decisions be given the benefit of the doubt.’” *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1253 (11th Cir. 2013) (quoting *Renico v. Lett*, 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)), *cert. denied*, 135 S. Ct. 67 (2014). At the same time, “[e]ven in the context of federal

habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Under § 2254(d)(2), “[t]he question ... is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.” *Schiro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). While “the term ‘unreasonable’ is no doubt difficult to define,” *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) (quoting *Williams*, 529 U.S. at 410, 120 S.Ct. 1495 (internal quotation marks omitted)), the Supreme Court has instructed that it is not sufficient that “the federal habeas court would have reached a different conclusion in the first instance.” *Id.* The state court's determination must be “objectively unreasonable.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court has found state factual findings unreasonable under § 2254(d)(2) when the direction of the evidence, viewed cumulatively, was “too powerful to conclude anything but [the petitioner's factual claim],” *Miller-El v. Dretke (Miller-EL II)*, 545 U.S. 231, 265, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), and when a state court's finding was “clearly erroneous,” *Wiggins v. Smith*, 539 U.S. at 528-29, 123 S.Ct. 2527.

In explaining the standard from § 2254(d)(1) (“contrary to, or ... an unreasonable application of ... Federal law”), the Supreme Court has said that “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103, 131 S.Ct. 770.

(1) The State Court Finding that Testimony About Combined Effect of PTSD and Cocaine Would Be Cumulative Was Implausible and an Unreasonable Determination of the Facts.

In denying Mr. Reaves' post-conviction relief, the state court found, and the Florida Supreme Court agreed, that “[a]ny of the proposed additional evidence [as to the penalty phase] would have been either irrelevant or cumulative.” *Reaves*, 826 So.2d at 941. As I previously explained in my Order Granting Evidentiary Hearing as to Penalty Phase Ineffectiveness (DE 40), that was an unreasonable determination of the facts.

When the Florida Supreme Court disposed of Mr. Reaves' 3.850 petition in its entirety, the state court record included: (1) the trial transcript; (2) the allegations in the 3.850 petition, presumed to be true, that (a) Mr. Reaves suffers from PTSD, brain damage, and a severe addiction to drugs, and (b) appropriate experts could explain the effects of substance abuse combined with PTSD in a stressful situation; (3) the testimony at the evidentiary hearing on voluntary intoxication, including the testimony of Dr. Richard Dudley, a clinical and forensic psychiatrist; Dr. Barry Crown, a neuropsychologist; Dr. Deborah Mash, a neuropharmacologist; Dr. Irving Parsons, a clinical psychologist; Dr. Thomas Hyde, a behavioral neurologist, and Dr. William Weitz; and (4) the Department of Veterans Affairs' PTSD disability determination.³⁵

*35 The most striking indication that the proposed medical testimony about the impact of PTSD and cocaine is not cumulative is the argument of the state prosecutor and the testimony of his argumentative summary expert, Dr. Cheshire. They literally waived a copy of the Diagnostic Manual, DSM-III-R, in front of the jury:

Q. And is [post-traumatic stress syndrome](#) recognized by both the psychiatric and psychological experts within the field and listed within the Diagnostic and Statistical Manual of Mental Disorders known as DSM-III-R that I am holding?

A. Yes.

Q. Now, Dr. Weitz has talked about Vietnam Syndrome. Is there such a thing recognized within this book?

A. No Sir.

(A-R14 at 2230). On redirect, after establishing that Dr. Cheshire had reviewed the deposition of Dr. Weitz, the prosecutor asked:

Q. What did the deposition of Dr. Weitz go into?

A. It went into a concept that I think he is developing concerning [post-traumatic stress syndrome](#) as it relates to Vietnam veterans. I think he is inventing some concept that he is trying to get other people to believe.

(*Id.* at 2239). Then during closing argument, the prosecutor discussed the testimony of Dr. Weitz:

Remember, I spent a lot of time on him and I was showing him the book, "DSM-III-R" the Diagnostic Manual. I said:

"Where does it say that post-traumatic stress people come back and commit crimes as criminals?" That's not in there.

Where is Vietnam Syndrome? Well, it's not in there either. They ain't in there for a reason, because they aren't recognized by the best psychologists and psychiatrists across the country. That's why it's not in there.

Dr. Weitz recognizes it because he is hired by the Defense to come up with a psychological defense, I submit, to convince you folks that the appropriate penalty should not be death, but life for the defendant, with this terrible record.

Dr. Weitz did his job. I mean, that's what he is here to do. But use your common sense in looking at that and accepting that.

The Military does not turn out killers and murderers and people that rob and do what this defendant did. And if that were so, we would have killers and robbers turned out from World War I, from World War II, from Korea, Vietnam, Lebanon.

(A-R15 at 2295-96).

At the evidentiary hearing on the voluntary intoxication defense, the medical experts testified that when he shot the Deputy, Mr. Reaves was acutely intoxicated with cocaine, had PTSD, and had organic or post concussive brain damage injury. According to these experts, he was paranoid, fully delusional, and unable to form the intent to kill.

