APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Post-Conviction Relief Granted by Reaves v. Jones, S.D.Fla., March 3, 2015

639 So.2d 1
Supreme Court of Florida.

William REAVES, Appellant, Cross–Appellee,
v.
STATE of Florida, Appellee, Cross–Appellant.

No. 79575.
|
April 7, 1994.
|
Rehearing Denied June 10, 1994.

Synopsis
Following remand for retrial, 574 So.2d 105, defendant was convicted in the Circuit Court, Indian River County, James B. Balsiger, Acting Circuit Judge, of murder, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) although witness' prior inconsistent testimony should have been admitted, error was harmless; (2) trial court did not abuse its discretion in refusing to strike two jurors who indicated that they would automatically recommend death penalty if a defendant were found guilty of murder; and (3) evidence of "Vietnam syndrome" was not admissible in guilt phase of trial.

Affirmed.

West Headnotes (19)

[1] Criminal Law
Exclusion of Evidence
In capital murder trial, although witness' prior inconsistent testimony should have been admitted, exclusion of evidence was harmless; inconsistent statements pertained to details and did not repudiate significant aspects of testimony. West's F.S.A. § 90.806.

Cases that cite this headnote

[2] Jury
Punishment prescribed for offense
Trial court did not abuse its discretion in refusing to strike two jurors who indicated that they would automatically recommend death penalty if a defendant were found guilty of murder, since both jurors were properly rehabilitated; first juror said he was capable of following law as instructed after judge explained process of weighing aggravating and mitigating circumstances, and second juror stated upon being questioned by state that he understood that no one could automatically be sentenced to death.

6 Cases that cite this headnote

[3] Jury
Punishment prescribed for offense
Trial court did not abuse its discretion in granting state's challenge for cause regarding prospective juror in capital murder case; prospective juror expressed reluctance in her ability to sentence someone to death, yet also indicated that she could follow judge's instructions relevant to capital sentencing.

4 Cases that cite this headnote

[4] Jury
Peremptory challenges
In capital murder trial of black defendant, state's peremptory challenge of jury panel's sole Jewish member was not racially discriminatory; record indicated that challenge was based on perceived misunderstanding of burden of proof, and nothing in record indicated that racial or religious background was grounds for challenge.

1 Cases that cite this headnote

[5] Homicide
Excuse or justification in general
Evidence of "Vietnam syndrome" was not admissible in guilt phase of capital murder trial to support excusable homicide defense; no evidence supported defendant's assertion

that syndrome was commonly understood condition. West's F.S.A. § 782.03.

Cases that cite this headnote

[6] **Criminal Law**
⇐ Disqualification of chief prosecutor or of office itself

State attorney's office would not be disqualified from prosecuting defendant on retrial, even though conviction obtained in first trial was reversed on basis that prosecutor in that trial had previously represented defendant in another case; defendant was properly shielded on retrial from prosecutor of first trial.

1 Cases that cite this headnote

[7] **Criminal Law**
⇐ Particular statements, comments, and arguments

Although prosecutor in capital murder trial, erroneously referred to defendant as a cocaine seller, reference was not made feature of trial and was harmless.

2 Cases that cite this headnote

[8] **Criminal Law**
⇐ Matters not sustained by evidence

Defendant in capital murder trial was not entitled to reversal based on prosecutor's erroneous "golden rule" argument which, in response to defendant's perceived argument that shooting was panic shooting, began "I submit to you that if you had a gun in your face in a store after hours."; error was immediately cured when trial judge interrupted, directed jury to disregard statement, and directed prosecutor not to put jury "in any position."

Cases that cite this headnote

[9] **Criminal Law**
⇐ Comments regarding character of victim

Prosecutor did not act improperly, in capital murder trial, by "portraying" slain deputy speaking from grave; after defense counsel argued in closing that it made no sense for defendant to shoot deputy because deputy had already phoned in warrant check on defendant, and that murder thus was not premeditated, prosecutor reminded jury that defendant had motive to kill deputy by saying that deputy was the only person who could say from witness stand that defendant was the person who shot him.

2 Cases that cite this headnote

[10] **Criminal Law**
⇐ Homicide, mayhem, and assault with intent to kill

Attempted sale of cocaine was irrelevant in murder trial, even though state argued that attempted sale, upon defendant alighting from bus in another state, was part of plan to finance escape and thus was integral part of flight from crime scene.

Cases that cite this headnote

[11] **Judges**
⇐ Exercise of powers in different courts

Fact that judge in murder trial was county judge from another circuit did not compel finding that judge lacked jurisdiction to hear case; judge was appointed by direct order of Supreme Court.

Cases that cite this headnote

[12] **Criminal Law**
⇐ Purpose of admission

Trial court did not abuse discretion in admitting color photograph of murder victim taken after autopsy; photograph was not inflammatory and was relevant to medical examiner's testimony and to show bullets lying just under skin.

Cases that cite this headnote

[13] Criminal Law
Clothing

In murder trial, court did not abuse its discretion in admitting clothing which deputy was wearing when shot; clothes were relevant to show that deputy was identifiable as officer when he asked defendant to surrender gun.

2 Cases that cite this headnote

[14] Jury
Constitutional and statutory provisions

Jurors were not required to be drawn from pool of licensed drivers rather than registered electors in defendant's 1992 trial; statute directing that jurors be taken from pool of licensed drivers would not become effective until January 1, 1998. West's F.S.A. §§ 40.01, 40.01 note.

Cases that cite this headnote

[15] Sentencing and Punishment
Counsel

No general requirement exists that defendant in capital case have co-counsel.

Cases that cite this headnote

[16] Criminal Law
Work product

Letters between prosecutor and expert witness that contained work product were privileged and not subject to discovery.

1 Cases that cite this headnote

[17] Sentencing and Punishment
Vileness, heinousness, or atrocity

In defendant's capital murder trial, court improperly found aggravating factor of heinous, atrocious, or cruel in relation to deputy's death from gunshot wounds; crime was not unnecessarily torturous to victim or set apart from norm in capital cases.

4 Cases that cite this headnote

[18] Sentencing and Punishment
Harmless and reversible error

In defendant's capital murder trial, court's error in finding aggravating factor of heinous, atrocious, or cruel in relation to deputy's death from gunshot wounds was harmless in view of other aggravating factors found and relatively weak mitigation; defendant was previously convicted of holding gun to head of hotel clerk during two separate robberies and punching correctional officer in face while in jail, and instant murder was committed to avoid or prevent lawful arrest.

13 Cases that cite this headnote

[19] Sentencing and Punishment
Mitigating circumstances in general

Trial court did not abuse its discretion, in defendant's capital murder trial, by grouping several proffered mitigated factors into three.

7 Cases that cite this headnote

Attorneys and Law Firms

*2 Jonathan Jay Kirschner of Carbia, Kirschner & Garland, P.A., Fort Pierce, for appellant/cross-appellee.

Robert A. Butterworth, Atty. Gen., and Sara D. Baggett, Asst. Atty. Gen., West Palm Beach, for appellee/cross-appellant.

Opinion

PER CURIAM.

William Reaves appeals his conviction for murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

*3 The victim, Deputy Sheriff Richard Raczkoski, at or about 3 a.m. on September 23, 1986, responded to a 911 call from a phone booth outside a Zippy Mart near Vero Beach. The deputy acknowledged his arrival at the

Zippy Mart and inquired about outstanding warrants on William Reaves. Within minutes of the call, the deputy was found near the phone booth with four gunshot wounds from which he died later that morning. A piece of paper inside the deputy's vehicle had written on it: William Reaves, black male, 4336 38th Avenue, date of birth 12/30/48.

Witness Whitaker, who discovered the deputy, testified that he saw a black man wearing red shorts and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton was ruled unavailable to testify, section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial [1] was read into the record. According to Hinton, Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment after the shooting and said: "I done ... up. I just shot a cop, I just shot a police." Hinton testified that Reaves quoted the deputy as saying, "Don't shoot me. Don't shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties. Witness Fredell testified that Reaves was wearing red shorts and a white T-shirt on the afternoon prior to the early-morning murder and did not appear to be under the influence of alcohol or drugs.

1 Reaves was convicted of the deputy's murder in August 1987. This Court reversed the conviction because Reaves' prosecutor formerly represented Reaves as his public defender. *Reaves v. State,* 574 So.2d 105 (Fla.1991). Reaves' retrial occurred in February 1992.

Detective Pisani quoted Reaves as stating that while he and the deputy were conversing, a gun fell out of Reaves' shorts. The deputy put his knee on the weapon, Reaves pushed the knee back, picked up the gun, refused to surrender it, and in a panic and "wired on cocaine" shot the deputy as he was running away. Reaves admitted that he emptied the seven-round clip of his .38 when he fired. A firearms expert testified that Reaves' gun was a type that required a pull of the trigger each time it was fired; it was not an automatic.

The jury convicted Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial judge imposed the death sentence, finding three aggravating circumstances [2] and no statutory mitigating circumstances. The judge found three nonstatutory mitigating circumstances. [3]

2 Reaves was previously convicted of a felony involving the use or threat of violence to the person; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and the capital felony was especially heinous, atrocious, or cruel. § 921.141(5)(b), (e), (h), Fla.Stat. (1985).

3 Reaves was honorably discharged from military service, had a good reputation in his community up to the age of sixteen, was a considerate son to his mother, and was good to his siblings.

Reaves presents sixteen issues, twelve in the guilt phase and four in the penalty phase.

[1] Reaves argues to this Court that several statements made by Hinton, under oath, prior to his 1987 trial testimony, [4] were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991). [5] We *4 agree that Hinton's prior inconsistent testimony should have been admitted, but we find that the trial court's exclusion of the testimony was harmless error. Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony.

4 *See supra* note 1.

5 Section 90.806, Florida Statutes (1991), provides:

(1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

(2) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

[2] Reaves challenges the trial judge's rulings regarding jurors Dudley, Hambleton, Mills and Kaplan. In response to Reaves' voir dire questioning, prospective jurors

Dudley and Hambleton indicated that they would automatically recommend a death sentence if a person were found guilty of murder. Based on these answers, Reaves asserts that the trial judge's refusal to strike Dudley and Hambleton for cause was an abuse of discretion. Under *Bryant v. State,* 601 So.2d 529, 532 (Fla.1992), when a venireperson expresses an opinion which indicates a substantial inability to properly perform a juror's duties either the prosecutor or the judge must "make sure the prospective juror can be an impartial member of the jury." Our reading of the record shows that both Hambleton and Dudley were properly rehabilitated by the judge and State Attorney respectively [6] and we find no abuse of discretion in the trial judge's denial of Reaves' challenge for cause relative to these jurors.

6 After Hambleton stated his willingness to automatically impose the death penalty, the judge explained the process of weighing aggravating and mitigating circumstances, and then asked Hambleton if he was capable of following the law as instructed. Hambleton answered in the affirmative. Upon being questioned by the State, Dudley indicated that he understood that no one could automatically be sentenced to death and that he must look at all evidence and follow the judge's instruction on mitigating and aggravating circumstances in considering the proper punishment.

[3] Reaves further avers that the court improperly granted the state's challenge for cause regarding prospective juror Mills. During voir dire, Mills expressed reluctance in her ability to sentence someone to death, yet she also indicated that she could follow the judge's instructions relevant to a capital sentencing. We have previously held that a trial judge must determine if a prospective juror's opinions will act as an impediment in the proper performance of her duties. *Trotter v. State,* 576 So.2d 691, 694 (Fla.1990). Our review of the record shows that the court granted the state's challenge based on what it considered Mills' "at best" equivocal answers. We find that the transcript fairly and adequately supports the trial judge's findings and there was no abuse of discretion.

[4] Reaves argues that the court erred by allowing the state to peremptorily challenge, in a racially discriminatory way, Kaplan, the panel's sole Jewish member. We find Reaves' contest of prospective juror Kaplan meritless. Nothing in the record indicates, nor proves that the state used Kaplan's racial or religious background as grounds for challenge. The record indicates that the state's challenge was based on what it perceived as Kaplan's misunderstanding of the burden of proof. Accordingly, we find no error in the court's granting of the challenge.

[5] Reaves argues that the trial judge erred when he refused to admit evidence of "Vietnam Syndrome" in the guilt phase of the trial to support his "excusable homicide" defense. [7] We find no error. We said in *Bunney v. State,* 603 So.2d 1270, 1273 & n. 1 (Fla.1992), that "evidence of certain commonly understood conditions that are beyond one's control ... should also be admissible" in the guilt phase of the trial; but "evidence relating to a general mental impairment or other esoteric condition" is not. There is no evidence in this record to support Reaves' assertion that "Vietnam Syndrome" is a commonly understood condition; it therefore was properly excluded in the guilt phase. We find, moreover, that even if this evidence's exclusion was error, it was harmless. There is no reasonable possibility that it would have *5 affected the jury's verdict. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

7 Section 782.03, Florida Statutes (1991), provides:

> Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

[6] Reaves argues that the state attorney's office should have been disqualified from prosecuting him on his retrial. We disagree. The trial judge found that Reaves was properly shielded from his former prosecutor, Mr. Colton (who was earlier Reaves' public defender). The judge's findings are supported by competent, substantial evidence and we affirm them.

