No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JORGE NIEVES --PETITIONER

VS.

RICKY DIXON --RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☑Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
United States Court of Appeals, for the Eleventh Circuit

☐Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☑Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐The appointment was made under the following provision of law:_____ ,or

☐a copy of the order of appointment is appended.

_____
(Signature)

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jorge Nieves, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis,* I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income Source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Self-employment	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Income from real property (such as rental income)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Interests and dividends	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Gifts	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Alimony	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Child support	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Retirement (such as Social Security, pensions, annuities, insurance)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Disability (such as Social Security, insurance payments)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Unemployment payments	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Public-assistance (such as welfare)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Other (specify): _____	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Total monthly income:	$ 0.00	$ 0.00	$ 0.00	$ 0.00

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer Address	Dates of Employment	Gross Monthly Pay
	N/A	

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

	N/A	

4. *How much cash do you and your spouse have?* $ N/A

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
		$ 0	$ 0
		$ 0	$ 0
		$ 0	$ 0

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home (Value)	Other Real Estate (Value)	Motor Vehicle #1 (Value)
		Make & Year:
		Model:
		Registration #:

Other Assets (Value)	Other Assets (Value)	Motor Vehicle #2 (Value)
		Make & Year
		Model:
		Registration #:

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	N/A	

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	Relationship	Age
	N/A	

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
For home-mortgage payment (include lot rented for mobile home)	$ 0.00	$ 0.00
Are real-estate taxes included? ☐ Yes ☑ No	$ 0.00	$ 0.00
Is property insurance included? ☐ Yes ☑ No	$ 0.00	$ 0.00
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0.00	$ 0.00
Home maintenance (repairs and upkeep)	$ 0.00	$ 0.00
Food	$ 0.00	$ 0.00
Clothing	$ 0.00	$ 0.00
Laundry and dry-cleaning	$ 0.00	$ 0.00
Medical and dental expenses	$ 0.00	$ 0.00
Transportation (not including motor vehicle payments)	$ 0.00	$ 0.00
Recreation, entertainment, newspapers, magazines, etc.	$ 0.00	$ 0.00
Insurance (not deducted from wages or included in mortgage payments)	$ 0.00	$ 0.00
Homeowner's or renter's	$ 0.00	$ 0.00
Life	$ 0.00	$ 0.00
Health	$ 0.00	$ 0.00
Motor Vehicle	$ 0.00	$ 0.00
Other: 0	$ 0.00	$ 0.00
Taxes (not deducted from wages or included in mortgage payments) (specify): 0	$ 0.00	$ 0.00
Installment payments	$ 0.00	$ 0.00
Motor Vehicle	$ 0.00	$ 0.00
Credit card (name): 0	$ 0.00	$ 0.00

Department store (name): ∅	$ 0.00	$ 0.00
Other: ∅	$ 0.00	$ 0.00
Alimony, maintenance, and support paid to others	$ 0.00	$ 0.00
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0.00	$ 0.00
Other (specify): ∅	$ 0.00	$ 0.00
Total monthly expenses	$ 0.00	$ 0.00

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?* ☐ Yes ☑ No
   If yes, describe on an attached sheet.

10. *Have you paid – or will you be paying– an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☑ No
    If yes, how much: $ N/A

11. *Have you paid – or will you be paying–anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?* ☐ Yes ☑ No
    If yes, how much: $ N/A
    If yes, state the person's name, address, and telephone number:

12. *Provide any other information that will help explain why you cannot pay the costs of this case.*

    I AM INCARCERATED WITH NO INCOME.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 4, 2022

Jorge Nieves -*Signature*

NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JORGE NIEVES – Petitioner

vs.

RICKY DIXON, – Respondent

PROOF OF SERVICE

I Jorge Nieves, do swear or declare that on this date, April 4, 2022, as required by Supreme Court Rule 29 I have served the MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows: Attorney General of Florida at 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2022.

JORGE NIEVES, DC# E49280
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JORGE NIEVES – Petitioner

vs.

RICKY DIXON, – Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,836 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2022.

JORGE NIEVES, DC# E49280
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JORGE NIEVES – Petitioner

vs.

RICKY DIXON, – Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JORGE NIEVES, DC# E49280
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

Petitioner, *pro se*

QUESTIONS PRESENTED

This case arises from the denial of a state prisoner's petition for writ of habeas corpus that was filed pursuant to Title 28 U.S.C. § 2254(d). The relevant constitutional claim was adjudicated on the merits in state court. The state court's decision did express the reasons for denial of the claim. The decision of the Eleventh Circuit conflicts with *Wilson v. Sellers*, *infra*, in that the Eleventh Circuit went far beyond analyzing the "specific reasons" expressed in the state court decision. The Eleventh Circuit also failed to apply § 2254(d) to the dispositive issue adjudicated by the state court, which is that Nieves was not entitled to an evidentiary hearing.

1. Has this Court established a rule that Federal courts performing a § 2254(d) analysis must analyze only the "specific reasons" provided in a written state court decision adjudicating the constitutional claim on the merits?

2. The procedural process through which a court makes substantive determinations influence the reasonableness of the substantive determination itself; therefore, must a Federal court specifically analyze the reasonableness of the state court's procedural ruling to determine whether the state court's ultimate factual findings are reasonable under §2254(d)(2).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES:

Nieves v. Sec'y, Fla. Dep't of Corr., 770 F.Appx 520 (11th Cir. 2019)

Nieves v. State, 162 So. 3d 1037 (Fla. 5th DCA 2014)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Jorge Nieves, on behalf of himself and all others similarly situated, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals, for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, for the Eleventh Circuit appears at Appendix B to the petition and is unpublished. The order denying rehearing and appears at Appendix A and is also unpublished.

JURISDICTION

This case was decided on April 12, 2021. See Appendix B. A timely filed motion for rehearing was denied on June 29, 2021. See Appendix A. On October 13, 2021, Petitioner filed a motion for extension of time asking the Court to grant a 60-day extension of time to file a petition for writ of certiorari to review the record in case number 19-14302-DD, of the United States Court of Appeals for the Eleventh Circuit. Appendix M. No order on the motion was ever received. On December 22, 2021, Petitioner filed a letter with the clerk of this court explaining that although his petition for writ of certiorari was complete, he was unsure of what to do because

he had not received an order granting the requested extension of time. Appendix N. The clerk did not respond to Petitioner's request. This petition follows:

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the United States Court of Appeals, for the Eleventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C § 2254: State custody; remedies in Federal courts

> (d) 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.

STATEMENT OF CASE AND FACTS

On February 17, 2012, the Petitioner, Jorge Nieves (hereinafter "Nieves") was arrested and charged with second degree murder after Seminole County Sheriff's deputies responded to his home and found, Karla Pagan, Nieves's paramour of five years and the mother of his son, dead in her bed with two stab wounds to her chest. Nieves was found unconscious, with a slashed neck, in the master bedroom bathroom just a few feet from Ms. Pagan's body and the presumed murder weapon, a kitchen knife. On March 15, 2012, Nieves was charged in a one count information with second degree murder, in violation of Florida Statutes §782.04(4) and §775.087(1). Appendix I at 2.

On April 23, 2012 defense attorney Doricia M. Rivas filed her notice of appearance as privately retained counsel for Nieves. On November 19, 2012, defense counsel Rivas, filed a Motion for Declaration of Immunity and Dismissal pursuant to sections 776.012 and 776.032, Florida Statutes (2012) (hereinafter "Stand-Your-Ground Motion"). Appendix H . The motion alleged the following:

> On or about February 16, 2012, the Defendant was physically attacked and injured by the deceased and alleged victim, Karla Pagan.
>
> At all times material, the Defendant used defensive force to repel Ms. Pagan's physical aggression against him.
>
> The Defendant reasonably believed that such deadly force was necessary to prevent imminent death or further great bodily harm to himself.
>
> The Defendant was lawfully present in his own home, located at 2768 Mystic Lake Drive, Unit 206, Oviedo, Florida, when he was attacked and thus had no duty to retreat therefrom.