In *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Supreme Court considered a claim that testimony of jailers about the petitioner's conduct in prison was "merely cumulative" to the testimony of the petitioner and his former wife about his prison behavior to show that he would use his time in prison productively. The Supreme Court reversed the South Carolina Supreme Court's affirmance of the death penalty: "We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us." 476 U.S. at 8, 106 S.Ct. 1669. The Court pointed out that disinterested testimony would likely be more believable than that of the petitioner and his former wife, and also noted that the prosecutor had argued future dangerousness in his closing argument. Under these circumstances, the Court concluded, "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.*

*36 In *Cooper v. Secretary*, 646 F.3d 1328, 1353 (11th Cir. 2011), the Eleventh Circuit found that “the Florida Supreme Court’s finding that the mitigation evidence presented at the evidentiary hearing was cumulative to that presented at sentencing was an unreasonable determination of the facts.” The Court found that, although Cooper’s mother had revealed that his home life was volatile, to “characterize her testimony as revealing a ‘substantial part’ of Cooper’s ‘disadvantaged childhood’ is a great exaggeration.” *Id.* Therefore, the Circuit determined, “the state court’s decision on prejudice was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,’ see 28 U.S.C. § 2254(d)(2), and we will review Cooper’s claim *de novo*.” *Id.*

Here, too, the state courts either ignored or failed to grasp the prejudice that was alleged. The question was not whether “[a]mple and significant evidence concerning the Vietnam War and Reaves’ part in the war” was presented (C-PCR1-7 at 1100), or “the conditions of fighting the war in Vietnam, including drug usage,” 826 So.2d at 941. The prejudice alleged was the failure to present in mitigation expert medical testimony about how mental injuries caused by the war contributed to what happened. The state court’s “cumulative” finding is particularly implausible where the only testimony at sentencing remotely similar to the available medical testimony, testimony about the ill-conceived “Vietnam Syndrome,” was attacked by the prosecutor as illegitimate and not recognized by the medical community. I find that the state court’s decision on penalty phase prejudice was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings pursuant to 28 U.S.C. § 2254(d)(2).

(2) An Unreasonable Application of *Strickland*.

In two cases particularly pertinent here, the Supreme Court has found state court prejudice decisions also to be an unreasonable application of *Strickland* under § 2254(d)(1). See *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Porter v. McCollum*, 558 U.S. 30, 130 (S.Ct. 447, 175 L.Ed.2d 398 2009). In *Williams*, the state supreme court had held that “the excluded mitigating evidence—which it characterized as merely indicating ‘that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment,’—‘barely would have altered the profile of this defendant that was presented to the jury.’” 558 U.S. at 372, 130 S.Ct. 876. The Supreme Court found that the state court

had “ignored or overlooked the evidence of Williams’ difficult childhood and abuse and his limited mental capacity,” and that it was “unreasonable to characterize the additional evidence as coming from ‘mostly relatives.’” *Id.* at 373, 130 S.Ct. 876 n.5.

“[T]he State Supreme Court’s prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation.” *Id.* at 397-98, 130 S.Ct. 876. The Court continued: “[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised ‘a reasonable probability that the result of the sentencing proceeding would have been different’ if competent counsel had presented and explained the significance of all the available evidence.” *Id.* at 399, 130 S.Ct. 876. “It follows that the Virginia Supreme Court rendered a ‘decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.’” *Id.*

The second case is *Porter v. McCollum*. There, the Supreme Court flatly declared, with facts similar to those presented here, that “[t]he Florida Supreme Court’s decision that Porter was not prejudiced by his counsel’s failure to conduct a thorough—or even cursory—investigation is unreasonable.” 558 U.S. at 42, 130 S.Ct. 447. “The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.” *Id.* “[N]either the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee’s testimony regarding the existence of a brain abnormality and cognitive defects.” *Id.* at 42-43, 130 S.Ct. 447. The Supreme Court also found that the Florida courts unreasonably discounted evidence of Porter’s military service, stating that “the relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.” *Id.* at 43-44, 130 S.Ct. 447.

*37 In Mr. Reaves’ case, the Florida Supreme Court unreasonably ignored the significant expert testimony presented in the state habeas hearing on voluntary intoxication that PTSD and cocaine affected his actions. The VA’s disability determination was either overlooked or intentionally ignored. In saying that ample evidence of

Vietnam and Mr. Reaves' role in the war had been presented, the Court failed to recognize that the relevance was not only that he served his country, but also that he had been mentally injured in doing so. The Florida Supreme Court rendered a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *Strickland v. Washington*.³⁶

(3) A Probability Sufficient to Undermine Confidence in the Outcome.

Our nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines

-Porter v. McCollum, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

Having found the state court's decision unreasonable under both § 2254(d)(1) and (2), I must examine whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. The totality of the evidence must be considered. *Id.* I examine both the state court record and the evidence produced during the federal evidentiary hearing, including credibility findings stemming from my opportunity to observe and hear the witnesses.

The case most instructive is *Porter*. A comparison of the facts in that case with those in Mr. Reaves' is compelling.

