

ATTACHMENT C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO. 15-11225-P

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Appellant-Respondent,

v.

WILLIAM REAVES,

Appellee-Petitioner.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

APPELLEE'S PETITION FOR PANEL REHEARING

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CERTIFICATE OF INTERESTED PERSONS

Secretary, Florida Department of Corrections v. Reaves, Case No. 15-11225-P

Appellant William Reaves files this Certificate of Interested Persons and Corporate Disclosure Statement as required by Rule 28(b) of the rules of this Court.

1. Honorable Donald L. Middlebrooks, United States District Court Judge
2. William Reaves, Appellee-Petitioner
3. William M. Hennis III, Counsel for Appellee-Petitioner
4. Rachel Lawrence Day, Counsel for Appellee-Petitioner
5. Neal A. Dupree, Counsel for Appellee-Petitioner
6. Julie L. Jones, Sec'y Dept. of Corrs., Appellant-Respondent
7. Pamela Jo Bondi, Attorney General, Counsel for Appellant-Respondent
8. Leslie T. Campbell, Asst. Attorney General, Counsel for Appellant-Respondent
9. Honorable Robert Hawley, state court judge
10. Honorable James B. Balsiger, state court judge
11. Honorable Lawrence Mirman, trial prosecutor
12. Jay Kirschner, trial defense counsel
13. Richard Raczkowski, victim

APPELLEE'S PETITION FOR PANEL REHEARING

Appellee William Reaves submits that certain legal and factual errors in the Court's opinion in this case call for panel rehearing. Below, Mr. Reaves provides a description of those errors, a description of the manner in which they relate to and perpetuate errors committed by lower courts, and requests that this Court conduct a panel rehearing in order to eliminate those errors.

Penalty Phase Ineffective Assistance of Counsel

In its Opinion of September 28, 2017, this Court asserted that the District Court granted relief on a claim that Appellant did not make, a claim that this Court has dubbed the "combined impact" claim. (Op. at 21) The Court asserts that the District Court's combined impact claim asserted that the errors of trial counsel at the guilt and sentencing phases rendered the result of the sentence phase unfair. (Op. at 21). This is hairsplitting.

In any postconviction motion, whether in state court or federal court, individual claims have to be considered in light of the entire pleading and indeed the entire record. In *Strickland v. Washington*, 486 U.S. 688 (1984), the Supreme Court made it clear that an ineffective assistance of counsel claim must be considered in the context of "whether counsel's assistance **was reasonable considering all the circumstances**". *Strickland* 486 U.S. at 688. (emphasis added) The circumstances surrounding counsel's preparation for and presentation

of guilt phase evidence are always pertinent to the penalty phase, especially in cases like this one in which facts that are pertinent to a guilt phase defense are also supportive of mitigation.

Strickland is clear that the court “must determine whether **in light of all the circumstances**, the identified acts or omissions by counsel were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms is to make the adversarial testing process work in the particular case”. *Strickland* 486 U.S. 690. (emphasis added)

In the instant case, the issues surrounding Mr. Reaves’ mental health including PTSD, and his history of substance abuse and intoxication at the time of the offense were and should be, relevant to preparation for both the guilt/innocence and penalty phases. In a case such as this it is impossible to separate the claims surgically, rather as a surgeon would separate conjoined twins. Indeed trial counsel has a duty to operate under a unified theory of the case from pretrial to penalty phase.

Applicable professional standards are set forth in the American Bar Association (ABA) Standards of Criminal Justice, “standards to which we have long referred as guides to determining what is reasonable.” *Wiggins v. Smith*, 539

U.S. 510 at 524. *Wiggins* makes clear that the ABA Guidelines¹ supply the guide to what is reasonable in investigating a capital case. Guideline 10.10.1 (2003) which deals with overall trial preparation makes it clear that counsel should formulate an internally consistent theory of the case; that will minimize inconsistencies between guilt and penalty phases. *See* ABA Guideline 10.10.1 (2003).² Thus a court cannot logistically, nor should it, assess individual claims in a vacuum, devoid of the rest of the circumstances of the case. The District Court correctly assessed the penalty phase ineffectiveness claim in light of the guilt phase claims and correctly determined that a new penalty phase was justified.