> Based on the facts presented in the above-styled case, the Defendant asserts that he is immune from criminal prosecution pursuant to Sections 776.012 and 776.032, Florida Statutes (2012).

Appendix H. at 1.

On December 18, 2012, attorney Rivas moved to suppress statements made by Nieves to investigators during interrogation conducted while he was recovering from surgery in the Intensive Care Unit (ICU) during the evening hours of February 17, 2012. Attorney Rivas sought to preclude the use at trial of any statements made by Nieves during the ICU interrogation based on the fact that Nieves was still heavily medicated during the interview and recovering from surgery when the investigators interviewed him. Appendix I at 3.

On February 28, 2013 the trial court held a hearing on the motion. At the hearing, Nieves testified that he had no recollection of what happened during the ICU interrogation by the investigators, and that when he was interrogated he was tired, sleepy and felt under pressure. The medical records confirming the fact that Nieves had surgery on the day of the interrogation were entered into evidence Appendix I at 3-4.

Subsequent to filing those motions, attorney Rivas withdrew from the case. No hearing was ever set on the Stand-Your-Ground Motion. Attorney Rivas filed a bare bones motion to withdraw as Nieves's attorney on March 11, 2013, stating only that Nieves had not fulfilled his contractual obligations, efforts to resolve the financial issues had been unsuccessful, and as a result there were "irreconcilable differences" between retained counsel and Nieves, and Ms. Rivas wanted to withdraw. A brief hearing was held on the Motion to Withdraw on March 26, 2013.

At the end of the hearing, the trial court granted the motion to withdraw and appointed the Public Defender to assume the representation of Nieves. Appendix I at 4.

Two months later, on May 23, 2013, and just two months before Nieves's murder trial was scheduled to begin, attorney Daniel Domenick Megaro, the Assistant Public Defender assigned to represent Nieves, filed a Motion for Nelson Hearing informing the trial court that Nieves was requesting new counsel. The trial court held a very brief hearing on the Nelson Motion on June 18, 2013. At the hearing, Nieves testified that his attorney was not in agreement with his defense and "that is the disagreement that they had." The trial court denied the motion finding that the reasons indicated by Nieves were insufficient to discharge the Public Defender. Appendix I at 4-5.

According to the record and the trial transcripts, two different attorney's from the Public Defender's office were substituted late in the proceedings for Mr. Megaro, to wit, Assistant Public Defenders Timothy Caudhill and Stuart Bryson. The trial court ordered the record amended to reflect the change in Nieves's attorneys on July 15, 2013, just two days before Nieves's murder trial began. These were the attorneys who actually represented Nieves during the trial. The record is not clear when this last minute switch of the attorneys representing Nieves was made by the Public Defender's office, and how much time the new attorneys actually had to

prepare for Nieves's murder trial.[1] However, the court record shows that neither attorney requested a hearing on the Stand-Your-Ground Motion. Appendix I at 5.

On July 15, 2013, Nieves's jury was selected and sworn. The trial then began on July 17, 2013, and ended on July 18, 2013, when the jury found Nieves guilty as charged. Nieves was sentenced to forty years followed by life on probation on August 26, 2013. His conviction and sentence were affirmed on appeal. *Nieves v. State*, 162 So. 3d 1037 (Fla. 5th DCA 2014). Appendix I at 6.

According to the evidence presented at trial, Seminole County Sheriff's Office deputies were dispatched to Nieves's Oviedo apartment after his brother, Hector Nieves, called 911 and reported that he had received a call from Nieves, who told him he was going to commit suicide. Nieves had been living there with Karla Pagan, his paramour and the mother of his 4-year old son. Appendix I at 6.

The deputies met Hector Nieves at the apartment complex, and he took them to Nieves's apartment. One of the deputies, Deputy Wilcox, entered the master bedroom and saw an almost completely naked female on her back on the bed with open eyes and no pulse, and who appeared to be dead. Deputy Wilcox then saw Nieves lying on the floor in blood, blood spattered on the walls, with a laceration on his neck and puncture wounds to his chest, and a knife lying next him. Appendix I at 6-7.

---

[1] What is clear from the record is that Mr. Nieves's defense counsel presented no real defense at all, made no opening statement, hired no forensic experts, conducted perfunctory cross-examination of the few state's witnesses who were questioned at all, called one defense witness for no apparent purpose, and then conceded Mr. Nieves's guilt during what was purportedly the defense's closing arguments. Appendix I at 5, n. 4.

Nieves was taken to Orlando Regional Medical Center (ORMC), where he underwent surgery for his very serious wounds. He was interviewed the following day in the ORMC Intensive Care Unit by Seminole County Sheriff's investigators. According to the investigators, in spite of the fact that he had recently had surgery, Nieves had been "propped up" in his bed and was purportedly coherent and lucid enough to be able to talk with them. Appendix I at 7.

During the interview, Nieves remembered many of the events of the prior evening, but did not remember what happened during the alleged stabbing of Karla Pagan. Specifically, Nieves told the investigators that after returning from a recent trip to Puerto Rico, he came to believe that Karla Pagan had been unfaithful, he told her of his suspicions, and they argued. He then decided to leave the home and packed his bags. Prior to leaving he and Karla Pagan had sex, but he noticed she was distant. He then went downstairs to leave, and did not remember what happened after that. However, according to the trial testimony of the investigators, Nieves denied that Karla Pagan attacked him on the evening of the incident. Appendix I at 7-8.

According to the Medical Examiner who performed the autopsy on Karla Pagan, she died as a result of the internal injuries caused by the two stab wounds to her chest. Notably, although the Medical Examiner witness, Dr. Timothy Gallagher, testified generally about his qualifications as a forensic pathologist, the State never asked that he be qualified and allowed to testify as an expert witness on forensic pathology, nor did the State ask whether his opinion about the cause of death was

"within a reasonable degree of medical certainty." Equally notable, and unfortunate, was the lack of any objection by Nieves's newly arrived defense counsel. Appendix I at 8.

Dr. Gallagher also explained that a person holding his hand up in a defense posture would get a cut on his hand. The Doctor reviewed Defendant's Exhibit 6, a photograph taken of Nieves while he was at the hospital on February 17, 2012, and noted a laceration on the finger. The laceration on Nieves's finger was consistent with a defensive wound. Additionally, based on his training and experience, while there have been cases where people tried to commit suicide by stabbing themselves in the chest, it's a very rare occurrence; he had possibly 5 or 6 cases over the years of having done thousands of autopsies. Appendix I at 8-9.

Solach Santiago testified that Nieves was her neighbor. She recalled hearing voices from Nieves's apartment in the early morning hours of February 17, 2012. There was a female voice that was loud. She could also hear a male voice. The word sounded like "stop". Appendix I at 9.

Prior to the State resting its case, the parties were discussing jury instructions. The trial court asked defense counsel if there were any additional instructions that the defense was asking for. Defense counsel stated there was one potential additional instruction that the defense might be asking for depending upon whether or not Nieves decided to testify, and that instruction "would be self-defense." However, Nieves did not testify. Appendix I at 9.

During the sentencing hearing the prosecution specifically noted an observation in the presentence investigation report; the probation officer indicated in the report that when he went to speak with Nieves, Nieves mentioned that it was self-defense. Appendix I at 9-10.

Nieves filed a sworn *pro se* motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure ("Rule 3.850 Motion") Appendix I at 10. Rule 3.850, provides:

> (f) *Procedure; Evidentiary Hearing; Disposition* On filing of a motion under this rule, the clerk shall forward the motion and file to the court. Disposition of the motion shall be in accordance with the following procedures, which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.
>
> * * *
>
> (3) *Timely Motions Containing Some Insufficient Claims* If the motion sufficiently states one or more claims for relief and it also attempts but fails to state additional claims, and the motion is timely filed under this rule, the court shall enter a nonappealable order granting the defendant 60 days to amend the motion to sufficiently state additional claims for relief. Any claim for which the insufficiency has not been cured within the time allowed for such amendment shall be summarily denied in an order that is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.
>
> * * *
>
> (5) *Motions Conclusively Resolved by the Court Record* If the motion is legally sufficient but all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case, the motion shall be denied without a hearing by the entry of a final order. If the denial is based on the records in the case, a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief shall be attached to the final order.