[7] **[8]** Reaves raises several issues regarding the trial judge's denial of his motions for mistrial based on alleged errors in the prosecutor's closing argument. First, he brings to our attention the fact that the prosecutor referred to him as a "cocaine seller." This reference was indeed error, but it was not made a feature of the trial and we find it harmless. [8] *DiGuilio.* Reaves next complains that the prosecutor made a prohibited golden rule argument when he said: "Mr. Kirschner wants to argue that this is a panic shooting.... Ladies and gentlemen, I submit to you that if you had a gun in your face in a store after hours at 3:00 in the morning is [sic] more than an eternity because...." The trial judge interrupted and directed the jury to disregard the statement and directed the prosecutor not to put the jury "in any position." Thus the error was immediately cured. Singularly or cumulatively, these errors fall short of the standard for granting a reversal: Whether the error was so prejudicial as to "vitiate the entire trial." *State v. Murray,* 443 So.2d 955, 956 (Fla.1984).

8 Reaves disclosed in his confession that he was apprehended when he attempted to sell cocaine to an undercover agent in a Georgia bus station the day after the shooting.

[9] Reaves also argues that prosecutor counsel acted improperly when he "portrayed the slain deputy speaking from the grave." We find no error when this assertion is viewed in context: Defense counsel argued in closing that it made no sense for Reaves to shoot the deputy because the deputy had already phoned in a warrant check on Reaves; the logical conclusion therefore was that the murder was not premeditated. We find that the prosecutor's assertion, that the deputy was the only person who could say from a witness stand that Reaves was the person who shot him at the Zippy Mart, was proper rebuttal; it reminded the jury that Reaves had a motive to kill the deputy.

[10] Reaves raises as his sixth claim that the introduction of evidence that he attempted to sell cocaine was error. The state argues that the attempted sale of cocaine, upon alighting from a bus in Georgia, was a part of Reaves' plan to finance his escape and was an integral part of his flight from the crime scene; it thus was relevant to flight and an incident in the chain of events. [9] We do not find the attempted sale of cocaine relevant to the instant murder; it should have been redacted from Reaves' confession and omitted from the evidence of flight. We nevertheless find the admission of this evidence harmless error. *DiGuilio.*

9 This evidence was contained in Reaves' confession to the murder.

[11] We find no merit to Reaves' claim that the trial judge lacked jurisdiction to hear his case because he was a county judge from another circuit. Judge Balsiger was appointed by direct order of this Court. [10] We also find no merit to Reaves' assertions that the jury instructions on premeditation and excusable homicide were inadequate; the standard jury instructions were given.

10 Florida Supreme Court Order 92A–046, December 30, 1991. The record demonstrates that Judge Balsiger handled this first-degree murder trial in an exemplary manner.

[12] **[13]** Reaves objects to the admission of a color photograph of the deputy taken after an autopsy had been performed. We find nothing inflammatory about the photo. The photo moreover was relevant to the medical examiner's testimony and to show three bullets lying just under the skin, which caused extensive internal hemorrhage to vital organs because of the mushroom-headed shape the bullets assumed after impact. The bullets are indicated by a large circle of blue color under the skin. Reaves also objects to the admission of the clothes the deputy was ***6** wearing when shot. The clothes were relevant to show that the deputy was identifiable as an officer when he asked Reaves to surrender his gun. We find no abuse of discretion in their admission.

[14] There is no merit to Reaves' claim that the jury venire should have been stricken because it was drawn from registered electors rather than from licensed drivers. Drawing jurors from licensed drivers was not required at the time of Reaves' trial. Ch. 91–424, Laws of Fla. Section 40.01, Florida Statutes (1991), which directs that jurors shall be taken from the pool of licensed drivers, does not become effective until January 1, 1998. *See* § 40.01, Note, Fla.Stat. (Supp.1992). Reaves' retrial occurred in February 1992.

[15] **[16]** We find no error in the trial judge's decision not to appoint co-counsel for Reaves. There is no general requirement that a defendant must have co-counsel in capital cases, and the judge did not abuse his discretion in failing to appoint additional counsel. We also find no error in the trial judge's determination that letters between the prosecutor and an expert witness that contained work product were privileged and not subject to discovery.

[17] **[18]** Reaves argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree with Reaves that the deputy's death from gunshot wounds was not heinous, atrocious, or cruel. This is not a crime unnecessarily torturous to the victim or set apart from the norm in capital cases. We find this error harmless, however, in view of the two other strong aggravating factors found [11] and relatively weak mitigation. There is no possibility the jury would have recommended or the judge would have imposed a lesser sentence.

11 Reaves was convicted of holding a gun to the head of a hotel clerk during two separate robberies and punching a correctional officer in the face while in jail. In addition, the instant murder was committed to avoid or prevent lawful arrest.

[19] We find no abuse of discretion in the trial judge's failure to find statutory mental mitigating factors. There is competent, substantial evidence upon which he could have rejected the testimony of Reaves' expert on these points in favor of the state's expert. We also find no abuse of discretion in the trial judge's finding of only three nonstatutory mitigating factors. Although Reaves proffered nonstatutory factors in greater number, the judge reasonably grouped several proffered mitigating factors into three. We finally find no constitutional infirmity in the statute.

We therefore affirm the conviction and sentence. [12]

12 We do not address the issue raised by the State's cross-appeal; in view of our affirmance, it is moot.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

All Citations

639 So.2d 1, 19 Fla. L. Weekly S173

APPENDIX B

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gray v. State, Fla.App. 4 Dist., October 26, 2011

826 So.2d 932
Supreme Court of Florida.

William REAVES, Appellant,
v.
STATE of Florida, Appellee.

No. SC00-840.
|
June 20, 2002.
|
Rehearing Denied Sept. 9, 2002.

Synopsis
After defendant's murder conviction and death sentence were affirmed on appeal, 639 So.2d 1, defendant filed motion for post-conviction relief. The Circuit Court, Indian River County, Robert A. Hawley, J., summarily denied motion, and defendant appealed. The Supreme Court held that: (1) claim that trial counsel was ineffective in failing to present voluntary intoxication defense was legally sufficient and was not refuted by record, and thus, trial court erred in failing to afford defendant evidentiary hearing on claim; (2) defendant did not show that counsel's failure to assert for cause challenges to prospective jurors constituted defective performance; (3) claim that counsel was ineffective in failing to prepare for and cross-examine numerous state witnesses was legally insufficient; (4) claims that counsel was ineffective in conceding defendant's guilt and in conceding inculpatory evidence were insufficiently pleaded; (5) trial counsel's failure to introduce allegedly mitigating evidence in death penalty phase did not constitute ineffective assistance; (6) claim that state's withholding of box which contained marijuana cigarette, notes, and automobile registrations constituted *Brady* violation was legally insufficient; and (7) juror interviews were not permissible.

Remanded.

Anstead, J., concurred in result.

Wells, C.J., dissented and filed opinion in which Harding and Lewis, JJ., concurred.

West Headnotes (20)

[1] **Criminal Law**
Post-Conviction Proceeding Not a Substitute for Appeal
Criminal Law
Affirmance of Conviction

Post-conviction claims based upon improper prosecutorial comments, denial of right to confrontation, improper penalty phase jury instructions, excessive security measures taken at trial, constitutionality of capital sentencing statute, judicial bias, and failure to have jury that was fair cross-section of community were procedurally barred, where claims were either raised or should have been raised on direct appeal. (Per three justices with one justice concurring in result.)

9 Cases that cite this headnote

[2] **Criminal Law**
Time for Proceedings

Issue of whether murder defendant was insane so as to warrant stay of execution was prematurely raised on motion for post-conviction relief; governor had not held proceedings for determining issue pursuant to appropriate statutes. (Per three justices with one justice concurring in result.) West's F.S.A. RCrP. Rule 3.811(c).

1 Cases that cite this headnote

[3] **Criminal Law**
Deficient Representation and Prejudice in General

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient, which requires showing that counsel made errors so serious that counsel was not functioning as counsel guaranteed by Sixth Amendment, and that such deficient performance prejudiced defense, which requires showing that counsel's errors were so serious as to deprive defendant of fair trial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[4] **Criminal Law**
Counsel

Post-conviction claim that trial counsel was ineffective in failing to present voluntary intoxication defense to first-degree murder charge was legally sufficient and was not refuted by record, and thus, trial court erred in failing to afford defendant evidentiary hearing on claim; defendant's confession that he was "coked up" when he fired gun could have supported defense, numerous witnesses testified about defendant's history of serious drug abuse, and jury instruction on defense was given. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

[5] **Criminal Law**
Insanity

Insanity is complete defense if, at time of crime, defendant was incapable of distinguishing between right and wrong as result of mental disease or defect.

2 Cases that cite this headnote

[6] **Criminal Law**
Existence of Specific Intent Essential to Offense

In order to successfully assert voluntary intoxication defense, defendant must come forward with evidence of intoxication at time of offense sufficient to establish that he was unable to form intent necessary to commit crime charged.

3 Cases that cite this headnote

[7] **Criminal Law**
Jury Selection and Composition

Trial counsel's failure to question jurors during voir dire about their reaction to voluntary intoxication defense did not establish ineffective assistance, where such defense was not advanced at trial. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[8] **Criminal Law**
Jury Selection and Composition

Defendant did not show that counsel's failure to assert for cause challenges to prospective jurors constituted defective performance, and thus, defendant could not establish ineffective assistance, where defendant did not show that counsel had reasonable basis for asserting such challenges. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

[9] **Criminal Law**
Counsel

Post-conviction claim that defense counsel was ineffective in failing to prepare for and cross-examine numerous state witnesses was legally insufficient, and thus,evidentiary hearing on claim was not warranted, where petitioner failed to indicate what favorable information counsel could have elicited from witnesses or how he was prejudiced. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[10] **Criminal Law**
Counsel

Post-conviction claims that counsel was ineffective in conceding defendant's guilt and in conceding inculpatory evidence were insufficiently pleaded, and thus, evidentiary hearing on claims was not warranted, where defendant offered only conclusory allegations.

(Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[11] **Criminal Law**
Necessity for Hearing

Conclusory allegations are insufficient to warrant evidentiary hearing on motion for post-conviction relief.

Cases that cite this headnote

[12] **Criminal Law**
Death Penalty

To establish prejudice during penalty phase of death sentence case, for purpose of ineffective assistance claim, defendant must show that there is reasonable probability that, absent trial counsel's error, sentencer would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[13] **Criminal Law**
Presentation of Evidence in Sentencing Phase

Trial counsel's failure to introduce allegedly mitigating evidence in penalty phase of capital murder trial did not constitute ineffective assistance; some evidence was cumulative of that presented, there was no reasonable probability that fact that defendant suffered from venereal disease and that his sister died after defendant returned from Vietnam war would have affected balance of factors, and any benefit to be obtained from fact that defendant assisted jail guard would have been negated by more recent evidence that defendant, while in prison, hit deputy in face. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[14] **Criminal Law**
Counsel

Allegations that counsel was ineffective in penalty phase of capital murder trial in failing to provide physician with records, in failing to object to qualification of retired FBI agent as expert in military records, in failing to object to court rushing proceedings and denying due process, and in failing to object to introduction of prejudicial and inflammatory testimony were legally insufficient, and thus, evidentiary hearing on such post-conviction claims was not warranted; petitioner failed to describe claims with any particularity and failed to assert how these actions prejudiced defense. (Per three justices with one justice concurring in result.) U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[15] **Criminal Law**
Conduct of Trial

Post-conviction claim that state's withholding of box which contained marijuana cigarette, notes, and automobile registrations constituted *Brady* violation was legally insufficient, and thus, petitioner was not entitled to evidentiary hearing on claim, where petitioner failed to indicate how these items were exculpatory or impeaching. (Per three justices with one justice concurring in result.)

Cases that cite this headnote

[16] **Criminal Law**
Materiality and Probable Effect of Information in General

In order to establish *Brady* violation, defendant must prove the following: (1) that evidence at issue is favorable to accused, either because it is exculpatory or because it is impeaching; (2) that evidence was suppressed by state, either willfully or inadvertently; and (3) that prejudice ensued.

Cases that cite this headnote

[17] **Criminal Law**

Waiver

Post-conviction relief petitioner waived claim that all relevant files and records from public agencies may not have been provided, where petitioner failed to pursue claim in trial court. (Per three justices with one justice concurring in result.)

Cases that cite this headnote

[18] **Criminal Law**

Objections and Disposition Thereof

Juror interviews were not permissible based upon defendant's assertion that juror attempted to discuss guilt prematurely, given that defendant's assertion went to matter that inhered in verdict itself. (Per three justices with one justice concurring in result.)

9 Cases that cite this headnote

[19] **Criminal Law**

Objections and Disposition Thereof

In order to be entitled to juror interviews after trial, defendant must present sworn allegations that, if true, would require court to order new trial because alleged error was so fundamental and prejudicial as to vitiate entire proceedings.

5 Cases that cite this headnote

[20] **Criminal Law**

Objections and Disposition Thereof

Juror interviews are not permitted relative to any matter that inheres in verdict itself and relates to jury's deliberations; to this end, any jury inquiry is limited to allegations which involve overt prejudicial act or external influence, such as juror receiving prejudicial nonrecord evidence or actual, express agreement between two or more jurors to disregard their juror oaths and instructions.

11 Cases that cite this headnote

Attorneys and Law Firms

***934** Neal A. Dupree, Capital Collateral Regional Counsel, and William M. Hennis, III, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel-South, Fort Lauderdale, FL, for Appellant.

Robert A. Butterworth, Attorney General, and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

William Reaves, a prisoner under sentence of death, appeals the summary denial of his motion for postconviction relief ***935** filed pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons detailed below, we remand for an evidentiary hearing on Reaves' claim that counsel was ineffective.