As explained above the claims relating to mental health and substance abuse and intoxication were inextricably interrelated in this case. It is noteworthy that in 2002 the Florida Supreme Court's remand for an evidentiary hearing on guilt phase ineffectiveness, including trial counsel's failure to raise the defense of voluntary

1 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter "ABA Guidelines").

2 The Commentary to the Guideline emphasizes that credibility will be lost if counsel takes inconsistent positions at different stages of the trial. It states that "it is critical that well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial including jury selection, witness preparation, pretrial motions, opening statements, presentation of evidence and closing argument." Commentary to Guideline 10.10.1 (2003). This emphasizes the need to consider the postconviction pleading as a whole rather than as individual surgically separated claims

intoxication, also included the phrase “**and related subclaims**,” allowing for the presentation of additional evidence. *See Reaves v. State*, 826 So. 2d 932, 944 (2002) (emphasis added).

Those “related subclaims” included the claim that trial counsel “was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects” *Id.* at 939. This claim is self-evidently broader in scope than voluntary intoxication, and resulted in evidence being presented at the evidentiary hearing on remand as to Reaves’ combat PTSD and substance abuse disorder.

The relevance of these issues to the ineffective assistance of counsel at the penalty phase was argued at the beginning of the evidentiary hearing on March 3, 2003. *Tp.* at 6-10. Counsel told the trial court that the scope of the hearing was not limited to voluntary intoxication and “the Supreme Court opinion also pointed out that the related [*Ake*] claim was also part of it.” *Tp.* at 6. The *Ake* claim was claim 5 in the 1999 Rule 3.851 motion, found at PCR 496-501.³

The claim incorporated “[a]ll other allegations and factual matters contained elsewhere in this motion” and then alleged that “Mr. Reaves was denied his rights under the federal Constitution to a professional, competent, and appropriate mental

³ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

health evaluation for use in the aid of his defense. Counsel failed to obtain a professional, competent and appropriate mental health evaluation.” PCR. 496.

The *Ake* claim also specifically set forth that “undersigned counsel has determined through the use of mental health experts who were available and would have testified **at the time of trial** that Mr. Reaves suffers from Post Traumatic Stress Disorder, brain damage and a severe addiction to drugs. The combination of P.T.S.D. and severe drug use caused Mr. Reaves to suffer from what is commonly known as dissociation (the inability of a person to have integration of action and thoughts) wherein he believes he is back in war. Mr. Reaves would have been incoherent and his ability to make proper judgements evaporated.” PCR at 499. (emphasis added)

Paragraph 8 of the *Ake* claim concluded that “Mr. Reaves did not receive a **fair penalty phase** because he did not receive appropriate assistance by the mental health expert. The court’s failure to ensure that he received appropriate assistance and adequate resources resulted in a violation of Mr. Reaves’ due process rights and **right to a fair trial.**” PCR. at 501 (emphasis added).

During that initial hearing the trial court acknowledged that “the only problem is the Supreme Court doesn’t say anything about that issue. I’ve looked through the cases and it’s like they’ve raised that issue and they didn’t decide on it.” PCR. at. 8. The trial court then opined that “[i]t’s like it was left out dangling

and no mention until the very end, and then they talk about related to subclaims and they refer to this as a related sub issue. So, if you're willing to go along with that, then that's what we'll do." PCR. at. 9.

After the hearing concluded written closing memos were provided and the trial court entered an order on March 10, 2004 denying relief. The order made reference to the substantial evidence, material to the related subclaim, that was presented at the evidentiary hearing, including the testimony of Dr. Weitz, Dr. Dudley, Dr. Mash, Dr. Parsons, Dr. Crown and Dr. Hyde. Order at 7. The trial court then denied the motion, "Because the Defendant has failed to establish that trial counsel was ineffective for failing to raise a voluntary intoxication defense and failing to retain experts who could testify properly as to the effects of substance abuse combined with the Defendant's mental defects, the motion is denied." Order at 9.

This Court found that following the state circuit court evidentiary hearing "[Mr. Reaves] did not, however, re-assert his penalty phase ineffectiveness claim or even mention it." Op. at 16. This is not the case.