First, the obvious difference, a double murder with days of preparation and premeditation, 558 U.S. at 31, 130 S.Ct. 447, compared to an unplanned encounter measured in moments. Porter was convicted of two counts of first-degree murder for killing his former girlfriend and her boyfriend. *Id.* at 31, 130 S.Ct. 447. As his relationship with his girlfriend was ending, Porter threatened to kill her but then left town. *Id.* Three months later he returned, tried to see her, but her mother told him she did not want to see him. *Id.* A few days later, Porter suggested to a friend that she would read about him in the papers. *Porter v. State*, 564 So.2d 1060, 1061 (Fla. 1990). He asked another friend for a pistol, and when the friend refused, the pistol disappeared from his house. *Id.* He drove by his former girlfriend's house each of the two days before the shooting, and the night before the murder, he tried to visit her but she called the police. *Id.* The next morning, after drinking heavily the night before, Porter shot her in her

home, struggled with her boyfriend, forced him outside the house, and shot him. 558 U.S. at 31-32, 130 S.Ct. 447.

After conviction, the trial court found four aggravating factors: the murder was committed during a burglary; Porter had been previously convicted of another violent or capital felony (in the former girlfriend's case, killing the boyfriend and in the boyfriend's case, killing the former girlfriend); the murder was committed in a cold, calculated, and premeditated manner; and the murder was especially heinous, atrocious or cruel. *Id.* at 32, 130 S.Ct. 447. The Florida Supreme Court affirmed the sentence but struck the heinous, atrocious or cruel aggravating factor. *Id.* at 33, 130 S.Ct. 447.

*38 In Porter's post-conviction evidentiary hearing, Porter presented the testimony of a neuropsychologist who had examined him and had administered a number of psychological assessments. *Id.* at 36, 130 S.Ct. 447. The expert concluded that Porter suffered from brain damage that could result in impulsive, violent behavior. *Id.* He testified that, at the time of the crime, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances. *Id.* He testified that Porter's symptoms could "easily" warrant a diagnosis of PTSD. *Id.* at 35, 130 S.Ct. 447 n.4. The State presented two experts, neither of whom had examined Porter, but each testified that based upon their review of the record, neither statutory mitigating circumstance was met. *Id.* at 36, 130 S.Ct. 447 n.5.

The trial judge who conducted the state evidentiary hearing found that Porter had failed to establish any statutory mitigating circumstance, and that the evidence as to the two nonstatutory mitigating factors would not have made a difference in the outcome. *Id.* at 36-37, 130 S.Ct. 447. The Florida Supreme Court affirmed, accepting the trial court's finding that Porter could not have established any statutory mitigating circumstances based on the trial court's acceptance of the State's expert's conclusion in that regard. *Id.* at 37, 130 S.Ct. 447. It then held that the trial court was correct to find "the additional nonstatutory mitigation to be lacking in weight because of the specific facts presented." 558 U.S. at 37, 130 S.Ct. 447 (quoting *Porter v. State*, 788 So.2d 917, 923, 925 (2001)).³⁷

Applying *Strickland*, in order to assess whether there was a reasonable probability that Porter would have received a different sentence, the Supreme Court said it would

“consider ‘the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding’—and ‘reweig[h] it against the evidence in aggravation.’ ” *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (quoting *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495). The Supreme Court found that “[t]he judge and jury at Porter’s original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.” *Id.* at 41, 130 S.Ct. 447. On the mitigating side, the Supreme Court pointed to Porter’s military service in Korea and struggles to regain normalcy upon return from the war, a childhood history of physical abuse, his brain abnormality, difficulty in reading and writing, and limited education. *Id.*

The Court also noted that the aggravating factors were not as substantial as the sentencing judge thought, pointing out that the Florida Supreme Court had stricken one of the four aggravating factors. *Id.* The Supreme Court said that although the Florida Supreme Court “acknowledged that Porter had presented evidence of both ‘statutory and non-statutory mental mitigation,’ ... it did not consider Porter’s mental health evidence in its discussion of nonstatutory mitigating evidence.” *Id.* at 43, 130 S.Ct. 447 n.7. The Court thought it “unreasonable to conclude that Porter’s military service would be reduced to ‘inconsequential proportions,’ simply because the jury would also have learned that Porter went AWOL on more than one occasion.” *Id.* at 43, 130 S.Ct. 447 (internal citations omitted). Citing a history of leniency based upon military service dating back to the Civil War, testimony of the Secretary of Veterans Affairs about the prevalence of PTSD among soldiers returning from Iraq and Afghanistan, and state laws requiring special consideration of mitigation for combat veterans,³⁸ the Court concluded:

***39** [T]he relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea. 558 U.S. at 43-44, 130 S.Ct. 447. The Court reversed the Court of Appeals’ judgment affirming Porter’s sentence of death. *Id.*

Mr. Reaves’ mitigating case is much stronger and his aggravating factors less weighty.

While as noted above, Mr. Porter’s expert said his symptoms “would easily warrant” a diagnosis of PTSD, the state’s experts identified problems with his tests and conclusions that were accepted by the state courts. But, the Supreme Court thought it unreasonable to entirely discount the effect of the testimony.

Here, it seems clear that Mr. Reaves actually has PTSD from combat and that he developed his serious drug addiction while in Vietnam. All of the testimony at the federal habeas hearing, expert and otherwise, leads to that conclusion and the Department of Veterans Affairs has confirmed that diagnosis. I find Mr. Reaves’ experts credible in that diagnosis and also in their explanation that the combination of PTSD and cocaine affected Mr. Reaves’ behavior. Unlike Mr. Porter’s murder of two people after threatening them, stealing a firearm in preparation, and telling others of his intention, Mr. Reaves reacted in a matter of seconds.