See Rule 3.850(f), Fla.R.Crim.P. Ground Two alleged counsel rendered ineffective assistance for failing to file a pretrial "stand your ground" defense motion. The

failure to do so, he alleged, was unreasonable and based on a failure to understand the "stand your ground" law. Appendix I at 10.

Since privately-retained predecessor counsel Rivas had filed a Stand-Your-Ground Motion, the postconviction court reframed the claim as alleging ineffective assistance of counsel for not setting a hearing on the Stand-Your-Ground Motion and attached to its order a copy of the "Motion for Declaration of Immunity and Dismissal" filed by attorney Rivas. Appendix I at 10. The state postconviction court denied the claim, explaining:

> Despite the Defendant's claim that there was undisputed evidence of self-defense, that is not the case. ... [T]he Defendant did not testify in his defense. When he was interviewed by law enforcement, he claimed to have no recollection of the events. He did, however, tell the investigators that there had never been any physical violence between himself and the victim and **he did not recall** her hitting, cutting, punching, or kicking him before she was stabbed. There were no other eyewitnesses who could have testified about the events.
>
> The Defendant concedes in his motion that the entirety of the evidence of self-defense was the presence of what the Defendant characterizes as a defensive wound and a neighbor hearing a male voice say "stop!" during a heated argument. However, there was some question about whether the wound on the Defendant's hand was defensive or whether it was caused by his hand sliding across the blade of the knife while stabbing the victim. Similarly, the neighbor was not sure whether he actually heard the male saying to stop. As the State pointed out during cross-examination, in the context of a domestic argument, there are other reasons that a person would say stop beyond physical self-defense.
>
> Self-defense was not a viable defense in this case when considering the totality of the evidence. In light of the ambiguous testimony about the defensive wound, the ambiguous and slightly probative nature of the neighbor's testimony, at best, and the absence of any other relevant evidence supporting a self-defense claim, there is no possibility that the jury would have found the Defendant guilty of a lesser crime or acquitted him altogether if the State had not [commented during its closing rebuttal that self-defense was not an

> issue in the case.] Moreover, had counsel set a stand your ground hearing, the Defendant would have borne the initial burden of proof to establish that the use of force was justified. Bretherick v. State, 170 So. 3d 766 (Fla. 2015). Similarly, there is no possibility that he could have met his initial burden had he presented this evidence at a stand your ground hearing. "[C]ounsel cannot be deemed to be ineffective for failing to raise a motion that would have been futile." Gordon v. State, 863 So. 2d 1215, 1223 (Fla. 2003).

Appendix F at 2-3, internal citations to the record omitted. The state court denied the claim without a hearing. Nieves appealed the decision. Appendix I at 11. Rule 9.141(b), Fla.R.App.P. governs "*Summary Grant or Denial of All Claims Raised in a Motion Without Evidentiary Hearing,*" and provides in pertinent part:

> (D) *Disposition* On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.

See Rule 9.141(b)(2)(D), Fla.R.App.P.

Nieves filed a *pro se* Initial Brief in the Fifth DCA and argued the post-conviction court should have granted him an evidentiary hearing on his claim regarding counsel's failure to set a hearing on the Stand-Your-Ground Motion. The Fifth DCA affirmed (without explanation) the denial of Nieves's Rule 3.850 Motion, *per curiam,* Appendix F. Nieves's *pro se* Motion for Rehearing thereof, Appendix I at 11-12, was also denied. Appendix E.

Nieves subsequently filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Nieves raised 10 grounds for relief. In Ground Five of his petition he alleged defense counsel ineffectively failed to set a hearing on the Stand-Your-Ground Motion. The failure to do so was based on counsel's failure to understand the law. This deprived Nieves of an opportunity to have the criminal

prosecution terminated and avoid going to trial. Respondents filed its Response. Respondents argued below that Ground 5 was procedurally barred. They also argued that based upon Nieves's statement and the evidence presented at trial there was no evidence to support a Stand-Your-Ground Motion or to request a hearing on the motion filed by prior counsel. Nieves filed a *pro se* Reply to the Response to the Petition. He requested an evidentiary hearing on all material facts in dispute. The petition was denied. Appendix I at 12.

A judge of the Eleventh Circuit granted a certificate of appealability. The Order concluded: "Because Nieves-who had life-threatening injuries when admitted to the hospital-alleged a facially valid constitutional claim, under the Sixth Amendment, a COA is GRANTED on the following issue:

> Whether the district court erred in denying Nieves' Claim 5, in which he argued that his counsel was ineffective for failing to request a "stand-your-ground" hearing, on the ground that it was unexhausted and procedurally defaulted.

Appendix I at 12-13.

On appeal, a panel of the Eleventh Circuit vacated the District Judge's Order in relevant part and remanded for consideration of the merits of Nieves's Claim 5 after it determined that the district court erred in denying Ground 5 of the petition as unexhausted and procedurally barred. *Nieves v. Sec'y, Fla. Dep't of Corr.*, 770 F.Appx 520, 522 (11th Cir. 2019) (per curiam).

On remand the District Judge again summarily denied the petition. The District Judge determined that it could resolve the petition on the basis of the

record and denied Ground Five of the habeas petition without an evidentiary hearing. Appendix D at 2.

A circuit judge of the United States Court of Appeals for the Eleventh Circuit granted a certificate of appealability. Appendix C.

The United States Court of Appeals for the Eleventh Circuit entered a decision in case number 19-14302-DD on April 12, 2021, affirming the district court's judgment denying a petition for writ of habeas corpus filed in case number 6:16-cv-01258-PGB-TBS. Appendix B. A timely petition for panel rehearing and rehearing en banc was filed on June 15, 2021. That petition was denied in June 29, 2021. Appendix A.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit injected its own independent inferences and reasons into the analysis required by Title 28 U.S.C. 2254(d) to justify a finding that the State court decision was reasonable. Unlike *Harrington v. Richter*, 526 U.S. 86 (2011), which allows a federal court to imagine what reasons support a silent state court decision, *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), reaffirmed this Court's holding that "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." Id at 1192 (citations omitted). Had the Eleventh circuit constricted its § 2254(d) analysis to the specific reasons offered by the state court, it would have found the decision to be unreasonable.

I. Had The Eleventh Circuit Limited Its Analysis To The Actual And "Specific Reasons" Expressed In The State Court's Decision Without Injecting Its Own Independent Reasons Into The § 2254(d) Analysis, It Would Have Found That Petitioner Met His Burden Under § 2254(d) And Was Entitled To De Novo Review Of His Constitutional Claim.

Florida's Fifth District Court of Appeal affirmed the decision of the postconviction court without explanation. Appendix F. Therefore, the relevant decision for AEDPA analysis is that of the State postconviction court. Appendix G. See *Wilson*, 138 S.Ct at 1192. The postconviction court's decision is not entitled to deference under § 2254(d); the postconviction court concluded Nieves was not entitled to relief on his claim that trial counsel was ineffective for not setting a hearing on the Stand-Your-Ground Motion, but it is a decision that was reached only through misstating the allegations in Nieves's Rule 3.850 Motion, ignoring key

facts and unreasonably applying clearly established Federal law. Had the Eleventh Circuit limited its analysis to the actual and "specific reasons" expressed in the state court without injecting its own independent reasons into the § 2254(d) analysis, it would have found that Petitioner met his burden under § 2254(d) and was entitled to de novo review of his constitutional claim

Subsequent to her investigation, predecessor defense counsel Doricia Rivas filed a Stand-Your-Ground Motion asserting that on the day in question "[Nieves] was physically attacked and injured by the deceased", "[a]t all times material, [Nieves] used defense force to repel...physical aggression against him", and that Nieves was "lawfully present in his own home, . . . when he was attached and thus had no duty to retreat therefrom." Counsel Rivas also asserted: "Based on the facts presented in the above-styled case, [Nieves] asserts that he is immune from criminal prosecution pursuant to Section s 776.012 and 776.032, Florida Statues (2012)." Appendix H at 1. Nieves was entitled to an evidentiary hearing on theses legally sufficient allegations of immunity. *Dennis v. State,* 51 So. 3d 456, 463 (Fla. 2010). A determination of immunity from prosecution must be made *after* an evidentiary hearing on the Stand-Your-Ground Motion. *Gray v. State,* 13 So. 2d 114, 115 (Fla. 5th DCA 2009). The trial court can resolve any factual disputes regarding the defense after the hearing. *Peterson v. State,* 983 So. 2d 27 (Fla. 1st DCA 2008)).