Mr. Reaves' counsel filed a motion for rehearing on March 26, 2004. It noted that the recent case of *Wiggins v. Smith*, 123 S. Ct. at 2536-37, had addressed a similar failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation but that the relevant applicable

ABA professional standards referenced therein were equally applicable to investigation at both the guilt phase and sentencing phase. Mot. at 10-11.

The motion further argued that “presenting such evidence to the court in postconviction is a critical part of the process of proving ineffective assistance, *Ake* violations, and prejudice.” Motion at 11. The final paragraph of the rehearing motion requested that “this court reconsider the denial of relief in light of the 100% military service related disability due to PTSD assigned to Mr. Reaves on August 28, 2003 by the United States Department of Veterans Affairs. A pleading dated December 9, 2003 memorialized this fact in the court file of the instant case.” Motion at 13. The motion for rehearing concluded by asking “this Court to grant his request for rehearing, providing relief consistent with this motion, including the vacation of his convictions and sentences, including his sentence of death.” Mot. At 13. The District Court’s analysis of the “combined impact” was therefore proper and in accordance with *Strickland* and its progeny.

This Court asserts that the District Court’s analysis of *Cullen v. Pinholster*, 563 U.S. 170 (2011), was in error because it relied on portions of the state court record that were created after the Florida Supreme Court’s rejection of the penalty phase ineffectiveness claim in 2002. (Op. at 31) This Court chastises the District Court for relying on the state court record that was created as a result of the remand for the hearing in 2003 on voluntary intoxication and related subclaims.

However this Court has apparently over looked the fact that *Pinholster* presented a procedural position similar to the instant cause. *Pinholster* had filed two separate state habeas petitions. Regarding the issue of which of the state court records should be considered the *Pinholster* court stated that:

The specific contents of the state-court record depend on which of the two state habeas proceedings is at issue. One amicus curiae suggests that both are at issue, that is, Pinholster must prove that both California Supreme Court proceedings involved an unreasonable application of law under § 2254(d)(1). By contrast, the most favorable approach for Pinholster would be review of only the second state habeas proceeding, the record of which includes all of the evidence that Pinholster ever submitted in state habeas. **We have not previously ruled on how to proceed in these circumstances, and we need not do so here.** Even taking the approach most favorable to Pinholster, and reviewing only whether the California Supreme Court was objectively unreasonable in the second state habeas proceeding, we find that Pinholster has failed to satisfy § 2254(d)(1).

Id. at 1388 n.12 (citation omitted) (emphasis added). Interestingly, the U.S. Supreme Court asked whether consideration of the second state court proceeding would be exclusive, not whether it would be considered at all. This is because Pinholster's freestanding penalty phase claim was addressed twice by the California Supreme Court, while Reaves' freestanding penalty phase claim was addressed only in the initial round of litigation. But no matter. *Pinholster* is not a rule dependent on the preservation of claims; it concerns the presentation of a

record. And again, the Florida Supreme Court had an opportunity to review and rule on the evidence presented at the 2003 state court evidentiary hearing.

The District Court found that the Florida Supreme Court was unreasonable in 2002 for finding that any further evidence would be cumulative:

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. . . . [T]hat was an unreasonable determination of the facts.

(Doc. 88 at 61). That alone settles this matter, because it is clear that nothing from the 2003 state court record was necessary to the district court's ruling. Considering the ways in which that record reaffirms the correctness of the ruling does not change the fact that the ruling stands on its own.

Pinholster ensures that a federal habeas court will only consider the record "that was before the state court that adjudicated the claim on the merits" (Doc. 88 at 34). The Florida Supreme Court was the state court that adjudicated Mr. Reaves claims relating to penalty phase ineffectiveness. The Florida Supreme Court also reviewed the record from the 2003 state court evidentiary hearing.