During the federal evidentiary hearing, Mr. Reaves called five experts, four of whom had testified in the state evidentiary hearing on voluntary intoxication.³⁹ Dr. Thomas Hyde, a behavior neurologist, affiliated with Johns Hopkins University School of Medicine, diagnosed Mr. Reaves with [Post-Traumatic Stress Disorder](#), major recurrent depression and cocaine dependency, with neurological findings associated with frontal lobe dysfunction. Dr. Richard Dudley, a physician with a specialty in psychiatry, diagnosed Mr. Reaves with [Post-Traumatic Stress Disorder](#), which through interaction with cocaine, caused him to be clinically paranoid. According to Dr. Dudley, PTSD and cocaine interacted with each other, making each worse. Dr. David Price, a forensic psychologist specializing in patients with PTSD, after examining Mr. Reaves, administering the Minnesota Multiphasic Personality Inventory II and Millon Clinical Multiaxial Inventory-III, and interviewing family members and persons serving with Mr. Reaves in Vietnam, also diagnosed Mr. Reaves with PTSD. Dr. Barry Crown, a psychologist specializing in neuropsychology and addictionology and former clinical director of the National Institute of Mental Health Drug Abuse Training Center, testified about Mr. Reaves’ extensive drug use and it was also his opinion that in conjunction with PTSD, it had impaired Mr. Reaves’ reasoning and judgment and caused paranoia.

***40** Dr. Hyde, Dr. Dudley, and Dr. Price each testified that Mr. Reaves met two of the Florida statutory mental health mitigating circumstances.⁴⁰ It was their opinion that at the

time of the crime, Mr. Reaves was under extreme mental or emotional disturbance and his capacity to conform his conduct to the law was substantially impaired. (DE 77 at 23, Hyde testimony); (*Id.* at 106, Dudley testimony); (*Id.* at 189-90, Price testimony). I found their testimony credible and convincing.

In analyzing the weight of the expert mitigation evidence, I also find it significant that Dr. Weitz credibly testified that (1) in his opinion, based upon reports that previously existed but he never saw, Mr. Reaves has PTSD (and had PTSD at the time of the shooting), and (2) his diagnosis of adult anti-social personality disorder was a mistake.

The State presented three experts, none of whom had testified at trial or at the postconviction hearing on voluntary intoxication. Dr. Bruce Zaret, a physician specializing in neurology, reviewed Dr. Hyde's neurological examination and report. He agreed that the findings reported by Dr. Hyde were abnormal but did not believe they reached a clinical threshold that would produce dysfunction. He testified that there are imaging tests that could be done to confirm or negate the possibility of brain damage. He was also quick to say he was not an expert in PTSD, substance abuse, or any kind of psychiatric diagnosis. I found Dr. Zaret credible but his testimony was limited, and he had not examined Mr. Reaves.

The State also called Dr. Enrique Suarez, a psychologist, who had worked at Veterans Administration Hospitals from 1974-1981. While he agreed that “most everybody” came back from combat “different” and that Mr. Reaves came back with a very heavy [heroin addiction](#), he did not agree that Reaves has PTSD or met the statutory mitigators. (DE 80 at 181, 213, Suarez testimony). While I generally found Dr. Suarez credible, he did not examine Mr. Reaves or conduct any interviews and seemed overly reliant upon information provided by counsel for the State. Moreover, since during his testimony he mentioned that PTSD evaluations needed to be rigorous because VA disability determinations were based upon them, I asked him why he disagreed with the VA's assessment of Mr. Reaves. (*Id.* at 232, 125 S.Ct. 2317). His response was unconvincing. After hearing all of the medical testimony, I find the experts called on behalf of Mr. Reaves to be the more persuasive.⁴¹

*41 Just as the Supreme Court said in [Porter](#), there exists too much mitigating evidence that was not presented to be ignored. The medical testimony is compelling and should be

considered by the sentencer.⁴² Conversely, the aggravating side of the ledger is less substantial.

Like in [Porter](#), in Mr. Reaves' case, the Florida Supreme Court, on direct appeal, struck the aggravating factor of heinous, atrocious or cruel. The court found the error harmless, however, “in view of the two other strong aggravating factors found and relatively weak mitigation.” [Reaves v. State](#), 639 So.2d 1, 6 (1994). “Reaves was convicted of holding a gun to the head of a hotel clerk during two separate robberies and punching a correctional officer in the face while in jail. In addition, the instant murder was committed to avoid or prevent lawful arrest.” *Id.* at 6 n. 11.

Thus, while Porter was left with three statutory aggravators, Mr. Reaves had two. And unlike Porter, whose previous act of violence was murder, the victims in Mr. Reaves' two robberies were not physically harmed. While Mr. Reaves did punch a correctional officer in prison, there was also evidence, although never presented to the sentencing jury, that he had assisted another prison guard who was being attacked by two inmates. Although describing it as “meaningful mitigation,” the Florida Supreme Court agreed with the trial judge that any benefit to be gained from the evidence would have been “negated” by the more recent episode where Mr. Reaves hit the guard. [Reaves](#), 826 So.2d at 941. Together with the expert testimony about his mental condition, the mitigation evidence of Mr. Reaves' assistance to the guard would have certainly shown Mr. Reaves in a different light than that of the unredeemable and violent man described by the prosecutor.