In rejecting Nieves's ineffective-trial-counsel claim, the postconviction court ignored numerous critical facts in concluding that Nieves would not have borne the initial burden of proof to establish that the use of force was justified. Appendix G at

3. Failing to consider the fact specific allegations in the Stand-Your-Ground Motion and other material facts and evidence in the record was an unreasonable determination of the facts.

In denying Nieves's claim, the postconviction court found: "The Defendant **concedes** in his motion that the entirety of the evidence of self defense was the presence of what the Defendant characterizes as a defense wound and a neighbor hearing a male voice say 'stop!'" Nieves made no such concession in his motion and he did not otherwise restrict the factual predicate of his claim to that evidence. To the contrary, he requested an evidentiary hearing. After the postconviction court incorrectly concluded the entirety of the evidence of self-defense was the defendant-characterized defensive wounds and the neighbor's testimony, it leaped to the conclusion that there is no possibility that Nieves could have met his initial burden of proof had he presented "this" evidence at a stand your ground hearing. The state court decision was unreasonable because it mischaracterized the factual predicate for Nieves's immunity claim and then resolved the merits of Nieves's claim based on its mischaracterization. See *Riechmann v. Fla. Dept. of Corr.*, 940 F.3d 559, 574, (11th Cir. 2019)("As to deficient performance, Reichmann correctly notes that the Florida Supreme Court appears to have somewhat mischaracterized the basis for his ineffective assistance claim in its deficiency ruling.").

The postconviction court also disregarded material facts and evidence in the record. First, although Nieves and defense counsel Caudill had disagreement about the defense, Nieves mentioned that it was self-defense. Second, the postconviction

court attempted to isolate and neutralize the trial evidence that would support Nieves's Stand-Your-Ground Motion. For example, it explained the defensive wound to Nieves's hand could have also come from slippage during an attack on the alleged victim and when the neighbor heard Nieves say "stop", it could have been for a reason beyond physical self-defense. Third, the postconviction court also failed to mention that Nieves had a stab wound to his chest.

The postconviction court also noted Nieves's statement that he did not recall the decedent physically attacking him and that he blacked out and lacked memory of portions of the events. The Eleventh Circuit referenced the state court's "notation," but that notation is not a factual finding that Nieves in fact lacked memory of the incident. Appendix K at 8-9. Therefore, there is no a factual determination on the issue that is due AEDPA deference or a presumption of correctness. Although he "**did not recall**" any such attack during his post-surgery ICU interrogation, Mr. Nieves made those statements while still in ICU shortly after having had surgery under general anesthesia. As pointed out by appellate counsel, "[i]t is common knowledge that general anesthesia causes post-surgery confusion and temporary memory loss[2].". Therefore, Nieves's statements, taken while he was in the intensive care unit "[t]ired, sleepy, and under pressure", does not disentitle him to relief. The trial court was free to resolve factual disputes at the Stand Your Ground hearing. *Peterson*, 983 So. 2d at 29. In other words, the trial

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[2]: "Once again, Mr. Nieves's court appointed trial counsel presented no expert testimony on the effect of anesthesia at the trial that would explain what no doubt otherwise appeared to be a self-serving convenient selective memory lapse[.]"

court could have found that based on his injuries, Nieves in fact was physically attacked by the decedent regardless of his memory at the time of the post-surgery interview. See e.g. *Bolduc v. State*, 279 So. 3d 768, 771 (Fla. 2nd DCA 2019) (The defendant denied involvement in any criminal activity, but the fact finder need not believe every part of his story in order to conclude that his use of force was justified.).

There is other evidence in the record that conflicts with the lack of memory theory. It is not likely that two different attorneys independently identified a factual claim of self-defense if Nieves could not recall specific facts in support of that defense since there were no eyewitnesses to the event. Not only was Nieves's specific factual claim of self-defense acknowledged in November of 2012 through attorney Rivas's written motion, but also in July of 2013, through attorney Caudill's dialog with the trial judge. The record is clear that at least two different attorneys representing Nieves at two different times in two different stages of the trial court proceedings were both independently aware of his factual claim of self-defense so Nieves must have been able to recall and discuss the facts surrounding Ms. Pagan's death. In addition to this, the prosecutor's acknowledgement at sentencing that Nieves reported it was self-defense.

The postconviction relied exclusively on the evidence presented at Nieves's trial to resolve his collateral claim. This was obvious error for two reasons. First, the record shows there was evidence to support a self defense claim that was not presented at trial, namely Nieves's testimony. Trial counsel anticipated that

Nieves's testimony would have been sufficient to justify the trial court instructing the jury on self-defense. Just because the trial defense was not self-defense does not mean Nieves did not have a viable claim for immunity. Second, the court ignored the fact specific allegations in the Stand-Your-Ground Motion.

Nieves's pretrial defense (presented to a judge via his immunity motion) would not have excluded his trial defense (presented to the jury). "A defendant may raise the question of statutory immunity **pre-trial** and, when such claim is raised, the court must determine whether the defendant has shown by a preponderance of the evidence that immunity attaches." Appendix H at 2. Cf. *Peterson*, 983 So. 2d at 30, approved by *Dennis*, 51 So. 3d at 463.

The postconviction court ignored relevant evidence, facts and the law such as Nieves's statement of self-defense, the injuries he sustained, which included a stab wound to his chest, and the factual allegations asserted in the Stand-Your-Ground Motion. The state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). A state court's decision is an "unreasonable determination of the facts" where that decision "ignore[s] highly probative and material evidence or where reasonable minds could not disagree that the trial court misapprehended or misstated material aspects of the record in making its findings." *Cordoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2013).

To hold that Nieves's Stand-Your-Ground Motion would not have prevailed at a hearing required the court to ignore everything except the prosecutor's theory.

"There were no eyewitnesses" Nieves reported that he acted in self-defense. Based upon her familiarity with the facts and the immunity motion that she filed, attorney Rivas concluded that there was a nonfrivolous claim of justifiable use of force[3]. Based upon his familiarity with the facts and possible presentation of Nieves's testimony which would require an instruction on self-defense, attorney Caudill concluded there was a nonfrivolous claim of self-defense[4]. Thus, it was unreasonable to conclude, based on the trial evidence alone, that Nieves had not demonstrated a reasonable probability that he would have been awarded immunity had counsel requested the evidentiary hearing.

II. The Decision Of The Eleventh Circuit Is In Direct Conflict With This Court's Precedent Which Requires A Federal Court To Analyze The "Specific Reasons" Of The State Court Decision When Applying § 2254(D).

The Eleventh Circuit went well beyond analyzing the specific reasons given by the postconviction court and conflated the analysis required by § 2254(d) with independent analysis of Petitioner's claim. Section 2254(d) provides that the federal court is to review the state court "decision" that rejected the claims now advanced in the habeas corpus petition, rather than adjudicating those claims independently of the state court decision. *Wilson*, 138 S.Ct. at 1192. In this way, section 2254(d)

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[3]: See Rules Regulating the Florida Bar 4-3.1(A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous..."); see also Rules Regulating the Florida Bar 4-3.3(a)(1) ("A lawyer shall not knowingly: make a false statement of fact or law to a tribunal...").