The Florida Supreme Court could have ruled on the penalty phase in its 2006 opinion, because it did not deny all ineffectiveness challenges to the penalty phase in 2002. As noted *supra*, when the Florida Supreme Court in 2002 remanded for an evidentiary hearing on guilt phase ineffectiveness, including failure to raise a

defense of involuntary intoxication, it also allowed hearing on “related subclaims.” *Id.* at 944. According to the Court those subclaims included the claim that trial counsel “was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects,” *Id.* at 939. This issue was much broader in scope than voluntary intoxication and resulted in substantial evidence being presented on remand as to Reaves’ combat PTSD and substance abuse disorder. This case is not a violation of *Pinhoster*.

This Court found that: “When the case was before the state supreme court on that later appeal after remand, Reaves did not re-assert the penalty phase ineffectiveness claim or ask the court to reconsider its rejection of that claim four years earlier.” Opinion at 34. However, in the initial brief there were multiple references to the ABA Guidelines as to both the guilt and penalty phase and their interplay with *Wiggins* and *Strickland*. I.B. at 55-57, 69. In the conclusion of the initial brief to the counsel also specifically requested “a review of the entire record of the case” and a new trial. I.B at 91. And in the Reply Brief Counsel also noted that trial counsel’s failure to properly investigate and present the defense of voluntary intoxication was comparable to the overall failures by trial counsel at guilt **and penalty phase** in *Rompilla v. Beard*, 125 S. Ct. 2456, 2470-1 (2005), where there was a failure “to conduct a prompt investigation of the case and to explore all avenues leading to facts relevant to the merits of the case **and the**

penalty in the event of conviction. Reply Brief at 10. Counsel also referred in his Reply Brief to the lower court's failure to consider "all of the relevant and material evidence [that] should have been heard at a full and fair evidentiary hearing on the issues included in this Court's remand." Reply Brief at 22. The Reply also noted that "the decisions of the lower court operated to frustrate **a full review of the mixed question of fact and law involved in a determination of whether there was ineffective assistance of counsel.**" *Id.*

In addition, during the pendency of the appeal, counsel moved on October 21, 2005 for relinquishment of jurisdiction for the purpose of obtaining additional discovery from the state attorney concerning guilt phase and penalty phase ineffective assistance of counsel. The motion stated that the documents sought were "relevant to the issue of ineffective assistance of trial counsel during Mr. Reaves' trial," and would potentially be useful for purposes of impeachment. That motion was supplemented on November 3, 2005 by a motion to supplement that included an supporting affidavit from trial counsel. Although the Court denied the motion to relinquish jurisdiction, by filing the motion counsel demonstrated that Mr. Reaves was still pursuing aspects of the penalty phase ineffectiveness claims during the pending appeal.

In his dissent to the denial of relief, Justice Anstead pointed to the Court's 2002 prior opinion that remanded for the 2003 evidentiary hearing. The section he

referenced noted the interconnection between the penalty phase presentation and the guilt phase evidence:

During the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional testimony 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.

Reaves v. State, 942 So.2d 874, 883 (Fla. 2006)

Finally, Mr. Reaves’ Motion for Rehearing to the Florida Supreme Court also specifically noted the Court’s earlier opinion of June 20, 2002 and the reference therein to the related sub-issue “that his attorney was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects.” Motion at 2. The motion for rehearing also noted that “this Court’s majority **has nothing to say about the extensive expert testimony that was presented below** except that “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.” Motion at 2.

Thus this Court’s position that the Florida Supreme Court had no duty to reconsider the penalty phase decision from 2002 without being asked should be reviewed Op. at 37. [*See also* Appellee’s Br. at 46, 52]. Had this Court relied on the entire state court record, as would have been proper, it would have found, as

the district court did, that Appellee received constitutionally ineffective assistance of counsel at his penalty phase. This Court's refusal to consider the 2003 record is error, for the reasons explained above.

The decision of the panel is also inconsistent with this Court's own cases. See *Hardwick v. Sec. DOC*, 803 F.3d 541 (11th Cir. 2015); *Hardwick v. Crosby*, 320 F3d 1127 (11th Cir. 2003); *Blanco v. Singletary*, 943 F.2d 1477, 1500–03 (11th Cir. 1991); *Cave v. Singletary*, 971 F.2d 1513, 1519–20 (11th Cir. 1992).