Finally, the prejudice in this case is not only the mitigation Mr. Reaves' counsel failed to introduce, but also the false and inflammatory evidence the prosecution was allowed to present while Mr. Kirschner silently watched. In Porter's case, the Supreme Court acknowledged that PTSD is not uncommon among veterans returning from combat. [Porter](#), 558 U.S. at 35 n.4, 130 S.Ct. 447.⁴³ Yet, the state presented a lay rebuttal witness (a former military officer, who according to a member of Mr. Reaves' squad, never left the base camp) who testified he never saw anyone with PTSD. The Supreme Court pointed to Porter's receipt of the Combat Infantryman Badge as a testament to his participation in combat, 558 U.S. at 35, 130 S.Ct. 447, yet according to the demonstrably false testimony of the State's “records expert,” everyone in Vietnam received one.

*42 In closing, a few words about the last testimony the sentencing jury heard before deciding Mr. Reaves' fate. As a

trial judge, I find it reprehensible; in my view its prejudice is hard to overstate. Without any objection, the prosecutor elicited testimony in the guise of expert opinion from a medical doctor that the Deputy was “executed while begging for his life ... by a drug dealer to cover up the possibility of his going back to jail ... to do away with the witnesses.” “It was a judgment call and he judged and then carried out the execution based on his judgment.”

This was wrong on so many levels. As the Florida Supreme Court said on direct appeal, the sale of drugs was not relevant to the murder. This was not expert opinion, it was not medical opinion, and there was no foundation. It was inflammatory, prejudicial, and a vivid illustration of a breakdown in the adversary system.

Mr. Kirschner's performance at the penalty phase was woefully inadequate, particularly his overall lack of investigation, which led to the failure to provide to his only expert critical facts available in the case file to properly diagnosis Mr. Reaves with PTSD and, as a result, the failure to present expert testimony as to the combined effect of PTSD and cocaine use. Additionally, Mr. Kirschner's failure to object to outrageous testimony about Mr. Reaves' military record and a medical doctor's statements (with no foundation) as to offense details and Mr. Reaves' motive for committing the crime affected Mr. Reaves' penalty. Had Mr. Kirschner not been deficient at the penalty phase, there is a reasonable probability that the judge and jury would have returned with a sentence other than death. With constitutionally adequate representation, the balance of aggravating and mitigating factors would have tipped in favor of Mr. Reaves and Mr. Reaves would have been portrayed to the jury and judge in a more favorable light. When considering counsel's errors at the penalty phase, either alone or combined with counsel's errors at the guilt phase, it is unjust to allow Mr. Reaves' sentence to stand.⁴⁴

IV. CONCLUSION

It is certainly true that our nation has a tradition of according leniency to veterans, especially those who have fought on the front lines. It is also true that, particularly after Vietnam but continuing today, our recognition and appreciation of the [wounds](#) and enduring struggles caused by combat have been expressed more often in words than deeds.⁴⁵

*43 An American soldier facing death at the hands of his government deserves effective representation. Mr. Reaves did not receive it—the penalty phase of his trial was constitutionally inadequate. Accordingly, it is

ORDERED AND ADJUDGED that

(1) Claim IX (ineffective assistance of penalty phase counsel) is **GRANTED**. William Reaves' conviction remains undisturbed. However, a Writ of Habeas Corpus shall issue upon William Reaves' claim of ineffective assistance of counsel at the penalty phase.

(2) William Reaves should receive a new sentencing hearing before an untainted jury within ninety (90) days of the date of this Order, unless Respondent files a timely appeal and obtains a stay of this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 3rd day of March 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 13657202

Footnotes

- 1 Julie L. Jones is now the Secretary of the Florida Department of Corrections and is automatically substituted as Respondent under [Federal Rule of Civil Procedure 25\(d\)\(1\)](#).
- 2 Tim O'Brien, *The Things They Carried* 72 (First Mariner Books 2009) (1990).
- 3 Writing for the Eleventh Circuit, Chief Judge Carnes took issue with my description of these circumstances as “bizarre,” but noted that “events sometimes tumble towards tragedy as if the devil himself had shaved the dice.” [Reaves v. Secretary](#), 717 F.3d 886, 889 (11th Cir. 2013) (quoting Rick Bragg, *The Prince of Frogtown* 177-181 (Alfred A. Knopf 2008)). In the passage quoted by Judge Carnes, Rick Bragg is describing the shooting of a police chief by a drunken storekeeper and fishing buddy the chief was trying to disarm. According to Bragg, “there are things impossible to reconcile, and the killing of Chief D. E. Whiteside haunts the place and people even now.” Bragg, *id.* at 177. The chiefs killing “makes no more

sense now to Whiteside's son Bill than when he was a seven-year-old boy...." *Id.* at 178. " 'They gave Dentmon life in the penitentiary. But I didn't know life meant seven years.' " *Id.* at 181.

The state court record was filed conventionally, as reflected in (DE 17). I cite to the state court record by exhibit name (such as A-R1) and page number within the exhibit.

Mr. Kirschner testified that "after this case I swore off capital litigation forever...." (Kirschner testimony at 48).