[4]: Rules Regulating the Florida Bar 4-3.3(a)(4)("A lawyer shall not knowingly: offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false...A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.").

eliminates the prior rule of adjudication *de novo* and makes the state court "decision" —rather than petitioner's "independent complaint"— a primary focus of federal review. See *Id.*; *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (section "2254(d)(1) requires federal courts to 'focu[s] on what the state court knew and did' "); *Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("The pivotal question [in federal habeas review of ineffective assistance claim in case governed by AEDPA] is whether the state court's application of the *Strickland [v. Washington]* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United Stated District Court. Under AEDPA, though, it is a necessary premise that the two questions are different."); *Jackson v. Coalter*, 337 F.3d 74, 83 (1st Cir. 2003) ("On habeas review, the AEDPA requires us to focus our attention on the state court's analysis.").

A. The Eleventh Circuit violated the reaffirmed rule that AEDPA review requires it to analyze the "specific reasons" expressed in the state court decision.

The Eleventh Circuit injected its own independent inferences and reasons into the § 2254(d) analysis to justify a finding that the State court decision was reasonable. Unlike *Harrington v. Richter*, 526 U.S. 86 (2011), which allows a federal court to imagine what reasons support a silent state court decision, *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), reaffirmed this Court's holding that "a federal

habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." Id at 1192 (citations omitted).

The Eleventh Circuit's prejudice analysis went beyond the postconviction record and the reasons expressed in the state court decision. Although the state court ignored and did not discuss evidence that Nieves was stabbed in the chest, the Eleventh Circuit reasoned that those "small puncture wounds" were insufficient to establish that he acted in self-defense given the hypothetical testimony regarding suicide. Appendix B at 12. The state court offered no such reasons to summarily deny Nieves's claim. Even if the Eleventh Circuit disagrees with medical staff's description of the stab wounds to Nieves's chest as "acute" Appendix L at 12, Florida's substantive law did not require him to suffer any injuries to claim immunity. The statute focuses instead on whether he "reasonably believed" that using force was necessary to protect himself. See § 776.012(2), Florida Statutes. Appendix K at 18-19. There was no testimony that Nieves stabbed himself in the chest and the Eleventh Circuit overlooked or ignored expert testimony that it was both unlikely and "very rare" that someone would attempt suicide in that manner.

The Eleventh Circuit twice made reference to Nieves's failure to indicate that he had additional evidence (1) to show his wounds were defensive and (2) to contradict his statement that he did not recall the incident. Appendix B at 13, 14. The Eleventh Circuit also faulted Nieves for (1) not providing evidence to corroborate the allegations in the immunity motion and (2) not providing evidence to show that he did recall the incident. Appendix B at 14 n.7. The postconviction

court did not deny Nieves's claim for any of these reasons. The state postconviction court would have known that Nieves had no obligation to make additional allegations or produce evidence to avoid summary judgment[5]. See *Davis v. State*, 26 So. 3d 519, 522 (Fla. 2009); *Simon v. State*, 997 So. 2d 490, 491-92 (Fla. 4th DCA 2008). It was entirely improper for the Eleventh Circuit to inject its own reasons into the AEDPA analysis to find the state court's decision reasonable because it relieved the postconviction court of its obligation to assemble a record that conclusively shows Nieves is entitled to no relief. See . *Ciambrone v. State*, 128 So. 3d 227, 234 (Fla. 2nd DCA 2013). Appendix K at 19-20. By injecting its own reasons into the AEDPA analysis, the Eleventh Circuit prematurely decided the substantive merits of Nieves's claim on an undeveloped record.

III. The Eleventh Circuit Failed To Analyze The Procedural Aspect Of The State Court's Decision And Instead Focused On The Substantive Merits Of The Factually Undeveloped Constitutional Claim. This Allowed The Eleventh Circuit To Bypass Addressing The Dispositive Issue, Which Is Whether The State Court's Procedural Ruling Rendered Its Ultimate Factual Findings Unreasonable Under §2254(d)(2).

Rather than ask whether Nieves proved his immunity motion would have been granted, the Eleventh Circuit should have asked whether the state court met its burden to assemble a record that "conclusively" proves Nieves is entitled to no relief, for this is what Florida's law requires. See *Ciambrone*, 128 So. 3d at 234. Thus, the dispositive question under AEDPA is whether the state court's decision not to hold an evidentiary hearing rendered its factual findings unreasonable.

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[5]: If the postconviction court believed Nieves's claim was legally insufficient, it would have been obligated to employ Florida's prophylactic rule and give him an opportunity to cure that defect. Rule 3.850(f)(3), Fla.R.Crim.P.

A. Review under Florida Court Rules 3.850(f)(5) and 9.141(b)(2)(D) is as much procedural as it is substantive.

At the pleading stage, the burden to produce evidence to show the defendant is not entitled to relief falls on the court. Rule 3.850(f)(5), Fla.R.Crim.P. At the evidentiary hearing, the burden to produce evidence to prove an entitlement to relief falls on the defendant. Rule 3.850(f)(8)(D), Fla.R.Crim.P. At the pleading stage, "examination of the record will ordinarily come only after a claim is found to be facially sufficient, and the purpose of that examination will be solely to determine whether the record conclusively refutes the claim." *Jacobs v. State*, 880 So. 2d 548, 550, 551 (Fla. 2004)). The First DCA also explained:

> When an order summarily denying a 3.850 motion without a hearing is appealed, ...review in such cases is as much procedural as substantive in nature, similar to reviewing orders dismissing complaints or granting summary judgment.

Thames v. State, 545 So. 2d 1061, 1065 (Fla. 1st DCA 1984). The "decision whether to grant an evidentiary hearing on a rule 3.850 motion is ultimately based on written materials before the court." *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011).

A determination of immunity from prosecution must be made *after* an evidentiary hearing on the Stand-Your-Ground Motion, which permits the trial court to resolve any factual dispute. *Gray*, 13 So. 2d at 115. *Peterson*, 983 So. 2d at 29. The evidence ignored by the postconviction court —the factual allegations in the immunity motion, stab wounds to Nieves's chest, and his statement and potential testimony establishing a factual claim of self-defense— create factual disputes

regarding the issue of prejudice. On these facts, the postconviction record does not support summary judgment.

B. The § 2254(d) analysis must focus on the procedural aspect of the state court decision.

Since the postconviction court implicitly determined that Nieves claim could be resolved without an evidentiary hearing, the Eleventh Circuit should have decided whether the failure to grant that hearing was reasonable.

> AEDPA requires us "to evaluate whether the Court of Criminal Appeals's determination that [Mr. Daniel's] relevant ineffective assistance of counsel claims were due to be dismissed for failure to state a claim with sufficient specificity under Rule 32.6(b) was 'contrary to, or involved an unreasonable application of, clearly established Federal law,'" Borden, 646 F.3d at 817-18 (quoting 28 U.S.C. § 2254(d)(1)), or whether it "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)(2).

Daniels v. Commissioner, Alabama, DOC, 822 F.3d 1248, 1261 (11th Cir. 2016). To resolve the appeal, the court considered the state court procedural rule to frame the relevant issues. First, whether the Rule 32 petition pleaded enough facts that, if proven, amount to a valid IAC claim. Second, if so, whether the state court decision to the contrary was unreasonable under § 2254(d). *Id.*

In *Wolf v. Sec'y, Dep't of Corr.*, 2008 US Dist LEXIS 18119 (M.D. Fla. March 10, 2008), the defendant appealed the denial of his IAC claim and argued that the state trial court erred in summarily denying his claim without conducting an evidentiary hearing. The district court first explained Florida's procedural law for obtaining an evidentiary hearing on a rule 3.850 motion then concluded that Wolf's

claims were indeed conclusively refuted by the record such that he was not entitled to an evidentiary hearing in state court.

By first resolving the question of whether the postconviction court met its burden to assemble a record that conclusively establishes that an evidentiary hearing was unnecessary, the Court would be addressing the precise question that was adjudicated in the state court. See Fla. R. Crim. P. 3.850(f)(5); and Fla. R. App. P. 9.141(b)(2)(D). And it is on this question that § 2254(d) applies.