In *Hardwick v. Sec. DOC* this Court upheld the district court's grant of penalty phase relief in a case where the trial jury in 1986 had voted for death by a seven to five margin:

Because of counsel's deficient performance, the jury saw only a drug dealer who brutally killed someone for stealing his quaaludes. They did not hear a word about Hardwick's traumatic childhood background that was consistently marked by neglect, deprivation, abandonment, violence, and physical and sexual abuse. They never had a chance to examine the trove of documents evidencing his decade-and-a-half long history of drug and alcohol addiction starting at the young age of eleven or twelve. They heard none of the affirmative evidence of his heavy intoxication at the time of the crime. Nor did they hear expert testimony about how these factors combined to render Hardwick substantially unable to conform his conduct to the requirements of the law, as the postconviction mental health experts unanimously concluded.

Hardwick v. Secretary, Fla. Dept. of Corrections, 803 F.3d 541, 564 (11th Cir. (2015)). In *Blanco v. Singletary* this Court reversed the district court's denial of penalty phase relief, finding that trial counsel's investigation and preparation for

the penalty phase was woefully deficient, non-strategic and objectively unreasonable:

In this case, the attorneys failed to conduct a reasonable investigation, and this failure was not a result of a tactical choice.

Counsel simply failed to investigate Blanco's mental health status. After the guilty verdict was rendered, one of the reasons counsel requested a continuance was because "I need to prepare ... the psychiatric testimony of a Court-appointed psychiatrist." No psychiatrist had been procured prior to this point, and no examination of Blanco was ever conducted. At conference the day before the penalty phase began, counsel informed the court after a brief discussion with Blanco that no mental health mitigation evidence existed. Given that this discussion constituted the extent of counsels' investigation into the availability of mental health mitigating evidence, that such evidence was available, that absolutely none was presented to the sentencing body, and that no strategic reason has been put forward for this failure, we find that counsels' actions were objectively unreasonable.

Blanco v. Singletary, 943 F.2d 1477, 1500-03 (11th Cir. 1991). In *Cave v. Singletary*, a pre-AEDPA case this Court upheld the district court as to the denial of relief at the guilt phase and the grant of relief at the penalty phase:

What have we learned regarding the Defendant's character? Absolutely nothing. What witnesses appeared during the second phase to testify regarding the Defendant's character? None. Of all the persons that Alphonso Cave knows, what person told you anything regarding Alphonso Cave's character? None.

However, despite this statement and the lack of preparation on counsel's part, five jurors voted for a life sentence. In Florida, a vote of six jurors for life constitutes a recommendation against the death penalty. Thus, despite the presentation of no mitigating circumstances, Cave came within one vote of being spared execution. There is a

reasonable probability that if Steger had provided adequate representation, her client would not have received a death sentence.

The representation provided to Cave by the State of Florida constitutes an embarrassment to the legal profession. However, we have found no evidence of prejudice in the conduct of the guilt phase because it is highly unlikely that the result of the trial would have changed even if his counsel had understood the law of felony murder. Our conclusion regarding the penalty phase, however, is different. Competent counsel would have prepared for sentencing and would have produced witnesses that the district court found were ready and willing to testify for Cave. Even without this evidence the sentencing jury came within one vote of recommending life imprisonment. Petitioner has demonstrated prejudice such that our confidence in the sentence of death is greatly undermined. We therefore affirm the district court's order denying relief on the conviction and granting the writ of habeas corpus as it relates to sentencing.

Cave v. Singletary, 971 F.2d 1513, 1519–20 (11th Cir.1992).

For the above stated reasons, Mr. Reaves requests panel rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellant certifies that this petition contains 3782 words. The size and style of type used in this document is Times New Roman 14 pt.

STATEMENT OF COMPLIANCE WITH ELECTRONIC FILING

Appellee states that this brief has been provided to the Court in electronic format as described in Eleventh Circuit Rule 31-5.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by United States Mail and electronic mail this 18th day of October 2017, to Leslie Campbell, Assistant Attorney General, Counsel for the Respondent: leslie.campbell@myfloridalegal.com; & capapp@myfloridalegal.com.

/s/ William M. Hennis III
WILLIAM M. HENNIS III

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