As will be discussed subsequently, I would have never imagined that this testimony would have been (1) offered; (2) not objected to; and (3) admitted in an American courtroom.

Richard A. Kulka, et al., *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam Veterans Readjustment Study* (Routledge 2013) (1990) ("NVVRS").

Although the defense had not presented any evidence about the length of the ambush or the number of casualties, the prosecution, through this testimony, sought to undermine Mr. Reaves' credibility based upon some of Dr. Weitz's notes of his interview with Mr. Reaves. The notes mentioned 30 days of combat and 20 casualties, although Dr. Weitz did not know if the notes referred to Mr. Reaves' tour of duty or a particular ambush.

This was a peculiar argument not only because Mr. Kirschner did not explain why the jury should disbelieve Mr. Hinton, but also because the prosecutor said nothing about the Deputy begging for his life in his closing.

In Florida, the parties can present additional evidence before the sentencing judge that the sentencing jury never heard. See *Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993).

"The defendant was honorably discharged after having served in the military. The defendant having enjoyed a good reputation in his community until he reached the age of 15 or 16 years. The defendant was a good and considerate son to his mother and siblings." (*Id.*)

The judge who tried and sentenced Mr. Reaves was unavailable to decide the state habeas petition. At the time of the 3.850 proceedings, the judge who presided over Mr. Reaves' trial, retired county judge James Balsinger, as a Senior Judge, was permitted only to handle county court cases. Therefore, the post-conviction proceedings were assigned to circuit judge Robert Hawley. (C-PCR1-2 at 217) (Order Denying State's Motion for Judicial Reassignment).

As noted, the 3.850 petition alleged that the diagnosis of anti-social personality disorder is wrong. (C-PCR1-4 at 499) (Amended Petition, Claim V ¶ 6). Dr. Weitz has also testified that his diagnosis was a mistake. (DE 79 at 104-05, Weitz testimony).

However, as the Florida Supreme Court itself stated in its prior opinion, "[t]his reasoning obscures the difference between an insanity defense and a voluntary intoxication defense.... Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense." 826 So.2d at 938-939.

In full, § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The decision to grant an evidentiary hearing is generally left to the discretion of the district court. *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). "That basic rule has not changed. See 28 U.S.C. § 2254, Rule 8(a) ('[T]he judge must review the answer [and] any transcript and records of state court proceedings ... to determine whether an evidentiary hearing is warranted.')." *Schiro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). After AEDPA, however, "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474, 127 S.Ct. 1933.

Alternatively, even if § 2254(d) were to be applied to the performance prong at the penalty phase, it is beyond dispute that in order to provide representation to a defendant in a capital trial, counsel must perform a thorough investigation where it appears necessary to do so. *Frazier v. Bouchard*, 661 F.3d 519, 531 (11th Cir. 2011). The 3.850 petition alleged a failure to investigate available mitigation, including the impact of PTSD and cocaine, failure to consult necessary experts, failure to prepare Dr. Weitz, and, because of lack of investigation, a failure to challenge the qualifications and testimony of state witnesses. "If [petitioner's] allegations concerning counsel's performance are true—an assumption we must indulge because the state trial judge conducted *no evidentiary hearing* to evaluate the strength of [petitioner's] claims—there

is support for [petitioner's] argument that his attorney failed to satisfy *Strickland's* performance prong.” *Id.* (emphasis added). The failure to evaluate Mr. Reaves' claims of deficient performance at the penalty phase, if taken as true based on the trial transcript alone, is an unreasonable application of *Strickland*.