FACTS

Reaves was convicted of first-degree murder for the shooting death of an Indian River County deputy sheriff and was sentenced to death. On direct appeal, this Court reversed the conviction. *Reaves v. State,* 574 So.2d 105 (Fla.1991). Upon retrial, a jury again found Reaves guilty and recommended the sentence of death by a vote of ten to two, a recommendation which the trial court followed. On direct appeal, this Court affirmed the conviction and sentence, finding the relevant facts as follows:

> The victim, Deputy Sheriff Richard Raczkoski, at or about 3 a.m. on September 23, 1986, responded to a 911 call from a phone booth outside a Zippy Mart near Vero Beach. The deputy acknowledged his arrival at the Zippy Mart and inquired about outstanding warrants on William Reaves. Within minutes of the call, the deputy was found near the phone booth with four gunshot wounds from which he died later that morning. A piece of paper inside the deputy's vehicle had written on it: William Reaves, black male, 4336 38th Avenue, date of birth 12/30/48.
>
> Witness Whitaker, who discovered the deputy, testified that he saw a black man wearing red shorts and a white

T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton was ruled unavailable to testify, [pursuant to] section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record. According to Hinton, Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment after the shooting and said: "I done ... up. I just shot a cop, I just shot a police." Hinton testified that Reaves quoted the deputy as saying, "Don't shoot me. Don't shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties. Witness Fredell testified that Reaves was wearing red shorts and a white T-shirt on the afternoon prior to the early-morning murder and did not appear to be under the influence of alcohol or drugs.

Detective Pisani quoted Reaves as stating that while he and the deputy were conversing, a gun fell out of Reaves' shorts. The deputy put his knee on the weapon, Reaves pushed the knee back, picked up the gun, refused to surrender it, and in a panic and "wired on cocaine" shot the deputy as he was running away. Reaves admitted that he emptied the seven-round clip of his .38 when he fired. A firearms expert testified that Reaves' gun was a type that required a pull of the trigger each time it was fired; it was not an automatic.

The jury convicted Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial judge imposed the death sentence, finding three aggravating circumstances [2] and no statutory mitigating circumstances. The judge found three nonstatutory mitigating circumstances. [3].

2 Reaves was previously convicted of a felony involving the use or threat of violence to the person; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and the capital felony was especially *936 heinous, atrocious, or cruel. § 921.141(5)(b), (e), (h), Fla. Stat. (1985).

3 Reaves was honorably discharged from military service, had a good reputation in his community up to the age of sixteen, [and] was a considerate son to his mother and was good to his siblings.

Reaves v. State, 639 So.2d 1, 3 (Fla.1994) (footnote 1 omitted).

[1] **[2]** On February 21, 1996, Reaves filed his initial motion for postconviction relief. He later amended this motion and filed the current motion on February 17, 1999. After a *Huff*[1] hearing, the trial court entered an order summarily denying the motion for postconviction relief without holding an evidentiary hearing. Reaves appeals this order and raises fourteen claims on appeal.[2] We find that several of these claims are procedurally barred,[3] insufficiently pled,[4] or premature.[5] For the reasons discussed below, we conclude that the trial court erred in summarily dismissing Reaves' claim of ineffectiveness of trial counsel.

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

2 Reaves asserts that he is entitled to relief because: (1) the trial court erroneously denied Reaves an opportunity to fully develop his claim of ineffective assistance of counsel and his claim of error under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), during an evidentiary hearing; (2) the prosecutor wrongfully engaged in inflammatory and improper comments; (3) he is entitled to additional public records; (4) he is innocent of first-degree murder and is innocent of the death penalty; (5) he should be entitled to interview the jurors; (6) he was denied his constitutional right to confront witnesses; (7) the penalty phase jury instructions were improper; (8) the State's decision to seek the death penalty was based upon racial considerations; (9) there were excessive security measures taken at trial which implicate the fairness of his trial; (10) Florida's capital sentencing statute is unconstitutional; (11) he is entitled to a new trial based on the impact of cumulative errors; (12) he was denied adversarial testing due to judicial bias; (13) the jury was not a fair cross-section of the community; and (14) he is insane for the purpose of execution.

3 We deny the following claims as they either were raised or should have been raised on direct appeal and accordingly are procedurally barred: (2) allegedly improper prosecutorial comments; (6) whether Reaves was denied his right to confrontation; (7) improper penalty phase jury instructions; (9) excessive security measures taken at trial; (10) the constitutionality of Florida's capital sentencing statute; (12) alleged judicial bias based on various

rulings during the trial; and (13) whether the jury was a fair cross-section of the community.

4 We find that his claim relative to whether the State's decision to seek the death penalty was based upon racial considerations is insufficiently pled.

5 Reaves has prematurely raised the issue of whether he is insane for the purpose of execution, and hence we deny this claim without prejudice. *See* Fla. R.Crim. P. 3.811(c) ("No motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes.").

ANALYSIS

This Court has recently summarized the applicable standard when reviewing a summary denial of a postconviction motion:

> [A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not ***937** refuted by the record. We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

Freeman v. State, 761 So.2d 1055, 1061 (Fla.2000) (citations omitted). With this standard in mind, we turn to the individual claims which Reaves now raises.

A. Guilt Phase Ineffective Assistance of Counsel

[3] In Reaves' first claim, he contends that his counsel performed below the constitutional threshold of adequate representation as established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[6] Reaves alleges seven instances which allegedly constitute ineffective assistance of counsel: (1) counsel was ineffective in failing to present a voluntary intoxication defense and a related *Ake*[7] claim; (2) counsel conceded guilt and failed to object to evidence of drug use and other "bad acts"; (3) counsel was ineffective during jury selection; (4) counsel failed to prepare for and cross-examine certain witnesses; (5) counsel failed to adequately investigate and present various mitigation including Reaves' family background; (6) counsel failed to object to prejudicial testimony during the penalty phase; and (7) counsel failed to have sufficient mental health experts.

6 Pursuant to *Strickland,* Reaves must make the following showing in order to prevail on this claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

7 *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[4] In Reaves' first subclaim, he asserts that he is entitled to an evidentiary hearing regarding whether trial counsel was ineffective in failing to present a voluntary intoxication defense. The record shows that during the guilt phase, the State introduced Reaves' confession-evidence which could have supported a voluntary intoxication defense since Reaves claimed to be "coked up" when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which supported voluntary intoxication despite the fact that there was other evidence which could have supported this theory. During the jury charge conference, the trial judge noted that during Reaves' first trial, the jury was informed as to this defense, and it was decided that such a jury instruction should be given again. Notwithstanding this fact, Reaves' counsel never mentioned voluntary intoxication during closing arguments, and never discussed how the evidence could have supported this theory or how cocaine affects the user. 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.

This case is similar to *Patton v. State,* 784 So.2d 380 (Fla.2000), a case in which ***938** defense counsel knew of but did not present evidence that the defendant had a substantial history of drug and alcohol abuse, that he had taken drugs seven hours prior to the crime, and that the defendant had fresh track marks on his arm at the time he was arrested. *Id.* at 387. In remanding the case for an evidentiary hearing, this Court held:

> Because the record does not conclusively refute some of Patton's allegations of ineffective assistance of counsel, the court should have held an evidentiary hearing. Specifically, the court should have held a hearing to determine if counsel was ineffective in failing to investigate and present evidence that Patton was intoxicated or insane at the time of the shooting. Instead, the court summarily denied this claim stating a strategy must be presumed. If this were the standard, a strategy could be presumed in every case and an evidentiary hearing would never be required on claims of ineffective assistance of counsel. To the contrary, it was necessary for the court to conduct an evidentiary hearing to determine whether counsel was acting competently when she chose not to present an intoxication or insanity defense to a charge of first-degree premeditated murder, where she had conceded that the defendant shot the victim.

Id. at 386-87. *Compare Kitchen v. State,* 764 So.2d 868, 869 (Fla. 4th DCA 2000) ("Counsel may make a tactical decision not to pursue a voluntary intoxication defense, but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing."), *with Stewart v. State,* 801 So.2d 59, 65 (Fla.2001) (holding that counsel was not ineffective for failing to employ a voluntary intoxication defense where, *at an evidentiary hearing,* defense counsel testified that he considered an intoxication defense but determined that it was not a viable defense based on the facts of the case).

[5] **[6]** The postconviction court denied Reaves' allegation without an evidentiary hearing despite evidence that his counsel had evidence supporting this defense which he did not present. Specifically, the judge found that voluntary intoxication was not an available defense since the defendant's expert witness testified during a proffer that Reaves was not so intoxicated that he did not know right from wrong. This reasoning obscures the difference between an insanity defense and a voluntary intoxication defense. Insanity is a complete defense if, at the time of the crime, the defendant was incapable of distinguishing between right and wrong as a result of a mental disease or defect.[8] Voluntary intoxication is a separate theory and is available to negate specific intent, such as the element of premeditation essential in first-degree murder.[9] In order to successfully assert the defense of voluntary intoxication, "the defendant must come forward ***939** with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged." *Rivera v. State,* 717 So.2d 477, 485 n. 12 (Fla.1998) (quoting *Linehan v. State,* 476 So.2d 1262, 1264 (Fla.1985)). Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense. As Reaves' claim of ineffective assistance was legally sufficient and was not refuted by the record, it was error not to afford him an evidentiary hearing on this issue.

8 *Nowitzke v. State,* 572 So.2d 1346, 1355 n. 5 (Fla.1990) ("Florida follows the M'Naghten Rule, which states that any expert testimony ... to be relevant, must concern whether [the defendant] (1) was incapable of distinguishing right from wrong (2) as a result of mental infirmity, disease, or defect.") (internal quotation marks omitted); *Hall v. State,* 568 So.2d 882, 885 (Fla.1990) ("[A]n accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong.").

9 *Gardner v. State,* 480 So.2d 91, 92 (Fla.1985) ("Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery."); *Burch v. State,* 478 So.2d 1050, 1051 (Fla.1985) ("We explicitly recognized [in *Cirack v. State,* 201 So.2d 706 (Fla.1967),] that the defense of voluntary intoxication was available to negate specific intent ....").

[7] In a related subissue, Reaves argues 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. Reaves also asserts that his counsel was ineffective during voir dire for failing to question jurors about their reaction to the defense of voluntary intoxication, substance abuse, and mental defects. The voluntary intoxication defense was not advanced at trial, so counsel was not ineffective in failing to question the jurors relative to a defense which he never utilized.

[8] In Reaves' second allegation of ineffective assistance of counsel, he asserts that his trial counsel was ineffective during jury selection because prospective jurors Shirley Brennan, Michael Moore, Mary Bilbrey, and John Ujvarosi revealed possible prejudice or bias during voir dire and trial counsel failed to follow up by asking more in-depth questions relative to this potential bias. Reaves also contends that his trial counsel was ineffective because he did not articulate a basis for challenging jurors Brennan, Moore, Bilbrey, and Ujvarosi. Reaves asserts that he would have been entitled to a new trial had trial counsel preserved the claim by challenging the four jurors for cause. The trial court denied this claim as legally insufficient because Reaves failed to assert how the alleged deficiencies caused prejudice.

We find that this claim does not provide a sufficient ground for relief since Reaves cannot show that his counsel's performance was deficient. [10] Specifically, Reaves has not shown that trial counsel had a reasonable basis to assert for-cause challenges. He attempts to surmount this problem by alleging that if counsel had "followed up" during voir dire with more specific questions, there would have been a basis for a for-cause challenge. [11] This is mere conjecture. We accordingly find that the trial court properly denied relief as to this subissue.

10 Since Reaves fails to establish the deficiency prong which is a prerequisite under *Strickland,* it is not necessary to address whether he has made a showing of prejudice. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.").

11 Although trial counsel indicated during the jury selection that he would have struck these four jurors if he had had any peremptory challenges left, there is no basis to find that trial counsel could have challenged these jurors for cause.

[9] Reaves next asserts that the trial record establishes his counsel was ineffective because he failed to prepare for and cross-examine numerous witnesses presented by the State. The trial court analyzed this in detail and denied the claim, finding:

> In Claim III(B)4, the Defendant claims that his trial counsel failed to conduct depositions in preparation for trial, and failed to effectively cross-examine the State's witnesses at trial. He states Lieutenant Kenneth Hamilton, the shift supervisor the night of the ***940** incident, apparently was never deposed and was quickly cross-examined. He makes no allegation about what the lieutenant should have been asked either at [the] deposition or on cross-examination. This claim is conclusory, and does not warrant an evidentiary hearing. *See Kennedy v. State,* 547 So.2d 912, 913 (Fla.1989). Dr. Leonard Walker was only cross-examined for "a minimal three transcript pages" and was not asked about the angle of the bullets, according to the Defendant. The record demonstrates that Dr. Walker did testify about the angle of the bullets on direct examination.... Mr. Kirschner followed up on this line of questioning on cross-examination, contrary

> to the Defendant's allegations.... The Defendant also claims Kirschner's cross-examination of Howard Whitaker and Detective Perry Pisani was minimal. The Defendant does not identify what more defense counsel could have asked the detective, nor how the "minimal" cross-examination caused the Defendant to be prejudiced.
>
> The Defendant argues that Whitaker should have been asked whether he saw the actual shooting, and that Kirschner should have followed up the witness's account that the Defendant was running as a person ran who was under fire in the Vietnam War. The record demonstrates that during his direct testimony, Whitaker stated that as he was pulling out from behind the convenience store, he heard some loud reports. As he and his trainee approached the store, he saw a black male run from a parked vehicle across the front of the building. Whitaker located the deputy, called 911 and stayed with the deputy until the ambulance arrived. It is obvious that the witness did not see the actual events.... Contrary to the Defendant's allegations, Kirschner followed through with questions that emphasized the witness had not seen the actual shooting. Kirschner also asked the witness about seeing the Defendant's "kind" of run in Vietnam.... None of the claims raised in this portion of Claim III, satisfy either prong of the *Strickland* test.