C. The Eleventh Circuit can and should have decided whether the state court unreasonably denied an evidentiary hearing rather than focus on the substantive merits of an undeveloped constitutional claim.

The Eleventh Circuit should have decided whether the state court's procedural ruling infected the fact finding process on the substantive merits of his claim. That is because Nieves's postconviction appeal was limited to arguing that he was entitled to an evidentiary hearing[6]. Such an argument is sufficient to exhaust the claim for federal review even if the appeal does not argue the substantive merits of the claim. See *Henry v. Secretary, Dept. of Corr.*, 197 F.3d 1361 (11th Cir. 1999); *Nieves*, 770 F.Appx at 521 (reiterating: "Florida's Rule 3.850 provided that the trial judge determine how much procedural attention a Rule 3.850 motion warrants."). The procedural process through which a court makes a substantive determination

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[6]: In Florida, an evidentiary hearing is presumed necessary, *Nolan v. State*, 794 So. 2d 639, 641 (Fla. 2nd DCA 2001), and is required when a factual dispute exists. *Louis v. State*, 143 So. 3d 452, 453 (Fla. 5th DCA 2014). The court cannot rely on suspicion and assumption to deny an evidentiary hearing. See *Snodgrass v. State*, 278 So. 3d 890, 893 (Fla. 1st DCA 2019); and *Livingston v. State*, 279 So. 3d 228, 230 (Fla. 1st DCA 2019). Due process requires a hearing on a rule 3.850 motion unless the files and records conclusively show the defendant is entitled to no relief. *Rivera v. State*, 984 So. 2d 574, 574 (Fla. 5th DCA 2008).

influences the reasonableness of the substantive determination itself. See *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018).

If the state court makes an evidentiary finding without holding a hearing and giving petitioner an opportunity to present evidence, the Ninth Circuit has concluded that "such findings clearly result in an 'unreasonable determination' of the facts." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004), abrogated in part on other grounds by *Cullen v. Pinholster*, 563 U.S. 170, 210-12 (2011). The Tenth Circuit agreed "that when a state court denies a request for an evidentiary hearing and then makes factual determinations, the failure to hold a hearing can, in limited circumstances, render the court's subsequent factual findings unreasonable." See *Smith*, 904 F.3d at 882. However, "a state court's decision not to hold an evidentiary hearing only renders its factual findings unreasonable in this context if all '[r]easonable minds' agree that the state court needed to hold a hearing in order to make those factual determinations." *Id.* 904 F.3d at 883 (citing *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015)).

The state court needed to hold a hearing to make a factual determination that Nieves could not meet his burden of establishing that he is entitled to immunity under §§ 776.012 and 776.032(1), Florida Statutes. That is because the record supports varying inferences that do not conclusively exclude the possibility that Nieves acted in self defense. Cf. *Heare v. State*, 283 So. 3d 390, 394 (Fla. 2nd DCA 2019) ("Our record is not clear on which of these possibilities is really true."). This same analogy applies under § 2254(d). If the record evidence "equally

support[s]" the state courts factual findings and the habeas petitioner's claim, then the state court's factual findings made without the benefit of holding an evidentiary hearing should be considered unreasonable. *Smith*, 904 F.3d at 883.

The Eleventh Circuit concluded that the state court finding that Nieves failed to prove prejudice was a reasonable determination of the facts. Appendix B at 11. Actually, that is not what the postconviction court held. The specific reason the postconviction court offer to support its implicit holding that Nieves's claim is refuted by the record is that "there is no possibility that [Nieves] could have met his initial burden **had he presented this evidence** at a stand your ground hearing." Appendix G at 3, bold print added. The postconviction court's prejudice holding was conditional because it was limited to the evidence mentioned in the Order.

Because the state court decision was based on "this evidence," the Eleventh Circuit should not have overlooked or ignored the fact that the postconviction court mischaracterized the facts alleged in Nieve's rule 3.850 motion when it made a finding that Nieves "conceded" that the entirety of the evidence to support the immunity claim was the defendant-characterized defensive wounds and the neighbor's testimony. Appendix I at 21-22. Even if he only referred to two pieces of evidence, as the Eleventh Circuit Found, Appendix B at 11, he did not "concede" that it represented the total evidence to support his claim nor did he expressly restrict the factual predicate of his claim to that evidence. "[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's

claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. See, e.g., *Wiggins*, 123 S. Ct. at 2538-39" *Taylor*, 366 F.3d at 1001.

By restricting the factual basis of his claim, the state court failed to consider and weigh other relevant evidence, such as the immunity motion and the specific factual statements made therein, that was properly before the court and part of the state-court record. The immunity motion details the basis of his immunity claim. That evidence is corroborated by trial counsel's representations to the trial judge, Nieves's statement to the probation officer, and the stab wounds to his chest. This evidence was highly probative and central to Nieves's claim at the pleading stage for the purpose of defeating summary judgment and the postconviction court would not have erred in considering it for that purpose. For example, in *Cohens v. State*, the defendant alleged in his rule 3.850 motion that counsel ineffectively failed to present a specific alibi witness. His motion did not detail what the witness would have testified to. *Id.*, 775 So. 2d 336, 337 (Fla. 2nd DCA 2000). The trial court denied relief on the basis that the claim was facially insufficient. *Id.* The appellate court reversed. It held the claim was neither legally insufficient nor conclusively refuted by the record because the notice of alibi provided sufficient information to establish that if the witness testified as indicated in the notice, counsel's omission "may" have constituted ineffective assistance. The immunity motion was sufficient to defeat summary judgment because Nieves "was not required to prove he was prejudiced at the pleading stage" under Rule 3.850. *Daniels*, 822 F.3d 1274.

Although the Eleventh Circuit characterized the significance of the stand-your-ground immunity motion as mere "cursory factual allegations," Appendix B at 14, the state court made no such finding with regard to the legally sufficient unopposed motion. This record evidence (the stand-your-ground motion) was sufficient to support Nieves's claim at the *pleading* stage, especially in the context of Nieves's potential testimony, the statement he made to the probation officer, and his documented injuries. Cf. *Cohens,* 775 So. 2d at 337. At the pleading stage, the factual allegations made in counsel's motion and trial counsel's verbal representations to the trial court should have been given greater weight because there is absolutely no evidence that they were made without a basis in fact or law or in bad faith. See Rules Regulating the Florida Bar 4-3.1, 4-3.3(a)(1); and 4-3.3(a)(4).

CONCLUSION

The Court should grant certiorari because the decision of the Eleventh Circuit conflicts with this Court's precedent that requires the Federal court to analyze the "specific reasons" expressed in the state court decision and because ensuring accurate judicial inquiry into the procedural aspect of the state court decision presents a question of exceptional importance. Petitioner prays this Court grant this petition for writ of certiorari.

Respectfully submitted,

Date: March 21, 2022.

JORGE NIEVES, DC# E49280
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JORGE NIEVES – Petitioner

vs.

RICKY DIXON, – Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,836 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 21 2022.

JORGE NIEVES, DC# E49280
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14302-DD

JORGE NIEVES, JR.,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before BRANCH, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14302
Non-Argument Calendar

D.C. Docket No. 6:16-cv-01258-PGB-TBS

JORGE NIEVES, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 12, 2021)

Before BRANCH, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Appendix B

Jorge Nieves, Jr., a Florida prisoner proceeding *pro se*, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. We granted a certificate of appealability ("COA") on the issue of whether Nieves's "trial counsel was ineffective for failing to set an evidentiary hearing on Mr. Nieves's stand-your-ground motion." After careful review, we affirm the district court's denial of Nieves's § 2254 petition.