- 18 The Florida Supreme Court also denied Mr. Reaves' cumulative error claim (that “he is entitled to a new trial based on the impact of cumulative errors”) as moot in light of the decision to remand the case for an evidentiary hearing. [826 So.2d at 944](#). It is not entirely clear whether this claim relates to the impact of cumulative errors throughout the trial and sentencing, or whether it is specific to counsel's cumulative errors at trial and sentencing. After the evidentiary hearing, neither the trial court nor the Florida Supreme Court ever addressed any cumulative error claim.
- 19 I previously denied Mr. Reaves' claim that his “trial was so infected with error that the cumulative nature of those errors rendered the trial unfair and its verdict and sentence unreliable.” (DE 20 at 55) (finding that Mr. Reaves had not exhausted this claim). The previously rejected cumulative error claim (DE 1, Claim XVIII) is different than the one I address in this Order, which is the cumulative effect, or combined impact, of defense counsel's errors at the penalty phase and sentencing phase. (DE 1, Claim XXII); (Amended Petition, Claim XXII ¶ 48).
- 20 See, e.g., Walker, *The Psychological Problems of Vietnam Veterans*, 246 J.A.M.A. 781 (1981); Wilson & Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 Behav. Sci. & L. 70 (1983); Smith, *Post Traumatic Stress Disorder—An Often Overlooked Element of Trauma*, Trial Mag. 92 (Feb. 1984); Walker & Cavenar, *Vietnam Veterans: Their Problems Continue*, 170 J. Nervous & Mental Disease 174 (1982); Michael J. Donaldson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415 (1988).
- 21 Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders—Text Revision* 463 (4th rev. ed. 2000) (“DSM-IV-TR”).
- 22 Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 236-37 (3d ed. 1980) [hereinafter DSM-III].
- 23 Kulka, *supra* note 7, at xxvi (foreword by Alan Cranston).
- 24 Analysis suggested that some of this difference likely could be attributed to differing levels of combat exposure. *Id.* at [85, 267, 130 S.Ct. 447](#).
- 25 The American Bar Association provides that “[i]n cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant.” American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (“ABA Guidelines”) at 2.1 (Number of Attorneys Per Case). The Commentary states: “[T]he defendant is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate defense at trial and an adequate appeal. In the context of capital litigation, this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney.” *Id.* at Commentary to 2.1. Guideline 5.1 (Attorney Eligibility) provides that “[l]ead trial counsel assignments should be distributed to attorneys who: (iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder and an additional five were felony jury trials....” *Id.* at 5.1.
- 26 Mr. Kirschner and Dr. Weitz's case files supported their testimony. For example, Mr. Kirschner's case file included this information (Kirschner testimony at 28), while Dr. Weitz's file did not (Weitz testimony at 81-84).
- 27 Subsection D.7 (Expert Assistance) of ABA Guideline 11.4.1 (Investigation) provides that “[c]ounsel should secure the assistance of experts where it is necessary or appropriate for (A) preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; (D) presentation of mitigation.” ABA Guideline 11.4.1, *supra* note 25. The Commentary states: “The need for a standard mandatory investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation. Inexperienced counsel—and even counsel experienced in non-capital cases—may underestimate the importance of developing meaningful sources of mitigating evidence....” See Guideline 11.8 and Commentary.” *Id.* at Commentary to 11.4.1. “Resources that counsel needs to pursue a proper investigation should be sought early in the case. The type or amount of assistance than can or will be made available varies from jurisdiction to jurisdiction; counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial.” *Id.*
- 28 His defense of excusable homicide never had any chance for success.

- 29 “Counsel should seek to ensure that the client is not harmed by improper, inaccurate, or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.” ABA Guidelines 11.8.2 (Duties of Counsel Regarding Sentencing Options, Consequences and Procedures), *supra* note 25.
- 30 Awards and Decorations Branch—Combat Infantry Badge CIB, U.S. Army Human Resources Command Website, [https://www.hrc.army.mil/TAGD/Awards% 20and% 20Decorations% 20Branch% 20-% 20Combat% 20Infantry% 20Badge% 20CIB](https://www.hrc.army.mil/TAGD/Awards%20and%20Decorations%20Branch%20-%20Combat%20Infantry%20Badge%20CIB) (last visited Feb. 23, 2015).
- 31 U.S. Army Service, Campaign Medals and Foreign Awards Information, Air Medal, <http://veteranmedals.army.mil/awardg&d.nsf/374fbd6468877ab385256b6600590a90/f899b90af9284b6785256b660063cfbd!OpenDocument> (last visited Feb. 23, 2015).
- 32 “And his father would have nodded, knowing full well that many brave men do not win medals for their bravery, and that others win medals for doing nothing.... He would’ve explained to his father that none of these decorations was for uncommon valor. They were for common valor. The routine, daily stuff—just humping, just enduring ... and if his father were to ask, he would’ve explained what each signified and how proud he was of all of them, especially the Combat Infantryman’s Badge, because it meant he had been there as a real soldier and had done all the things soldiers do, and therefore it wasn’t such a big deal that he could not bring himself to be uncommonly brave.” O’Brien, *supra* note 2, at 135.
- 33 See also *Libberton v. Ryan*, 583 F.3d 1147, 1166 (9th Cir. 2009) (“But ineffectiveness is often manifested earlier. For example, defense counsel may have failed to discover impeaching evidence that could have been used against an unfavorable witness who testified during the guilt phase, and which would have portrayed the defendant in a light that would have assisted him at the penalty phase.”); *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005) (“The combination of counsel’s guilt and penalty phase deficiencies, including their failure to investigate their client’s mental health and failure to overcome a complete communication failure, combined to deny Daniels effective representation and prejudiced the outcome of his penalty phase trial.”).
- 34 During the Iran-Contra hearings, Brendan Sullivan was Col. Oliver North’s attorney. The Committee Chairman, Sen. Inouye (D. Ha.), suggested after a Sullivan objection that North could take care of himself. “Let the witness object if he wishes to,” the Senator told Sullivan. “Well, sir,” Sullivan replied, “I’m not a potted plant. I’m here as the lawyer. That’s my job.” *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. Times, July 10, 1987.
- 35 I recognize that, when the Florida Supreme Court first determined in 2002 that Mr. Reaves’ proposed evidence was cumulative, the Florida Supreme Court did not have the evidence from the hearing on voluntary intoxication or the PTSD disability determination. However, in 2006, the Florida Supreme Court had all of that evidence and unreasonably did not reconsider its finding of cumulativeness. Although Mr. Reaves’ 3.850 petition was resolved piecemeal, with the Florida Supreme Court addressing certain claims in 2002 and other claims in 2006, the Florida Supreme Court had a duty to consider the entire state court record when it finally dismissed Mr. Reaves’ 3.850 petition.
- 36 Again, I recognize that the record was further developed after the Florida Supreme Court found in 2002 that Mr. Reaves’ proposed evidence was cumulative. However, the evidence from the state evidentiary hearing only confirmed Mr. Reaves’ allegations and highlighted counsel’s failures, which affected the penalty phase. The Florida Supreme Court’s failure to reconcile its 2006 opinion with its 2002 opinion, as well as explain the more fully developed state record’s impact on its 2002 opinion, is unreasonable. As Justice Anstead explained, “[a]ll that has been added to the record is *more* evidence, expert and otherwise, of the defendant’s cocaine addiction and intoxication at the time of the offense.” 942 So.2d at 882.
- 37 The United States Supreme Court found this explicit state court finding unreasonable:
 [N]either the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to [the expert’s] testimony regarding the existence of a brain abnormality and cognitive defects. While the State’s experts identified perceived problems with the tests that [the expert] used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.
Porter, 558 U.S. at 42-43, 130 S.Ct. 447.
- 38 Both Minnesota and California have enacted statutes explicitly listing mental illness and military service as mitigating sentencing factors. See Cal. Penal Code § 1170.9(a) (West 2011); Minn. Stat. Ann. § 609.115(10)(a) (West 2011). Federal Sentencing Guidelines have also been amended to recognize military service as an appropriate mitigating factor: “Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” U.S. Sentencing Guidelines Manual § 5H1.11 (2011). See also Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 Cardozo L. Rev. 53 (Oct. 2012).