Upon review of the record, we agree with the trial court's analysis. Reaves does not indicate what favorable information defense counsel could have elicited from these witnesses, nor does he show how he was prejudiced. As Reaves' claim was legally insufficient, we affirm the trial court's denial of relief. *See Magill v. State,* 457 So.2d 1367, 1370 (Fla.1984) (holding that the defendant's claim that his counsel was ineffective in failing to cross-examine certain witnesses was insufficient since he failed to allege what material may have been brought out in cross-examination).

[10] **[11]** In the fourth subclaim regarding ineffective assistance of counsel, Reaves summarily asserts that defense counsel conceded guilt without first consulting him and also conceded inculpatory evidence. As to Reaves' assertion that counsel conceded guilt, the entire substance of this claim as presented in his 3.850 motion stated: "Counsel conceded guilt without consulting Reaves of his strategy or decision." Reaves failed to allege how his counsel conceded guilt or when during the trial this occurred. His claim as to the concession regarding inculpatory evidence was equally vague, asserting merely that his counsel was ineffective because he erroneously failed to object when the State introduced evidence of drug use and "other bad acts by Mr. Reaves." We hold that both of these grounds were insufficiently pled, and hence Reaves was not entitled to relief on these allegations. Conclusory allegations are insufficient to warrant an evidentiary hearing. ***941** *Sireci v. State,* 773 So.2d 34, 40 n. 11 (Fla.2000) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing.") (quoting *Kennedy v. State,* 547 So.2d 912, 913 (Fla.1989)).

B. Penalty Phase Ineffectiveness

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

[13] Reaves first contends that counsel unreasonably failed to introduce various mitigating circumstances, like Reaves's impoverished childhood, his military background, his drug addiction, his sister's death which occurred shortly after he returned from Vietnam, and his giving assistance to a jail guard in 1973. The trial court denied this claim, finding that "[a]ny of the proposed additional evidence would have been either irrelevant or cumulative." We agree. Defense counsel presented numerous witnesses who discussed Reaves' childhood in detail and further testified as to his drug addiction when he returned home from Vietnam. Two men who served with Reaves also testified as to the conditions of fighting the war in Vietnam, including drug usage. A review of the record supports the trial court's finding that the evidence which he now seeks to introduce is cumulative. [12] The only evidence identified in Reaves' postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a venereal disease, that one of his sisters died shortly after he returned from Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances. [13] The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer.

12 *See, e.g., Jennings v. State,* 583 So.2d 316, 321 (Fla.1991) ("It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position.").

13 *Occhicone v. State,* 768 So.2d 1037, 1049 (Fla.2000) ("In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show 'both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.' ").

In Reaves' final claim regarding ineffective assistance of counsel, he contends that during the penalty phase counsel failed to object to references to Reaves' first trial and conceded "key issues." The trial court denied this claim, finding that "the record demonstrates that no such references to a prior trial and conviction were made" and that the remainder of his claims were conclusory. After reviewing the record, we likewise find no references ***942** were made to Reaves' initial trial and find that the trial court properly denied the claim.

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

C. Brady Claims

[15] Reaves asserts that he is entitled to an evidentiary hearing to establish whether a *Brady* [14] violation occurred and that the State withheld a box which contained a portion of a marijuana cigarette, notes, and automobile registrations. The trial court summarily denied this claim as insufficiently pled. We agree.

14 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[16] In order to establish a *Brady* violation, a defendant must prove:

> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

Way v. State, 760 So.2d 903, 910 (Fla.2000) (quoting *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). Reaves' allegations are legally insufficient. He does not indicate or allege how these items are exculpatory or impeaching. In fact, the marijuana cigarette would be *consistent* with Hinton's trial testimony in which he stated that he and Reaves had smoked marijuana *after* the shooting. We hold that the trial court properly denied this claim as conclusory and legally insufficient. *See Asay v. State,* 769 So.2d 974, 982 (Fla.2000) (holding that a trial court does not err in refusing to grant an evidentiary hearing as to *Brady* claims which were insufficiently pled).

D. Entitlement to Public Records

[17] Reaves asserts that all relevant files and records from public agencies may not have been provided. The trial court summarily denied this claim, finding that Reaves had waived it:

> At a status conference on October 5, 1998, defense counsel gave an update to the Court on the status of the records production, and advised the Court that the public record production had been completed, unless something unexpected arose. The Court informed counsel that if any additional public records requests from this date forward materialized, a motion must be filed with the trial court, and an emergency hearing would be held.... No motions were filed with the Court.

As this Court has recognized, where a defendant fails to pursue a claim for public records at the trial court, he waives such claim and cannot raise it on appeal with this Court. *Johnston v. State,* 708 So.2d 590, 592-93 (Fla.1998) (holding that the trial court properly denied the defendant's motion for an evidentiary hearing on the ***943** public records request because "at the *Huff* hearing Johnston's postconviction counsel volunteered that while not waiving his right to make the public records requests, he was not going to pursue them at that time"); *Lopez v. Singletary,* 634 So.2d 1054, 1058 (Fla.1993) ("[A]ny postconviction movant dissatisfied with the response to any requested access must pursue the issue before the trial judge or that issue will be waived."). This Court, accordingly, finds that the trial court correctly decided this claim.

E. Juror Misconduct

[18] **[19]** **[20]** In Reaves' next claim, he asserts that the postconviction court erred in denying his juror misconduct claim without first permitting juror interviews. His amended 3.850 motion alleges the factual basis behind this claim as follows:

> Undersigned counsel has learned through investigation that Jonathan Jay Kirschner, trial counsel, was approached by two female jurors after the trial was concluded and related that one of the other jurors, Mr. John Ujvarosi, was discussing the guilt of Mr. Reaves from the beginning of the trial, long before they were able to discuss such issues and after they were instructed not to discuss such issues.

In order to be entitled to juror interviews, Reaves must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State,* 804 So.2d 1218, 1225 (Fla.2001). Juror interviews are not permitted relative to any matter that inheres in the verdict itself and relates to the jury's deliberations. [15] To this end, any jury inquiry is limited to allegations which involve an overt prejudicial act or external influence, [16] such as a juror receiving prejudicial nonrecord evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions. *Id.* at 100.

15 § 90.607(2)(b), Fla. Stat. (1999) ("Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment."); *Johnson v. State,* 593 So.2d 206, 210 (Fla.1992) ("[A] verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations.") (quoting *Mitchell v. State,* 527 So.2d 179, 181 (Fla.1988)).

16 *Baptist Hosp. of Miami, Inc. v. Maler,* 579 So.2d 97, 99 (Fla.1991) ("The distinction drawn by the cases quoted above [which permit juror interviews] is between overt prejudicial acts, and subjective impressions or opinions of jurors. To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed.").

In the instant case, Reaves has alleged that one juror attempted to discuss guilt prematurely. This contention does not involve any agreement among the other jurors to disregard their oaths and ignore the law, nor does it imply that the jury was influenced by external sources or improper material. Reaves' assertion, which involves a lone juror's understanding of the jury instructions, is "a matter which essentially inheres in the verdict itself"; hence, juror interviews are not permissible. *See, e.g., Sims v. State,* 444 So.2d 922, 925 (Fla.1983) ("A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself.... Therefore the court did not err in refusing to allow further questioning of the juror."); *see also Devoney v. State,* 717 So.2d 501, 504 (Fla.1998) (discussions of matters which the jury was ***944** explicitly instructed to disregard does not constitute an overt act of misconduct that would permit inquiry into the verdict); *Johnson,* 593 So.2d at 210 (questioning the jury foreman about misunderstandings of the jury instructions during their deliberations in the penalty phase of a capital case is testimony which "essentially inheres in the verdict" and hence is inadmissible). Consequently, as Reaves has not sufficiently alleged any fact which involves an overt prejudicial act that would necessitate a new trial, the trial court was correct in prohibiting juror interviews.

F. Cumulative Error

Reaves' final claim contends that he is entitled to relief based on cumulative errors. This claim has been rendered moot in light of our decision to remand this case for an evidentiary hearing. *See, e.g., Thompson v. State,* 796 So.2d 511, 515 n. 5 (Fla.2001) ("Thompson's cumulative error claim ... has been rendered moot in light of our decision to remand this case for an evidentiary hearing.").

CONCLUSION

For the reasons expressed above, we remand this case to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the related subclaims as addressed above. We affirm the trial court's denial of Reaves' postconviction motion in all other aspects.

It is so ordered.

SHAW, PARIENTE, and QUINCE, JJ., concur.

ANSTEAD, J., concurs in result only.

WELLS, C.J., dissents with an opinion, in which HARDING and LEWIS, JJ., concur.

WELLS, C.J., dissenting.

I dissent because I do not find that appellant has demonstrated that an evidentiary hearing is required in respect to the claim of ineffective assistance of counsel based upon the failure to pursue involuntary intoxication as a defense. First, I observe that even in appellant's brief this issue is not pursued in any sort of depth. I conclude that this is because it is clear from the trial record that what the defense did use as the basis for its defense was inconsistent with voluntary intoxication. Second, I find no reason to find the trial court's order on this issue to be erroneous. The trial court stated:

> The Defendant next argues in Claim III(B)7, that his attorney unreasonably failed to properly present Reaves' mental impairment to the jury, in order to negate the specific intent required for first-degree murder. The Defendant claims that during the penalty phase, the defense expert presented evidence of the Defendant's history of cocaine abuse and polysubstance abuse, and of Defendant's claim that he blamed the shooting of the deputy on the fact that Reaves was under the influence of cocaine and panic and paranoia. However, he maintains that trial counsel failed to investigate his client's substance abuse history or to instruct and prepare Dr. Weitz to do so during the guilt phase. The Defendant argues that had counsel presented the mental impairment with the substance abuse, this would have caused the jury to convict the Defendant of a lesser included crime, rather than first degree murder.
>
> The record demonstrates that voluntary intoxication was not an available defense. Dr. Weitz testified on proffer that even though the Defendant had been smoking cocaine and drinking beer, he was not so intoxicated to prevent ***945** Reaves from knowing right from wrong. (A copy of the trial transcript, pages 1517-1518, is attached as exhibit "5.") *Therefore, defense counsel could not have combined evidence of the Vietnam Syndrome with evidence of drug or alcohol*

abuse to negate the specific intent required for first-degree murder, as the focus must be on the defendant's intoxication. See State v. Bias, 653 So.2d 380, 382 (Fla.1995).

Claim III(B)8 states that Mr. Kirschner failed to investigate and discover additional evidence of Reaves' intoxication, to wit: Reaves' extreme nervousness and excessive sweating when picked up by the taxi driver; witness Hinton's testimony that he and Reaves were smoking marijuana on the night of the offense; the remains of a marijuana cigarette found at Hinton's residence; testimony of family and friends that Reaves' had a long-standing history of substance abuse; and military records that Reaves underwent drug treatment counseling just prior to his discharge from the military. The record refutes these claims.

The record demonstrates that Mr. Kibbee, the taxi driver, picked up the Defendant the day after the murder, in Melbourne, Florida. Still, Mr. Kirschner asked Mr. Kibbee whether he had ever seen anyone under the influence of crack cocaine, and whether they appeared to be nervous. (A copy of the trial transcript, page 1232, is attached as exhibit "6.") The driver's testimony did not go undiscovered by counsel. Eugene Hinton testified on cross-examination that he and Reaves smoked marijuana on the day of the offense, after the Defendant shot Deputy Raczkoski. (A copy of the trial transcript, page 1202, is attached as exhibit "7.") Furthermore, Mr. Hinton testified that the Defendant appeared to be normal to him, after the shooting, except that he was frightened or excited. (A copy of the trial transcript, pages 1208-09, is attached as exhibit "8.") *See also Reaves,* 639 So.2d at 3.

The assertions and affidavits attached to the motion, which allege that Mr. Reaves had a long-standing history of substance abuse, do nothing to establish that the Defendant was under the influence of drugs or alcohol at the time of the murder. Therefore, such evidence would not negate the specific intent requirement for first-degree murder. Mr. Kirschner could not be deemed ineffective for failing to discover this evidence.

State v. Reaves, No. 86-729-CF, order at 7-8 (Fla. 19th Cir. Ct. order filed Feb. 10, 2000) (emphasis added).

HARDING and LEWIS, JJ., concur.

All Citations

826 So.2d 932, 27 Fla. L. Weekly S601

End of Document

APPENDIX C

942 So.2d 874
Supreme Court of Florida.

William REAVES, Appellant,
v.
STATE of Florida, Appellee.

No. SC04-891.
|
Sept. 14, 2006.
|
Rehearing Denied Nov. 2, 2006.