I. Background

In 2012, Florida law enforcement responded to Nieves's apartment and found Karla Pagan, Nieves's girlfriend and the mother of his child, stabbed to death. Nieves was found unconscious a few feet away with a laceration across his neck and a knife lying next to his body. Nieves was ultimately arrested and charged with the second-degree murder of Pagan, in violation of Florida Statute §§ 782.04(2), 775.087(1)(A). Thereafter, Nieves, through retained counsel, filed a "motion for declaration of immunity and dismissal," pursuant to Florida's "stand-your-ground law," Florida Statute §§ 776.012, 776.032(1) (2012).[1] Nieves alleged that he was immune from prosecution because (1) Pagan physically attacked and

[1] At the time of Nieves's trial, Florida law provided that "a person is justified in the use of deadly force and does not have a duty to retreat if . . . [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony." Fla. Stat. § 776.012 (2012). Section 776.032 further provided that "[a] person who uses force as permitted in s. 776.012 . . . is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer . . . ." *Id.* § 776.032(1) (2012).

injured him in his home; (2) he "used defensive force to repel [her] physical aggression against him"; and (3) he "reasonably believed that such deadly force was necessary to prevent imminent death or further great bodily harm to himself."

Several months later, Nieves's retained counsel moved to withdraw from representation, citing "irreconcilable differences" and Nieves's failure to fulfill the agreed-upon contractual obligations. The trial court granted counsel's motion following a hearing and appointed new counsel. Thereafter, a few days prior to trial, two new attorneys from the Public Defender's Officer were substituted for Nieves's appointed counsel. It is undisputed that none of the attorneys requested an evidentiary hearing on the previously filed stand-your-ground motion, and the trial court never ruled on the motion. Following a trial, the jury convicted Nieves as charged, and he was sentenced to 40 years' imprisonment. Nieves appealed his conviction, and the Florida Fifth District Court of Appeal ("DCA") summarily affirmed. *Nieves v. State*, 162 So. 3d 1037 (Fla. 5th DCA 2014) (unpublished table decision).

Subsequently, Nieves filed a *pro se* motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, arguing in relevant part that his trial counsel rendered ineffective assistance by failing to file a stand-your-ground motion based on the "undisputed evidence of defense wounds justifying a use of force." Nieves requested an evidentiary hearing on this claim,

noting that "the determination [of] whether defense counsel['s] action(s) were tactical is a conclusion best made by the trial judge following [an] evidentiary hearing."

Because a stand-your-ground motion had been filed, the state postconviction court reframed the issue as alleging ineffective assistance for failure to set a hearing on the motion. The state court then denied the claim on the merits without an evidentiary hearing, noting that this was "not a case" of "undisputed evidence of self-defense" because Nieves did not testify at trial and there were no other eyewitnesses, and Nieves lacked any recollection of the incident when interviewed by police. The state court noted that the only evidence Nieves cited in support of his claim was that he had a defensive wound on his hand and a neighbor's testimony that he heard a male voice say "stop!" during what sounded like a "heated argument." However, based on testimony at trial, there was some question about whether the wound on Nieves's hand was in fact defensive, and the neighbor testified she was "not sure whether [s]he actually heard the male saying to stop." Further, "[a]s the State pointed out during cross-examination [of the neighbor], in the context of a domestic argument, there are other reasons that a person would say to stop beyond physical self-defense." Thus, given the limited and ambiguous evidence concerning self-defense, the state post-conviction court concluded that, even if counsel had set a hearing on the stand-your-ground motion, there was "no

possibility" that Nieves could have met his burden of proving that the use of force was justified. Nieves appealed, arguing that he should have been granted an evidentiary hearing on the issue of his counsel's ineffective assistance with regard to the stand-your-ground motion, and the Fifth DCA summarily affirmed without a written opinion. *See Nieves v. State*, 189 So. 3d 796 (Fla. 5th DCA 2016) (unpublished table decision).

Nieves then filed a *pro se* § 2254 petition in the United States District Court for the Middle District of Florida, arguing that his trial counsel was ineffective for failing to request an evidentiary hearing on the stand-your-ground motion. Initially, the district court denied the claim as unexhausted and procedurally defaulted, concluding that Nieves failed to properly raise the substantive claim in his appeal from the denial of his Rule 3.850 motion. We granted a COA on the issue of whether the district court erred in concluding the claim was unexhausted and procedurally defaulted, and we reversed and remanded for the district court to consider the issue on the merits, holding that the claim "was fairly presented and exhausted in state court." *Nieves v. Sec'y, Fla. Dep't of Corr.*, 770 F. App'x 520, 522 (11th Cir. 2019).

On remand, the district court denied the claim on the merits, concluding that the state court's decision was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts because, as the

state postconviction court found, Nieves could not demonstrate prejudice because of the insufficient evidence of self-defense. The district court denied a COA and Nieves moved for a COA in this Court. We granted a COA on the issue of "[w]hether trial counsel was ineffective for failing to set an evidentiary hearing on Mr. Nieves's stand-your-ground motion." This *pro se* appeal followed.[2]

II. Discussion

On appeal, Nieves argues that had his trial counsel moved for an evidentiary hearing on his stand-your-ground motion, the motion would have been granted and the criminal prosecution terminated. Nieves contends that the state postconviction court's decision is not entitled to deference because it misstated the allegations in his Rule 3.850 motion, disregarded key facts in determining that he could not meet his burden of proof with regard to the stand-your-ground motion, and unreasonably applied clearly established federal law. Specifically, Nieves argues that he never conceded in his state postconviction proceedings that the only evidence of self-

[2] In a footnote of his *pro se* initial brief, Nieves requests that counsel be appointed to represent him in this appeal and be permitted to file supplemental briefing. There is no constitutional right to counsel in federal habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). However, counsel may be appointed for a financially eligible person in a habeas proceeding if "the interests of justice so require." *See* 18 U.S.C. § 3006A(a)(2). Here, appointment of counsel is not required in the interests of justice. Nieves's appeal involves one issue, and the facts in the record appear to be fully developed and straightforward. The appeal does not appear to present novel legal issues, and Nieves has demonstrated in his *pro se* briefs that he is capable of adequately presenting the essential merits of his position. *See Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) (explaining that the key consideration in determining whether to appoint counsel in a civil case "is whether the pro se litigant needs help in presenting the essential merits of his . . . position to the court"). Accordingly, we deny Nieves's request for appointment of counsel.

defense was an alleged defensive wound and a neighbor hearing a male voice saying "stop"; rather, he requested an evidentiary hearing in the state postconviction court on his claim so that he could further demonstrate the basis of his claim. Nieves further maintains that, in denying his claim, the state postconviction court disregarded: (1) the fact that he was admitted to the hospital with a life-threatening injury and that his statement to police, in which he lacked memory of the victim attacking him, was taken shortly after he underwent surgery and general anesthesia; (2) his potential testimony which could have supported his claim of self-defense; and (3) the specific allegations in his stand-your-ground motion which supported his claim. Because he maintains that the state court's decision is not entitled to deference, he argues that we should remand the case so that the district court may conduct an evidentiary hearing and consider his claim *de novo*.[3]

We review the district court's denial of a § 2254 habeas petition *de novo*. *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1146 (11th Cir. 2018). Yet the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) also

[3] Pursuant to *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), a § 2254 petitioner is precluded from receiving an evidentiary hearing in the district court on a claim that was adjudicated on the merits by a state court, unless he *first* demonstrates an entitlement to relief under § 2254(d)—meaning that the petitioner must demonstrate the state court's decision was (1) contrary to, or an unreasonable application of, clearly established federal law, or (2) based on an unreasonable determination of fact on the part of the state court.

governs this appeal, which establishes a "highly deferential standard for evaluating state-court rulings, [and] demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)). Thus, under AEDPA, our review of a final state habeas decision is greatly circumscribed, and where a state court has adjudicated a claim on the merits,[4] a federal court may grant habeas relief only if the decision of the state court:

> (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)(1)–(2).