39 Only Dr. David Price testified for the first time in the federal evidentiary hearing. Dr. Deborah Mash testified at the state hearing but did not testify before me. Her testimony at the state hearing, that at the time of the crime Mr. Reaves was in a markedly altered state of intoxication and paranoia and delusion, is consistent with the other defense experts.

40 Section 921.141(6), Florida Statutes, Mitigating Circumstances, provides, in part:

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

* * *

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

* * *

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Fla. Stat. § 921.141(6). At the time of Mr. Reaves' trial in 1992, the statute included subsection (b) and (f), but did not contain subsection (h), which was added by amendment in 1996.

41 I found one of the State's experts, Dr. Michael Brannon, unpersuasive. While he was glib, quick to throw around medical jargon, and expressed opinions with great certainty, it seemed most lacked any foundation. Unlike all of the other experts, he never expressed any limitation on his willingness to opine. Also, unlike the others, most of his earnings come from being a witness, not treating patients. (He claims to have testified "thousands of times.") (DE 80 at 105, Brannon testimony).

42 "There are compelling arguments, from a neuropsychiatric perspective, to consider the combat veteran who is genuinely affected by certain PTSD and/or TBI sequelae at the time of a criminal offense to be treated as a distinct class of offender. In most such instances, the facts surrounding the wounded warrior's military experiences and service-related injuries ought to be considered mitigating in the sentencing of the offender." Hal S. Wortzel and David B. Arciniegas, *Combat Veterans and the Death Penalty: A Forensic Neuropsychiatric Perspective*, 38 J. Am. Acad. Psychiatry Law 407, 412 (Sept. 2010).

43 The Supreme Court cited the testimony of Eric Shinseki, Secretary of Veterans Affairs, reporting that approximately 23% of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility have been preliminarily diagnosed with PTSD. 558 U.S. at 35 n.4, 130 S.Ct. 447. Further, in July 2009, the Army's Surgeon General released a lengthy report of an investigation conducted after eight homicides were perpetrated by six soldiers from units at Fort Carson, Colorado between November 2008 and May 2009. Among its conclusions: "Survey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes;" "Psychopathology (particularly alcohol/drug disorders, mood disorders, and anxiety disorders) are clear risk factors for aggression individually and particularly in conjunction with each other;" "Nearly 80 percent (11 of 14) of alleged homicide perpetrators in this analysis had documented alcohol or drug abuse problems." Epidemiological Consultation 14-HK-OB1U-09, Investigation of Homicides at Fort Carson, Colorado, U.S. Army Center for Health Promotion and Preventative Medicine, July 2009. See also David Phillips, *Lethal Warriors: When the New Band of Brothers Came Home* 241 (Palgrave Macmillan 2010) ("It is not, in most cases, that war took guys who otherwise would have been Eagle Scouts and Nobel Prize winners and turned them into drug-addled homicidal maniacs. It is that war nudged everybody toward the edge. Guys who might have struggled with minor crime ended up committing something major, like murder.").

44 I would reach the same result even if I only considered the state court record, without any consideration of the evidence from the federal evidentiary hearing. The federal evidentiary hearing only supported Mr. Reaves' allegations of ineffectiveness and bolstered evidence adduced at the state habeas evidentiary hearing, as well as the VA's PTSD determination.

45 David Finkel, a journalist embedded with the 2-16 Infantry Battalion during the surge in Iraq, has written about the return of those soldiers home. See David Finkel, *Thank You For Your Service* (Farrar, Straus and Groox 2013). According to one, "[a]ll of the soldiers he went to war with—the 30 in his platoon, the 120 in his company, the 800 in his battalion—came home broken in various degrees, even the ones who are fine." *Id.* at 10. "I don't think anyone who came back from that deployment without some kinds of demons they needed to work out." *Id.* Every war has its after war and Finkel recounts the addictions, broken marriages, encounters with the justice system, and suicides of those sent to fight in Iraq and Afghanistan and the scarce resources and fragmented services provided for their care.