Synopsis
Background: After defendant's murder conviction and sentence of death were affirmed on appeal, 639 So.2d 1, defendant filed motion for postconviction relief. The Circuit Court, Indian River County, Robert A. Hawley, J., summarily denied motion, and defendant appealed. The Supreme Court, 826 So.2d 932, remanded. On remand, the Circuit Court denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] trial counsel's failure to investigate, prepare, and present a voluntary intoxication defense did not constitute deficient performance, as element of ineffective assistance claim;

[2] postconviction court did not abuse its discretion in denying defendant's motion for a writ of habeas corpus ad testificandum to secure witness's testimony at evidentiary hearing; and

[3] postconviction court did not abuse its discretion in denying defendant's motion for testing some of the evidence for drug metabolites.

Affirmed.

Anstead, J., concurred in part, dissented in part, and filed a separate opinion.

West Headnotes (13)

[1] **Criminal Law**
Capacity to Commit Crime;Insanity or Intoxication

Trial counsel's failure to investigate, prepare, and present a voluntary intoxication defense during capital murder trial did not constitute deficient performance, as element of ineffective assistance claim; other than defendant's own statements in his confession, no direct evidence existed that defendant was intoxicated at time of the offense, while defendant said during his confession that he was high at time he shot victim, he also made statements indicating he knew exactly what he was doing at the time of the shooting, and witness, who was the first person to see defendant after the shooting, testified that defendant's speech was not slurred and appeared to be in full control of his faculties. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[2] **Criminal Law**
Deficient Representation and Prejudice in General

An ineffective assistance of counsel claim has two components: a defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
Deficient Representation in General

To establish deficient performance, as element of an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
Prejudice in General

To establish that he was prejudiced by counsel's deficient performance, as element of ineffective assistance of counsel claim, a defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
Determination

Failing to establish either the deficiency or prejudice prong of the test for ineffective assistance of counsel results in a denial of the claim. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[6] **Criminal Law**
Effective Assistance

Criminal Law
Post-Conviction Relief

For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**
Adequacy of Representation

On an ineffective assistance of counsel claim, the standard is not how present counsel would have proceeded in hindsight. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[8] **Criminal Law**
Adequacy of Representation

Criminal Law
Determination

A fair assessment of attorney performance, for purposes of an ineffective assistance claim, requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
Existence of Specific Intent Essential to Offense

In order to assert the defense of voluntary intoxication, a defendant must present evidence of intoxication at the time of the offense that would show his inability to form the requisite specific intent.

4 Cases that cite this headnote

[10] **Witnesses**
Habeas Corpus Ad Testificandum

Postconviction court did not abuse its discretion in denying defendant's motion for a writ of habeas corpus ad testificandum to secure witness's testimony at evidentiary hearing, even though defendant claimed the testimony was relevant and material to claim that trial counsel was ineffective for failing to raise a voluntary intoxication defense at retrial for capital murder offense; while defendant sought to have witness testify in regard to witness's affidavit wherein he described defendant as "all strung out," such affidavit was made seven years following retrial, at which witness refused to testify, and testimony given by witness at defendant's first trial did not support defendant's claim of intoxication. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[11] **Criminal Law**
Preliminary Proceedings

The standard of review for a trial court's ruling on a motion for writ of habeas corpus ad testificandum is abuse of discretion.

Cases that cite this headnote

[12] **Criminal Law**
Preliminary Proceedings
The abuse of discretion standard of review applies to the denial of a motion for discovery in a postconviction case.

2 Cases that cite this headnote

[13] **Criminal Law**
Discovery and Disclosure
Postconviction court did not abuse its discretion in denying defendant's motion for testing some of the evidence for drug metabolites, even though defendant claimed that such would support his claim that trial counsel rendered ineffective assistance during capital murder trial by failing to raise voluntary intoxication defense; defendant's expert testified at evidentiary hearing that while testing could reveal the presence of drugs, it could not reveal the actual time the drugs were taken or in what amount, and thus any drugs, drug paraphernalia, hair sample, or clothing seized could not provide competent evidence relating to defendant's level of intoxication. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

Attorneys and Law Firms

***875** Neal A. Dupree, Capital Collateral Regional Counsel-Southern Region, William M. Hennis, III, Litigation Director, CCRC, Fort Lauderdale, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, Debra Rescigno, and ***876** Leslie Campbell, Assistant Attorneys General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

William Reaves, a prisoner under sentence of death, appeals an order of the circuit court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the trial court's denial of relief.

FACTUAL AND PROCEDURAL HISTORY

Reaves was convicted and sentenced to death for the murder of Deputy Richard Raczkowski of the Indian River Sheriff's Department. On direct appeal we summarized the facts of the case as follows:

> In the early morning hours of September 23, 1986, Deputy Richard Raczkowski of the Indian River Sheriff's Department was dispatched by the 911 operator to a convenience store in response to a call from the store's pay telephone. According to Reaves' confession, when the deputy arrived at the store he spoke to Reaves who explained he had made the 911 call because he had no money to call a taxi cab. The deputy then called the 911 operator and requested a cab be sent to the store.
>
> In his confession Reaves stated that while he and the deputy awaited the cab, a gun fell from the shorts Reaves was wearing. When Reaves tried to pick up the gun, the deputy prevented him from doing so by stepping on his hand. Reaves pushed the deputy's knee and then grabbed him by the throat. Reaves eventually got the gun and declared he would not give it to the deputy. The deputy backed away before turning to run. Reaves then shot the deputy in the back four times, claiming he was frightened because he had been using cocaine and because the deputy had reached for his own gun.
>
> It was later determined that the deputy's gun in fact had been fired three times.
>
> After the shooting Reaves went to the home of a friend named Hinton. According to Hinton, Reaves said he was able to retrieve the gun after pushing the deputy in the throat. Reaves pointed the gun in the deputy's face

> as the deputy attempted to draw his own weapon and stated, "I wouldn't do that if I were you." The deputy began backing away, turned, and ran. Reaves then shot him as he ran away.

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

This Court reversed the judgment and sentence and remanded the case for a new trial. *See id.* at 107-108. This Court held where the prosecuting attorney had previously represented Reaves in a grand larceny case as a public defender and had actual access to privileged defense-related information, the trial court erred in denying the properly filed motion to disqualify the prosecutor filed before trial. *Id.*

On direct appeal after the retrial in 1992, this Court summarized the following additional facts:

> Witness Whitaker, who discovered the deputy, testified he saw a black man wearing red shorts and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton was ruled unavailable to testify, [pursuant to] section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record.... [Hinton testified that he] had no trouble understanding Reaves; his speech was not slurred ***877** and he appeared to be in full control of his faculties.

Reaves v. State, 639 So.2d 1, 3 (Fla.1994). The jury convicted Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial court found three aggravating circumstances (prior violent felony conviction, avoid arrest, and murder was especially heinous, atrocious, or cruel). Although no statutory mitigating circumstances were found, the trial court found three nonstatutory mitigating circumstances (honorable military discharge, good reputation in the community up to the age of sixteen, and he was a good family member). *Id.* at 3 & nn. 2-3.

On direct appeal, Reaves raised twelve issues concerning the guilt phase and four issues concerning the penalty phase of the trial. In particular, Reaves asserted that several statements by witness Hinton, under oath, prior to Hinton's 1987 trial testimony were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991). 639 So.2d at 3. In affirming the conviction and sentence, this Court rejected all of Reaves' claims on the guilt and penalty phase issues. This Court held while it "agree[d] that Hinton's prior inconsistent testimony should have been admitted," it found the trial court's exclusion harmless error. *Reaves,* 639 So.2d at 4.

Reaves filed a petition for writ of certiorari to the United States Supreme Court which was denied. *See Reaves v. Florida,* 513 U.S. 990, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Reaves filed an initial motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.851 in February 1995. The motion was amended in February 1999. After a *Huff*[1] hearing on May 28, 1999, the trial court entered an order on February 9, 2000, summarily denying the motion for postconviction relief without an evidentiary hearing. Reaves' motion for rehearing was denied on March 14, 2000.

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

Reaves appealed to this Court and raised fourteen issues. While we found several of those claims were procedurally barred, insufficiently pled or premature, we concluded that the trial court erred in summarily denying Reaves' claim of ineffectiveness of trial counsel, Jay Kirschner. *See Reaves v. State,* 826 So.2d 932, 936 (Fla.2002). The case was remanded to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and related subclaims. *See id.* at 944.

An evidentiary hearing was held on March 4-6, 2003. While awaiting the trial court's decision on the pending motion, Reaves filed a successive 3.851 motion based on *Ring*[2] on June 24, 2003. Reaves also supplemented his 3.851 motion on December 10, 2003, by notifying the court of his eligibility to receive veteran's benefits based on a finding of 100% disability due to Post-Traumatic Stress Disorder (PTSD). On March 10, 2004, the trial court denied both the amended motion for postconviction relief and the successive motion for postconviction relief. After denying the motion for rehearing, the trial court signed final orders denying both motions on April 20, 2004.

2 *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In this appeal Reaves raises two issues: (1) whether the trial court erred in denying a new trial where it was demonstrated that trial counsel was deficient in failing to investigate, prepare or present a voluntary intoxication defense; and (2) whether the ***878** trial court erred in excluding the testimony of Eugene Hinton from the evidentiary hearing and in denying forensic testing of evidence for drug metabolites. For the reasons expressed herein, we affirm the trial court's order denying Reaves' motion for postconviction relief.

DISCUSSION

Failure to Present Voluntary Intoxication Defense

[1] Reaves argues that trial counsel rendered ineffective assistance on retrial by failing to investigate, prepare, and present a voluntary intoxication defense. Reaves maintains he was prejudiced by counsel's failure to present this defense because there was ample evidence to show he was intoxicated and could not have formed the specific intent for murder. Conversely, the State argues that Reaves failed to demonstrate that counsel was deficient for failing to present a voluntary intoxication defense. The State argues Reaves failed to present any additional testimony regarding his level of intoxication at the time of the offense. The State maintains there is substantial, competent evidence supporting the trial court's finding that Reaves failed to meet this burden. Based upon the record at retrial, the facts of the case, the law in Florida at the time, and counsel's experience and knowledge of the case, we agree that counsel rendered reasonably effective representation.

[2] [3] [4] [5] [6] [7] [8] When considering claims of ineffective assistance of counsel, this Court applies the following standard:

> An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted) (quoting *Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The prejudice prong of the analysis "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Failing to establish either prong results in a denial of the claim. *Ferrell v. State,* 918 So.2d 163, 170 (Fla.2005). For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. *See Freeman v. State,* 858 So.2d 319, 323 (Fla.2003); *State v. Riechmann,* 777 So.2d 342 (Fla.2000). On an ineffective assistance of counsel claim the standard is not how present counsel would have proceeded in hindsight. *See Cherry v. State,* 659 So.2d 1069, 1073 (Fla.1995). On review, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Rolling v. State,* 825 So.2d 293, 298 (Fla.2002) (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052).

This Court has held it will not second-guess counsel's strategic decisions about whether to pursue an intoxication defense. *See Jones v. State,* 855 So.2d 611, 616-617 (Fla.2003); *Johnson v. State,* 769 So.2d 990, 1001-02 (Fla.2000); *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000). [3] ***879** Furthermore, we have said that counsel's decision not to pursue a voluntary intoxication defense was not ineffective assistance where no evidence was presented that defendant was intoxicated at the time of the crime although there has been a history of drug abuse. *See Dufour v. State,* 905 So.2d 42, 53 (Fla.2005); *Pietri v. State,* 885 So.2d 245, 253 (Fla.2004); *Henry v. State,* 862 So.2d 679, 683 (Fla.2003). [4]

3 In these cases this Court held that strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.

4 In *Dufour* this Court found no ineffectiveness where trial counsel made an informed and reasoned decision

> not to pursue a voluntary intoxication defense, which was inconsistent with the underlying defense theory of the case. Moreover, Dufour failed to establish that the defense was viable because he could not demonstrate that he was actually intoxicated at the time of the offense. *See Dufour*, 905 So.2d at 53.
>
> In *Pietri* this Court found no ineffectiveness where Pietri did not present evidence at the postconviction evidentiary hearing to demonstrate that he was in fact intoxicated at the time of the offense. Furthermore, Pietri did not present any competent evidence proving his inability to form the specific intent to commit the crime. *See Pietri*, 885 So.2d at 253.
>
> In *Henry* this Court found no ineffectiveness where Henry failed to present any evidence that he was actually intoxicated at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. *See Henry*, 862 So.2d at 683.

[9] Reaves has failed to show how counsel's performance at retrial was deficient, i.e., that he did not function as 'counsel' guaranteed by the Sixth Amendment. In order to assert the defense of voluntary intoxication, Reaves must present evidence of intoxication at the time of the offense that would show his inability to form the requisite specific intent. *See Rivera v. State,* 717 So.2d 477, 485 (Fla.1998); *Linehan v. State,* 476 So.2d 1262, 1264 (Fla.1985). Reaves did not present any evidence at the evidentiary hearing to show his level or state of intoxication at the time of the murder. There was no evidence to corroborate Reaves' assertions that he was "high" at the time of the offense. Importantly, although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions.

Other than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense. During his confession, Reaves said he was "high" at the time he shot Deputy Raczkowski, but he also made statements indicating he knew exactly what he was doing at the time of the shooting. These statements essentially negated any voluntary intoxication defense that trial counsel could have presented on Reaves' behalf on retrial. *See Pace v. State,* 854 So.2d 167, 177 (Fla.2003) (finding counsel's rejection of an intoxication defense was not deficient performance where Pace's confession "indicated a clear recollection of the facts of the offense and involved deliberate behavior"); *Davis v. State,* 875 So.2d 359, 367 (Fla.2003) (finding competent, substantive evidence supported trial court's determination that counsel made an informed, strategic decision not to pursue an intoxication defense where defendant gave detailed confessions as to the circumstances of the crime that "substantially undermined the viability of a voluntary intoxication defense"); *Damren v. State,* 838 So.2d 512, 517-18 (Fla.2003) (holding counsel's strategic decision not to present a voluntary intoxication defense did not constitute ineffective assistance of counsel where counsel determined the ***880** murder was not committed while Floyd was under the influence of cocaine).