"[C]learly established law" under § 2254(d) refers to the holdings of the Supreme Court at the time of the relevant state court decision. *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004). "A state court acts contrary to clearly established federal law if it confronts a set of facts that are materially

[4] Because the Fifth DCA affirmed the postconviction court's decision denying Nieves's ineffective-assistance claim without explaining its reasoning, we "look through" to the last reasoned decision and assume that the Fifth DCA adopted that reasoning. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that when the final state court to adjudicate the merits of a petitioner's claim simply affirms or denies a lower court's decision without explaining its reasoning, the federal habeas court should "look through" to the last reasoned state court decision and assume that the unexplained decision adopted that reasoning).

indistinguishable from a decision of the Supreme Court of the United States and nevertheless arrives at a result different from its precedent." *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quotation omitted). A state court's decision is based on an unreasonable application of clearly established federal law if it "identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Id.* (quotation omitted). To be clear, the state court's application of federal law "must be 'objectively unreasonable.' This distinction creates 'a substantially higher threshold' for obtaining relief than *de novo* review." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotation omitted); *White v. Woodall*, 572 U.S. 415, 419 (2014) (explaining that, for purposes of § 2254(d)(1), the state court's application of clearly established federal law must be "'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003))). "A state court's application of federal law is not unreasonable so long as fairminded jurists could disagree on the correctness of the state court's decision." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1312 (11th Cir. 2015) (quotation omitted).

To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the

deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Failure to establish either the deficient performance prong or the prejudice prong is fatal and makes it unnecessary to consider the other. *Id.* at 697. Further, "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quotations omitted).

To be clear, "whether defense counsel's performance fell below *Strickland*'s standard" is not the question before a federal habeas court reviewing a state court's decision under § 2254. *Id.* at 101. Accordingly, where, as here, "§ 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether *there is any reasonable argument that counsel satisfied Strickland's deferential standard.*" *Id.* at 105 (emphasis added). With these principles in mind, we turn to Nieves's claim.

At the time of Nieves's trial in 2013, when a defendant raised a question of immunity from criminal prosecution under Florida's stand-your-ground law, the defendant bore the burden of proving at a pretrial evidentiary hearing entitlement

to immunity under the statute by a preponderance of the evidence.[5] *Bretherick v. State*, 170 So. 3d 766, 775 (Fla. 2015). Thus, had Nieves's counsel pursued such a hearing, Nieves would have borne the burden of establishing by a preponderance of the evidence that he was entitled to immunity under the statute. *Id.*; *see also* Fla. Stat. §§ 776.012, 776.032(1) (2012).

The state court concluded that Nieves could not meet this burden given the facts of this case, and, therefore, he did not suffer any prejudice from his counsel's failure to pursue an evidentiary hearing. Nieves has failed to establish that the state court's denial of his claim was contrary to, or an unreasonable application of, *Strickland* or based on an unreasonable determination of the facts.[6] Specifically, in his Rule 3.850 motion for postconviction relief, Nieves referred to only two pieces of evidence in support of his claim—the "undisputed" evidence that he suffered defensive wounds and the testimony from his neighbor that, around the time of the incident, she heard a male voice yell stop. As the state postconviction court found,

[5] In 2017, Florida Statute § 776.032 was amended to provide that "[i]n a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof *by clear and convincing evidence* is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1)." Fla. Stat. § 776.032(4) (2017) (emphasis added).

[6] To the extent that Nieves argues that the state postconviction court erred in failing to address the deficient performance prong, his argument fails because *Strickland* makes clear that a court need not address both prongs. *Strickland*, 466 U.S. at 687.

this evidence was far from "undisputed" and was insufficient to establish by a preponderance of the evidence his entitlement to immunity under the statute.

First, as the state court noted, it was not "undisputed" that Nieves's wounds were defensive. Rather, when presented with pictures of a cut on Nieves's finger during cross-examination, the medical examiner gave no definitive testimony concerning the cause of the cut on Nieves's finger, noting only that he could not tell from the pictures provided to him which hand or finger was cut. The medical examiner explained that if the cut was on Nieves's pinkie it would be more consistent with a defensive wound, but if the cut was on Nieves's forefinger, it would be more consistent with his hand slipping on the knife handle as he stabbed the victim. Additionally, there was no evidence presented that the wound to Nieves's neck was defensive, and testimony established that the police responded to Nieves's home after his brother called 911 to report that Nieves had called him and had stated that he was going to commit suicide. Likewise, the small puncture wounds on Nieves's chest were insufficient to establish by a preponderance of the evidence that he acted in self-defense, particularly in light of the medical examiner's trial testimony that there are instances in which a suicidal person inflicts stab wounds to his chest as he "builds up the courage" to increase the depth of the wound and inflict a fatal blow. Accordingly, although Nieves argues that the evidence that his wounds were defensive was "undisputed," his contention is

undermined by the record, and he has not indicated that he had any additional evidence that he would have presented at an evidentiary hearing on his stand-your-ground motion that tended to show by a preponderance of the evidence that the wounds were in fact defensive as opposed to possibly self-inflicted.

Second, with regard to the neighbor's testimony, as the state court noted, while perhaps slightly probative of self-defense, it was insufficient to meet Nieves's burden. Nieves's neighbor testified that her apartment was next door to Nieves's and Pagan's apartment. In the early morning hours of the day of the incident, she heard loud voices coming from Nieves's apartment. At one point she thought she head the male voice say what "sounded like stop, but it was incomplete." She confirmed that she did not hear anything else "immediately after that." On cross-examination, she admitted that she had no idea why the male voice was saying stop, and acknowledged that during a domestic argument, a person could say stop for any number of reasons. Thus, as the state court found, the neighbor's testimony was ambiguous and was insufficient, even when combined with the evidence concerning Nieves's wounds, to establish his entitlement to immunity under the statute.

Third, as the state court noted, Nieves told the officers that he had no recollection of the incident, did not remember Pagan hitting him or attacking him, and that there was no history of physical violence between them. Although Nieves

now suggests on appeal that his statement should be given less weight because he made that statement shortly after undergoing surgery and general anesthesia, he has not indicated that he would have presented any evidence at an evidentiary hearing on his stand-your-ground motion that would have contradicted his statement that he did not recall the incident.[7]

Finally, to the extent that Nieves argues that the cursory factual allegations in his stand-your-ground motion—that he was physically attacked and injured by Pagan—would have entitled him to pretrial immunity along with his potential testimony, he provided no evidence to corroborate those allegations, nor has he alleged what his potential testimony at a stand-your-ground hearing would have revealed.

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[7] Moreover, we note that, prior to the trial, Nieves unsuccessfully moved to suppress his statement to the police, arguing in part that it was not voluntary because he was under the influence of post-surgical medications. The trial court denied the motion, noting that Nieves was questioned several hours after surgery, had not received any medications in at least four hours, and appeared lucid, "coherent, forthcoming and responsive during questioning." Thus, Nieves's statement was properly before the court, and the state postconviction court did not err in considering it when assessing whether Nieves could establish that he was prejudiced by his counsel's failure to pursue an evidentiary hearing on Nieves's stand-your-ground motion.

To the extent that Nieves argues that his statement that he had no recollection of the incident is refuted by the cursory allegations in the stand-your-ground motion itself and his potential testimony, Nieves provided no other evidence to corroborate those allegations. It was Nieves's burden to establish that he was prejudiced by counsel's failure to pursue an evidentiary hearing on the stand-your-ground motion, and it would have been Nieves's burden to establish his entitlement to immunity under the statute had his counsel pursued a hearing. Nieves has not shown that the state court's determination in this case—that he suffered no prejudice from his counsel's failure to pursue an evidentiary hearing on his motion because he would not have been able to meet his burden of proving entitlement to immunity—was based on an unreasonable determination of the facts or was contrary to, or an unreasonable application of, *Strickland*.

Thus, in light of the limited and ambiguous evidence concerning self-defense in this case, the state court's determination—that Nieves could not have met his burden of establishing immunity under the statute, and, therefore, his counsel was not ineffective for failing to pursue an evidentiary hearing on the stand-your-ground motion—was not contrary to, or an unreasonable application of *Strickland*. *See* 466 U.S. at 687–88. Nor was it based on an unreasonable determination of the facts. Accordingly, the district court did not err in denying Nieves's § 2254 petition. *See* 28 U.S.C. § 2254(d). Consequently, we affirm.

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.