Furthermore, Hinton, the first person to see Reaves after the shooting, testified at the 1987 trial that Reaves came to his house and said he had shot a cop. Reaves told him the officer begged Reaves not to shoot him but Reaves said, in essence, "One of us has to go." Hinton also testified that Reaves' speech was not slurred and he appeared to be in full control of his faculties. Because Hinton made himself unavailable to testify at retrial, this testimony was read into the record and further negated the use of a voluntary intoxication defense.

Trial counsel Kirschner testified at the evidentiary hearing that his theory of defense at the time of retrial in 1992 was excusable homicide, which was based on his investigation of the case. He recalled discussing available defenses with Reaves and discussing Reaves' cocaine use around the time of the incident. Kirschner testified he would look for lab reports, lay observations of how defendant was behaving, and toxicology reports to determine whether there was sufficient evidence to argue the defense of voluntary intoxication. Kirschner stated his thought process led him to believe that excusable homicide was "the right fit for the defense in this case," and based on the record, the trial court found his strategic decisions were competent.

In its order denying relief, the trial court found the ability to offer evidence of the combined effect of intoxication and a mental defect was not fully articulated or established in law until *State v. Bias,* 653 So.2d 380 (Fla.1995), which was issued three years after the retrial. Thus, the trial court found no error in the court's reliance during the retrial on *Chestnut v. State,* 538 So.2d 820 (Fla.1989), to deny trial counsel's request to present Dr. William Weitz's mental health testimony at the guilt phase. In *Chestnut,* this Court held that an abnormal mental condition not constituting legal insanity was inadmissible for the purpose of proving that an accused did not or could not form the specific intent to commit an offense. *See Chestnut,* 538 So.2d at 820. Dr. Weitz diagnosed Reaves as having an antisocial personality disorder, [5] polysubstance abuse (particularly cocaine), and Vietnam Syndrome. [6] This diagnosis did not rise to the level of legal insanity, and trial counsel would have known that it could not support a voluntary intoxication defense at the time.

5 Dr. Weitz defined antisocial personality disorder as having difficulty relating to authority figures. Anger, irritability, and rage are components of this disorder.

6 Vietnam Syndrome is defined as a series or a set of personality characteristics and behavioral patterns of changes that have occurred in combat veterans as a result of combat experience. The qualities of the syndrome include rage reactions, alienation, and isolation from the social environment, hypervigilant type alertness known as "startle response," a potential increase in alcohol and drug use, and some depression.

Furthermore, during the proffer of Dr. Weitz's testimony during the guilt phase, he revealed that Reaves' consumption of cocaine and beer did not raise his level of intoxication to a point that would prevent Reaves from knowing right from wrong. Dr. Weitz further testified that Reaves knew to flee the area, hide in the woods, and take evasive action, all of which indicated Reaves knew what he was doing.

There is competent, substantial evidence in the record supporting the trial court's conclusion that trial counsel provided reasonably effective assistance of counsel. Without the distorting effect of hindsight, ***881** trial counsel's strategic choice of excusable homicide as a defense over involuntary intoxication was reasonable under the facts of the case and the law at the time. Thus, Reaves has not demonstrated that trial counsel's performance was deficient under *Strickland.* Because counsel's performance was not deficient, we need not address the prejudice prong. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.

Exclusion of Hinton's Live Testimony/Denial of Forensic Testing

[10] Prior to the evidentiary hearing, Reaves filed a motion for a writ of habeas corpus ad testificandum [7] seeking to have Hinton appear and testify. The motion was denied, but the trial court allowed Hinton's affidavit to be used and argued. Reaves argues the trial court erred in excluding Hinton's live testimony at the evidentiary hearing because the testimony was relevant and material to the claim of ineffective assistance of counsel. Reaves also argues the trial court erred in denying his motion for forensic testing of some of the evidence for drug metabolites because the testing would provide scientific support to bolster the claim of intoxication at the time of the offense. Conversely, the State argues that the trial court did not abuse its discretion in not allowing Hinton to testify in light of his prior testimony and deposition. The State also contends the trial court did not err in denying the motion for forensic testing because Reaves failed to show how the testing would reveal his level of intoxication at the time of the offense. In light of Hinton's testimony at the 1987 trial and the fact that he would not testify at retrial in 1992, we agree the trial court did not abuse its discretion in not allowing Hinton to testify at the evidentiary hearing. Furthermore, denial of the motion for forensic testing was proper because the testing could not reveal Reaves' level of intoxication at the time of the offense.

7 A motion for writ of habeas corpus ad testificandum is defined in *Black's Law Dictionary* 728 (8th ed.2004), as a writ used in civil and criminal cases to bring a prisoner to court to testify.

[11] **[12]** The standard of review for a trial court's ruling on a motion for writ of habeas corpus ad testificandum is abuse of discretion. *See Moody v. State,* 418 So.2d 989, 992 (Fla.1982). The abuse of discretion standard of review also applies to the denial of a motion for discovery in a postconviction case. *See State v. Lewis,* 656 So.2d 1248, 1250 (Fla.1994). Reaves has failed to demonstrate an abuse of discretion by the trial court on either of these issues.

Hinton was physically present as a witness for the State but refused to testify at the 1992 retrial and was ruled unavailable to testify pursuant to section 90.804(1)(b), Florida Statutes (1991). *See Reaves v. State,* 639 So.2d 1, 3 (Fla.1994). Thereafter, Hinton's testimony from the 1987 trial was read into the record. *Id.* Hinton's testimony revealed that when Reaves showed up at his home and told him about the incident he "had no trouble understanding

Reaves; his speech was not slurred and he appeared to be in full control of his faculties." *Id.*

Reaves sought to have Hinton testify at the evidentiary hearing in regards to Hinton's 1999 affidavit wherein he described Reaves as "all strung out, he had been smoking crack and pretty much out of his head." The affidavit was created seven years after Hinton refused to testify at the retrial and is significantly different from his 1987 trial testimony. The issue before the trial court at the evidentiary hearing was, however, ineffectiveness of counsel at retrial in 1992. Trial counsel had reviewed ***882** the statements Hinton made prior to the 1987 trial, and he had reviewed Hinton's 1987 trial testimony as well. Hinton's account at the time was that he had no trouble understanding Reaves; Reaves' speech was not slurred, and Reaves seemed to be in control of his faculties. At retrial that was the only information, other than Reaves' statements, available to counsel in regards to Reaves' level of intoxication at the time of the murder. Hinton made himself unavailable to testify at the retrial, and his previous trial testimony in 1987 did not indicate that Reaves was intoxicated when Hinton saw him after the murder. The trial court properly found that the affidavit contained the sum and substance of any testimony that would have been procured from Hinton if he had testified at the evidentiary hearing. That testimony in effect was irrelevant to the ineffectiveness of counsel issue because the information now being posited by Hinton was *not* available to counsel in 1992.

[13] Furthermore, the trial court did not err in denying the motion for testing for drug metabolites. Reaves failed to show how the additional testing would reveal material evidence to show his level of intoxication at the time of the crime. At the hearing, Reaves' own expert, Dr. Debra Mash, testified that, at most, testing could reveal the presence of drugs. However, testing could not reveal the actual time the drugs were taken or in what amount. Therefore, any drugs, drug paraphernalia, hair sample, or clothing seized could not provide competent evidence relating to Reaves' level of intoxication at the time of the crime.

In light of these circumstances, the trial court did not abuse its discretion in denying Reaves' request to have Hinton testify at the evidentiary hearing and did not abuse its discretion in denying his request to have items tested for the presence of drug metabolites.

CONCLUSION

For the reasons stated, we affirm the trial court's order denying Reaves' motion for postconviction relief after an evidentiary hearing.

It is so ordered.

LEWIS, C.J., WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion.

ANSTEAD, J., concurring in part and dissenting in part. I cannot concur in the majority's approval of the conduct of counsel in failing to properly investigate or present an intoxication defense to explain Reaves' bizarre conduct that ultimately resulted in the death of a police officer when he responded to defendant's emergency 911 call for help. Unfortunately, the record is as devoid of an explanation for counsel's failure to investigate and assert this defense as it was when we reversed and remanded for an evidentiary hearing in our earlier review of the summary denial of the claim. All that has been added to the record is *more* evidence, expert and otherwise, of the defendant's cocaine addiction and intoxication at the time of the offense.

In an earlier remand we described this claim and its setting:

> In Reaves' first subclaim, he asserts that he is entitled to an evidentiary hearing regarding whether trial counsel was ineffective in failing to present a voluntary intoxication defense. The record shows that during the guilt phase, the State introduced Reaves' confession-evidence which could have supported a voluntary intoxication defense ***883** since Reaves claimed to be "coked up" when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which supported voluntary intoxication despite the fact that there was other evidence which could have supported this theory. During the jury charge conference, the trial judge noted that during Reaves' first trial, the jury was informed as to this defense, and it was decided that such a

jury instruction should be given again. Notwithstanding this fact, Reaves' counsel never mentioned voluntary intoxication during closing arguments, and never discussed how the evidence could have supported this theory or how cocaine affects the user. 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.

....

The postconviction court denied Reaves' allegation without an evidentiary hearing despite evidence that his counsel had evidence supporting this defense which he did not present. Specifically, the judge found that voluntary intoxication was not an available defense since the defendant's expert witness testified during a proffer that Reaves was not so intoxicated that he did not know right from wrong. This reasoning obscures the difference between an insanity defense and a voluntary intoxication defense. Insanity is a complete defense if, at the time of the crime, the defendant was incapable of distinguishing between right and wrong as a result of a mental disease or defect. [N.8] Voluntary intoxication is a separate theory and is available to negate specific intent, such as the element of premeditation essential in first-degree murder. [N.9] In order to successfully assert the defense of voluntary intoxication, "the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged." *Rivera v. State,* 717 So.2d 477, 485 n. 12 (Fla.1998) (quoting *Linehan v. State,* 476 So.2d 1262, 1264 (Fla.1985)). Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense. As Reaves' claim of ineffective assistance was legally sufficient and was not refuted by the record, it was error not to afford him an evidentiary hearing on this issue.

N.8. *Nowitzke v. State,* 572 So.2d 1346, 1355 n. 5 (Fla.1990) ("Florida follows the M'Naghten Rule, which states that any expert testimony ... to be relevant, must concern whether [the defendant] (1) was incapable of distinguishing right from wrong (2) as a result of mental infirmity, disease, or defect.") (internal quotation marks omitted); *Hall v. State,* 568 So.2d 882, 885 (Fla.1990) ("[A]n accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong.").

N.9. *Gardner v. State,* 480 So.2d 91, 92 (Fla.1985) ("Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and ***884** robbery."); *Burch v. State,* 478 So.2d 1050, 1051 (Fla.1985) ("We explicitly recognized [in *Cirack v. State,* 201 So.2d 706 (Fla.1967),] that the defense of voluntary intoxication was available to negate specific intent....").

Reaves v. State, 826 So.2d at 937-39. At the evidentiary hearing, defense counsel testified that he believed there was a basis for the voluntary intoxication defense but he viewed it as a secondary or fall-back defense that he would leave completely to the jury to figure out without his assistance. This was essentially his only explanation for not investigating or presenting the defense, and this explanation is patently unreasonable and inadequate in light of the facts and circumstances we outlined in our remand opinion and the additional facts and circumstances developed at the postconviction hearing.

Try as I may, I cannot conclude, as the majority has done, that this testimony represents a reasonable and adequate investigation by counsel of the circumstances that would support this defense. As we have noted in our past opinions, this case involves tragic and bizarre circumstances that included the defendant calling 911 at 3 a.m. from a Zippy Mart apparently in an effort to get a taxicab. When a police officer responded to this call for help, he was killed as a result of a struggle over a gun that fell out of Reaves' clothing. Reaves' confession was replete with statements that he was high on cocaine at the time. Reaves was also seen by a mental health expert who, while acknowledging that Reaves knew right from wrong, was prepared to testify on the voluntary intoxication defense. Because even more evidence of appellant's cocaine addiction was presented in the postconviction hearing, and defense counsel provided no reasonable explanation for his failure to investigate and present this defense, I cannot join in the majority's conclusion that counsel provided competent representation.

In the face of a lack of an adequate explanation of counsel, the trial court and the majority have fashioned a speculative and hypothetical explanation by pointing out possible weaknesses in the defense of voluntary intoxication. But that is neither the trial court's nor our obligation on review of counsel's actions. Rather, we are bound by the facts, most of which are outlined in our prior opinion, and by counsel's explanations, not our own speculation or rationalization of counsel's conduct.

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

All Citations

942 So.2d 874, 31 Fla. L. Weekly S585

End of Document

APPENDIX D

KeyCite Red Flag - Severe Negative Treatment
Vacated and Remanded by Reaves v. Secretary, Florida Dept. of Corrections, 11th Cir.(Fla.), May 30, 2013

2011 WL 13243586
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

William REAVES, Petitioner,
v.
Edwin G. BUSS, Secretary, Florida Department of Corrections [1], Respondent.

1 During the course of these proceedings, Walter A. McNeil was replaced as the Secretary of the Department of Corrections by Edwin G. Buss who is now the proper respondent in this proceeding. Buss should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

CASE NO. 10-14046-CIV-MIDDLEBROOKS
|
Signed 08/12/2011
|
Entered 08/16/2011

Attorneys and Law Firms

Craig Joseph Trocino, University of Miami Law School, Miami, FL, Michael Chance Meyer, Neal Andre DuPree, William McKinley Hennis, III, Rachel Lawrence Day, Office of the Capital Collateral Regional Counsel, Fort Lauderdale, FL, for Petitioner.

Leslie T. Campbell, Attorney General Office, West Palm Beach, FL, for Respondent.

Opinion

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE

*1 **THIS CAUSE** comes before the Court upon Petitioner, William Reaves' ("Mr. Reaves") Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") [D.E. 1], filed on February 16, 2010. Mr. Reaves is currently on death row at the Union Correctional Institution in Raiford, Florida following a conviction in 1992 for first degree murder.[2] On May 17, 2010, the State filed a Response to Petition for Writ of Habeas Corpus. [D.E. 14]. Mr. Reaves filed a reply on July 22, 2010. [D.E. 18]. I have considered the written submissions, the entire record of Mr. Reaves' state court proceedings and am otherwise fully advised in the premises. For the reasons set forth below, the Petition for Writ of Habeas Corpus is **GRANTED**, in part, as to Claims IX and XXII. Mr. Reaves' remaining claims are **DENIED**.

2 Mr. Reaves was initially convicted of murder in August 1987. The Florida Supreme Court reversed the conviction because the person prosecuting Mr. Reaves had previously represented Mr. Reaves as his public defender. *Reaves v. State,* 574 So.2d 105 (Fla. 1991). Mr. Reaves was re-tried in February 1992.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Reaves was convicted in Indian River County, Florida of first-degree murder of Sheriff s Deputy Richard Raczkowski. The Florida Supreme Court summarized the facts of the murder and the evidence at trial as follows:

> The victim, Deputy Sheriff Richard Raczkoski, at or about 3 a.m. on September 23, 1986, responded to a 911 call from a phone booth outside a Zippy Mart near Vero Beach. The deputy acknowledged his arrival at the Zippy Mart and inquired about outstanding warrants on William Reaves. Within minutes of the call, the deputy was found near the phone booth with four gunshot wounds from which he died later that morning. A piece of paper inside the deputy's vehicle had written on it: William Reaves, black male, 4336 38th Avenue, date of birth 12/30/48.
>
> Witness Whitaker, who discovered the deputy, testified that he saw a black man wearing red shorts and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in Vietnam.) Witness Hinton was ruled unavailable to testify, section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record. According to Hinton, Reaves, wearing red shorts and carrying a gun wrapped in a white T-shirt, came to his apartment after the shooting and said: "I done ... up. I just shot a cop, I just shot a police."

Hinton testified that Reaves quoted the deputy as saying, "Don't shoot me. Don't shoot me. Don't kill me," to which Reaves responded, "One of us got to go. One of us got to go, me or you." Hinton had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties. Witness Fredell testified that Reaves was wearing red shorts and a white T-shirt on the afternoon prior to the early-morning murder and did not appear to be under the influence of alcohol or drugs.

*2 Detective Pisani quoted Reaves as stating that while he and the deputy were conversing, a gun fell out of Reaves' shorts. The deputy put his knee on the weapon, Reaves pushed the knee back, picked up the gun, refused to surrender it, and in a panic and "wired on cocaine" shot the deputy as he was running away. Reaves admitted that he emptied the seven-round clip of his .38 when he fired. A firearms expert testified that Reaves' gun was a type that required a pull of the trigger each time it was fired; it was not an automatic.

Reaves v. State, 639 So.2d 1 (Fla. 1994) (footnote omitted). The jury convicted Mr. Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial judge imposed the death sentence, finding three aggravating circumstances and no statutory mitigating circumstances. The court found that Mr. Reaves was previously convicted of a felony involving the use or threat of violence to the person; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and the capital felony was especially heinous, atrocious, or cruel. The judge found three non-statutory mitigating circumstances: Mr. Reaves was honorably discharged from military service, had a good reputation in his community up to the age of sixteen, was a considerate son to his mother, and was good to his siblings. *Id.* at 3.

On direct appeal to the Florida Supreme Court, Mr. Reaves presented sixteen issues, twelve in the guilt phase and four in the penalty phase. In particular, Mr. Reaves asserted that several statements made by witness Eugene Hinton, under oath, prior to Mr. Hinton's 1987 trial testimony were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991). In affirming the conviction and sentence, the Florida Supreme Court rejected all of Reaves' claims on the guilt and penalty phase issues. The court held that, while it "agree[d] that Hinton's prior inconsistent testimony should have been admitted," the trial court's exclusion was harmless error. *Reaves*, 639 So.2d at 4. Mr. Reaves filed a petition for writ of certiorari to the United States Supreme Court, which was denied. *See Reaves v. Florida*, 513 U.S. 990 (1994).

Mr. Reaves then filed an initial motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.851 in February 1995. The motion was amended in February 1999. After a Huff[3] hearing on May 28, 1999, the trial court entered an order on February 9, 2000, summarily denying the motion for postconviction relief without an evidentiary hearing.

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

Mr. Reaves then appealed to the Florida Supreme Court and raised fourteen issues. While the court found several of the claims procedurally barred, insufficiently pled, or premature, the court concluded that the trial court erred in summarily denying Mr. Reaves' claim of ineffectiveness of trial counsel. *See Reaves v. State*, 826 So.2d 932, 936 (Fla. 2002). The case was remanded to the trial court for an evidentiary hearing on the claims relating to whether Mr. Reaves' counsel, Jay Kirschner, was ineffective for failing to raise a voluntary intoxication defense and related subclaims. *See id.* at 944.

An evidentiary hearing was held on March 4-6, 2003. While awaiting the trial court's decision on the pending motion, Mr. Reaves filed a successive 3.851 motion based on *Ring*[4] on June 24, 2003. Mr. Reaves also supplemented his 3.851 motion on December 10, 2003, by notifying the court of his eligibility to receive veteran's benefits based on a finding of 100% disability due to Post-Traumatic Stress Disorder (PTSD). On March 10, 2004, the trial court denied both the amended motion for postconviction relief and the successive motion for postconviction relief. After denying the motion for rehearing, the trial court signed final orders denying both motions on April 20, 2004.

4 *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

*3 On appeal, Mr. Reaves raised two issues: (1) whether the trial court erred in denying a new trial where it was demonstrated that trial counsel was deficient in failing to investigate, prepare or present a voluntary intoxication defense; and (2) whether the trial court erred in excluding the testimony of Eugene Hinton from the evidentiary hearing and in denying forensic testing of evidence for drug metabolites. The Florida Supreme Court affirmed the trial court's order denying Reaves' motion for postconviction relief, and the instant petition for writ of habeas corpus by a person in state custody followed. On February 26, 2010, Mr. Reaves filed this Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254, raising twenty-five claims. (*See* [D.E. 1] at 6-34).

II. TIMELINESS

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented form filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including the instant case, the limitation period begins to run pursuant to § 2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). Under § 2244(d)(2), AEDPA's statutory tolling provision, the word "pending" covers the time between a lower court's decision and the filing of a notice of appeal to a higher state court. *Carey v. Saffold*, 536 U.S. 214, 215 (2002). The State properly concedes that the Petition is timely.

III. PROCEDURAL DEFAULTS

A procedural-default bar in federal court can arise in two ways: (1) when a petitioner raises a claim in state court and the state court correctly applies a procedural default principle of state law; or (2) when the petitioner never raised the claim in the highest state court, and it is obvious that the unexhausted claim would now be procedurally barred there. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999).

First, a state procedural default precludes consideration of an issue on federal habeas review when the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar, or if there is a clear and unambiguous application of a bar by the trial court, followed by affirmance without opinion. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Harmon v. Barton*, 894 F.2d 1268 (11th Cir. 1990). To overcome a procedural bar, a petitioner must demonstrate objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the identified error. [5] *See United States v. Frady*, 456 U.S. 152, 168(1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

5 To establish cause for a procedural default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate that there is at least a reasonable probability that the outcome of the proceeding would have been different. *See*

Crawford v. Head, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

***4** Second, Section 2254 provides that an application for a writ of habeas corpus by a state prisoner shall not be granted unless it appears that the applicant has exhausted the remedies available in state courts. 28 U.S.C. § 2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270 (1971). For the exhaustion requirement to be met, the petitioner must have "fairly presented" the same claim as a matter of *federal* law to the *highest* court of the State. *Duncan v. Henry*, 513 U.S. 364 (1995); *see also Baldwin v. Reese*, 541 U.S. 27 (2004); *Dye v. Hofbauer*, 126 S.Ct. 5 (2005); *Leonard v. Wainwright*, 601 F.2d 807 (5th Cir. 1979). General appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). *See also Picard v. Connor*, 404 U.S. 270 (holding that for purposes of exhausting state court remedies, a claim for habeas corpus relief must include a reference to a specific constitutional guarantee, as well as a statement of the facts the petitioner believes entitle him to relief). When a federal habeas petitioner raises a claim ostensibly presented in the state courts, but bases the federal claim on new factual allegations, new legal theories, or materially different and stronger evidence than was presented to the state courts, the claim has not been "fairly presented" at the state level, and exhaustion has not been accomplished. *Givens v. Green*, 12 F.3d 1041 (11th Cir. 1994).

Dismissing an unexhausted claim so as to permit a petitioner to exhaust available state remedies is not warranted where further efforts to exhaust it in the state forum would be futile. Exhaustion would be futile when no state corrective process remains available: the claim would be procedurally barred in state courts if presented there. [6]

6 The claim would be procedurally barred in state court if the motion or other application for relief would be untimely pursuant to state procedural rules. The general rule in capital cases is that the petitioner has one year, from the date the judgment and sentence become final, to file any motion to vacate judgment of conviction and sentence of death. FLA. R. CRIM. P. 3.851(d). Furthermore, except under limited circumstances, Florida law is that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983). A successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. *Moore v. State*, 820 So.2d 199, 205 (Fla. 2002).

Where dismissal of a federal claim would be futile due to the existence of a state procedural bar, the claim is generally barred from federal review as well. In other words, unexhausted claims that would be procedurally barred if presented to the state court are procedurally defaulted for purposes of federal habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). To overcome such a procedural bar in federal court, a petitioner would have to show objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the error complained of, or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See Teague v. Lane*, 489 U.S. 288 (1991); *United States v. Frady*, 456 U.S. 152, 168 (1982); *Wainright v. Sykes*, 433 U.S. 72, 87 (1977) (adopting presumption against federal habeas review of claims defaulted in state court according to state procedural rule); *Kennedy v. Herring*, 54 F.3d 678 (11th Cir. 1995); *Tower v. Phillips*, 7 F.3d 206 (11th Cir. 1993); *Collier v. Jones*, 910 F.2d 770, 773 (11th Cir. 1990).

In order to establish actual innocence as grounds to excuse a procedural default, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). For such a claim to be credible, it must be supported with "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence-that was not presented at trial." *Id.* at 324. A federal court has discretion to deny an application for a writ of habeas corpus on the merits "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). If the petition is mixed, meaning that it has both exhausted and unexhausted claims, the court may address the exhausted claims where dismissal of the unexhausted claims would be futile. *Kelley v. Sec.'y for Dep't of Corr.*, 377 F.3d 1317, 1351 (11th Cir. 2004). Here, the State has argued that certain claims of Mr. Reaves' are procedurally barred.

IV. ANALYSIS

Applicable Law and Standard of Review

***5** Mr. Reaves filed a Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence. "[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." [7] 28 U.S.C. § 2254(a). AEDPA limits the review of Mr. Reaves' petition, establishing a " 'general framework of substantial deference' for reviewing 'every issue that the state courts have decided.' " [8] *Fotopoulos v. Sec'y for the Dep't of Corr.*, 516 F.3d 1229, 1232 (11th Cir. 2008) (citing *Crowe v. Hall*, 490 F.3d 840, 844 (11th Cir. 2007)) (quoting *Diaz v. Sec'y for the Dep't of Corr.*, 402 F.3d 1136, 1141 (11th Cir. 2005)). Under AEDPA, an application under Section 2254 may not be granted with respect to any claim that was adjudicated on the merits in state court proceedings, unless that adjudication 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 "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). [9] *See also Williams v. Taylor*, 529 U.S. 362 (2000) (holding that when a federal court is deciding whether the state court unreasonably applied clearly established federal law, the federal court must focus on objective unreasonableness). A state appellate court's rejection of a claim without discussion is an "adjudication on the merits" entitled to deference under AEDPA. *Wright v. Sec'y for the Dep't. of Corr.*, 278 F.3d 1245 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 34 Fed.Appx. 393 (11th Cir. 2002).

7 Furthermore, a petitioner is entitled to federal habeas corpus relief only if the constitutional error from his trial had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Federal courts are not bound by state court determinations as to whether the constitutional error is harmless. *Jackson v. Dugger*, 931 F.2d 712, 717 (11th Cir. 1991), *cert. denied sub nom. Singletary v. Jackson*, 112 S.Ct. 452 (1991).

8 AEDPA altered the federal court's role in reviewing state prisoner applications in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

9 AEDPA, as incorporated in the federal habeas corpus statute for persons in custody pursuant to a state court judgment, provides: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

"Clearly established federal law" refers to the holdings, as opposed to dicta, of the United States Supreme Court as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court's decision is "contrary to" clearly established federal law if either: (1) the state court applied a rule that contradicts United States Supreme Court case law, or (2) the state court, when faced with materially indistinguishable facts, arrived at a result different from that reached in a Supreme Court case. *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court, is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

A state court arrives at an "unreasonable application" of clearly established federal law if either: (1) it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case, or (2) "unreasonably extends, or unreasonably declines to extend a legal principle from Supreme Court case law to a new context." *Putman*, 268 F.3d at 1241. The Supreme Court has stated with respect to the term "unreasonable" that:

> ***6** The term 'unreasonable' is 'a common term in the legal world and, accordingly, federal judges are

familiar with its meaning.' At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 663-64 (2004) (citation omitted). An application of federal law cannot be considered unreasonable merely because the federal court deems it to be incorrect or erroneous: the state court decision must also be unreasonable. *Jennings v. McDonough*, 490 F.3d 1230, 1236 (11th Cir. 2007).

State court findings of fact, as opposed to mixed determinations of law and fact, are subject to the presumption of correctness; the petitioner may only rebut this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies equally to factual determinations made by state trial and appellate courts; it is applicable to both explicit and implicit factual determinations. *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Bui v. Haley*, 321 F.3d 1304, 1312 (11th Cir. 2003). The presumption of correctness is limited to "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (internal quotation marks and citations omitted). *See also Provenzano v. Singletary*, 148 F.3d 1327, 1330(11th Cir. 1998) ("The questions of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct."); *Thomas v. Zant*, 697 F.2d 977, 980 (11th Cir. 1983) ("[S]pecific historical facts found by a state habeas court (such as what an attorney actually did for his client), to which a standard of law is applied in deciding a mixed question of fact and law, ... merit ... [the] presumption of correctness in a federal habeas proceeding.") (internal quotation marks and citation omitted).

Furthermore, interpretation of Florida law by Florida courts is binding on a federal court deciding a petition for writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (reaffirming principle that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, must be followed by federal courts).

I. Whether Mr. Reaves' Sixth Amendment right to confront witnesses was violated when the court prohibited the jury from hearing the prior inconsistent statements of the State's key witness against Mr. Reaves.

In Mr. Reaves' first claim for relief, he argues that his Confrontation Clause rights were violated when the trial court refused "to admit evidence of prior inconsistent statements from a hearsay declarant, Erman Eugene 'Goose' 'Pluto' Hinton." ([D.E. 1] at 6). At Mr. Reaves' 1987 trial, Mr. Hinton testified as to certain events and statements made by Mr. Reaves which implicated him in the murder of Deputy Sheriff Richard Raczkowski. However, at Mr. Reaves' 1992 retrial, Mr. Hinton claimed that he could not remember anything about the prior events or his prior testimony and effectively refused to testify. The trial court declared him "unavailable" to testify and ordered that his prior testimony be read into the record before the jury. ([D.E. 17, Ex. A-R7] at 1129). After the court ruled, defense counsel made a motion "to allow [defense counsel] to let the jury be aware of prior inconsistent statements that were made by this witness prior to the time of his testimony at the trial in 1987." (*Id.* at 1132). The court allowed defense counsel to proffer into the record which statements and a summary of their substance he would like to put before the jury. The court then denied the motion to introduce the statement before the jury, but did grant defense counsel's request to have the prior statement made part of the record for appeal. ([D.E. 17, Ex. A-R8] at 1147). Mr. Reaves first made this claim on direct appeal of his conviction and sentence. The Florida Supreme Court found that "Hinton's prior inconsistent testimony should have been admitted, but we find that the trial court's exclusion of the testimony was harmless error. Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony." *Reaves*, 639 So.2d at 4. Mr. Reaves argues that this determination was "unreasonable in light of the record." ([D.E. 6] at 62).

*7 The Florida Supreme Court's determination was reasonable. The inconsistencies were not such that they undermined the testimony or changed the substance in any meaningful way. However, even if I were to disagree with the Florida Supreme Court's determination that Mr. Hinton's prior inconsistent statements did not repudiate the significant aspects of the testimony (which I do not), Mr. Reaves must also show prejudice. I find he has not. The record reflects that defense counsel, during the 1987 trial, vigorously cross-examined Mr. Hinton on his prior inconsistent statements to police and during deposition. ([D.E. 17, Ex. A-R8] at 1189-1204, 1209-1210). In 1992, this cross-examination was read to the jury. While the 1987 cross-examination was not as thorough as defense counsel in 1992 would have liked, it certainly was not so deficient that the jury was not aware of the inconsistencies of Hinton's prior statements and his credibility issues. Accordingly, Mr. Reaves was not prejudiced.

> In habeas proceedings, we review whether a constitutional violation is harmless by determining "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Sims v. Singletary*, 155 F.3d 1297, 1315 (11th Cir. 1998) (citation omitted). To show prejudice under *Brecht*, there must be "more than a reasonable possibility that the error contributed to the [conviction or] sentence." *Horsley v. State of Ala.*, 45 F.3d 1486, 1493 (11th Cir. 1995); *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710. We analyze the effect of the Confrontation Clause violation by looking at several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, ... and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Mason v. Allen, 605 F.3d 1114, 1123-24 (11th Cir. 2010). Under this standard, Mr. Reaves cannot show prejudice in order to reverse his conviction. Mr. Reaves confessed to the murder after his capture in Georgia, and the recorded statement was played to the jury in its entirety. ([D.E. 6] at 15). Mr. Reaves' confession was essentially that "the shooting was the result of accident and panic and that Mr. Reaves was 'wired on cocaine' at the time of the shooting." (*Id.*). When viewed in light of the overall strength of the prosecution's case and the presence of corroborating evidence, I cannot say that there was "more than a reasonable possibility that the [Confrontation Clause] error contributed to the [conviction]." *Horsley*, 45 F.3d at 1493. Habeas relief is denied.

II. Whether the trial court erred by denying Mr. Reaves' cause challenges and prohibiting Mr. Reaves from questioning jurors about their pre-disposition to impose the death penalty in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

In his second claim for relief, Mr. Reaves asserts that the trial court erred during jury selection. (*See* [D.E. 6] at 63-71). Mr. Reaves' claim has three sub-parts. First, Mr. Reaves argues that the trial court violated Mr. Reaves' constitutional right when it denied him the opportunity to question the jurors about their predisposition to impose the death penalty, and when it denied his cause challenges for two jurors who indicated they were predisposed to impose a death sentence. Second, Mr. Reaves asserts that the trial court erred when it permitted the State to exercise a peremptory challenge to exclude the panel's lone Jewish juror. Finally, Mr. Reaves contends that the trial court erred in granting the State's cause challenge of a juror who ultimately testified that she could put aside her personal views and vote for a death sentence according to the law. Mr. Reaves argued these sub-claims on direct appeal. *Reaves*, 639 So.2d at 4. The claim has been exhausted.

A. <u>Juror Questioning and Challenges</u>

***8** Mr. Reaves argues that he was denied his right to question the jurors regarding their views on the automatic imposition of the death penalty upon someone who has been convicted of murder. (*See* [D.E. 6] at 68). He further argues that he was wrongfully denied the ability to remove two jurors for cause after they indicated that they would automatically impose a death sentence upon Mr. Reaves if he was convicted. (*Id.*).

i. Questioning of Jurors

Mr. Reaves argues that after he began to question jurors about their propensities to automatically impose the death penalty, the trial court sustained the State's objection to his question and he was unable to question the remaining jurors. (*See* [D.E. 6] at 66-67). Mr. Reaves raised this claim on direct appeal. The Florida Supreme Court's opinion was silent on this issue. *See Reaves v. State*, 639 So.2d 1 (Fla. 1994). Nonetheless, this claim is without merit.

Mr. Reaves asserts that he was denied his right to inquire of the jurors their thoughts on the automatic imposition of the death penalty. In support of this argument, Mr. Reaves cites to *Morgan v. Illinois*, 504 U.S. 719 (1992). While it is true that in *Morgan*, the Court found that a petitioner was entitled to inquire so as to discern which jurors had predetermined whether to impose the death penalty, it does not explicitly state that the inquiry must be made only by defense counsel. Here, when the trial court grew frustrated by what it viewed as an inaccurate statement of the law, the court stopped counsel and inquired of the jurors directly. The inquiry was as follows:

> THE COURT: Let me ask the jurors, do you understand that you will be asked to weigh certain aggravating and mitigating circumstances before you're asked to come back with a recommendation on death or life? Do you understand that?
>
> PROSPECTIVE JURORS: Yes.
>
> THE COURT: Will you consider those aggravating and mitigating circumstances before you would come back with any such recommendation?
>
> PROSPECTIVE JURORS: Yes.
>
> THE COURT: Are there any of you who would just totally ignore listening to the aggravating and mitigating circumstances, automatically just go back and vote for the death penalty because somebody is convicted of first degree murder?
>
> PROSPECTIVE JURORS: No.
>
> THE COURT: Thank you. Let's proceed.

([D.E. 17, Ex. A-R3] at 441). While these questions were not asked by defense counsel, they were asked. This *voir dire* comports with the dictates of *Morgan*. In *Morgan*, the Court held that the "[p]etitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty. Accordingly, the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge." 504 U.S. at 738. Here, the trial judge made the required inquiry. This claim is rejected.

ii. Denial of Cause Challenge

Mr. Reaves argues that among the few jurors he was allowed to question regarding an automatic imposition of the death penalty (before the trial court disallowed trial counsel's questions), there were two jurors who should have been removed for cause based on their answers. (*See* [D.E. 6] at 70-71.) Defense counsel made those cause challenges, but they were denied. Mr. Reaves first made this claim on direct appeal. *Reaves*, 639 So.2d at 4. The Florida Supreme Court denied the claim as follows:

> ***9** Reaves challenges the trial judge's rulings regarding jurors Dudley, Hambleton, Mills and Kaplan. In response to Reaves' voir dire questioning, prospective jurors Dudley and Hambleton indicated that they would automatically recommend a death sentence if a person were found guilty of murder. Based on these answers, Reaves asserts that the trial judge's refusal to strike Dudley and Hambleton for cause was an abuse of discretion. Under *Bryant v. State*, 601 So.2d 529, 532 (Fla. 1992), when a venireperson expresses an opinion which indicates a substantial inability to properly perform a juror's duties either the prosecutor or the judge must "make sure the prospective juror can be an impartial member of the jury." Our reading of the record shows that both Hambleton and Dudley were properly rehabilitated by the judge and State Attorney respectively FN6 and we find no abuse of discretion in the trial judge's denial of Reaves' challenge for cause relative to these jurors.
>
> > FN6. After Hambleton stated his willingness to automatically impose the death penalty, the judge explained the process of weighing aggravating and mitigating circumstances, and then asked Hambleton if he was capable of following the law as instructed. Hambleton answered in the affirmative. Upon being questioned by the State, Dudley indicated that he understood that no one could automatically be sentenced to death and that he must look at all evidence and follow the judge's instruction on mitigating and aggravating circumstances in considering the proper punishment.

Reaves, 639 So.2d at 4. I have reviewed the relevant transcripts of the *voir dire* and agree. This claim stems in part from the way defense counsel was asking the question. Initially, defense counsel asked jurors if they felt that someone who was found guilty of murder should automatically get the death penalty. ([D.E. 17, A-R3] at 432). These two jurors agreed with that statement. Defense counsel did not mention potential mitigators. Afterwards, the judge (and later the assistant state attorney) inquired if those same jurors were capable of weighing the aggravators and mitigators before making a sentencing recommendation. Both jurors indicated that they could. The Florida Supreme Court's determination was not contrary to, nor did it involve an unreasonable application of, clearly established federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos*, 516 F.3d at 1232. This claim must be rejected.

B. Exclusion of Jewish juror

Mr. Reaves also asserts that the trial court erred when it allowed the State to use a peremptory challenge to exclude the panel's "lone Jewish juror." ([D.E. 6] at 68-69). Mr. Reaves first made this claim on direct appeal. The Florida Supreme Court rejected this claim because:

> Reaves argues that the court erred by allowing the state to peremptorily challenge, in a racially discriminatory way, Kaplan, the panel's sole Jewish member. We find Reaves' contest of prospective juror Kaplan meritless. Nothing in the record indicates, nor proves that the state used Kaplan's racial or religious background as grounds for challenge. The record indicates that the state's challenge was based on what it perceived as Kaplan's misunderstanding of the burden of proof. Accordingly, we find no error in the court's granting of the challenge.

Reaves, 639 So.2d at 4. A review of the record shows that the Florida Supreme Court's determination was reasonable. [10] In order for Mr. Reaves to prove a *Batson* violation, he would have had to show a *prima facie* case that the peremptory challenge was exercised on the basis of race; the burden would then shift to the State to articulate a race-neutral explanation for striking the jurors in question, and then the trial court would determine whether Reaves had carried his burden of proving purposeful discrimination. *See Batson v. Kentucky*, 476 U.S. 79 (1986). After Mr. Reaves challenged the State's use of a peremptory challenge to remove the Jewish juror from the panel, the trial court required the prosecutor to provide a basis for her removal. The prosecutor argued that he struck the juror because during *voir dire* she indicated that she believed the burden of proof to be 'any doubt" as opposed to "beyond a reasonable doubt." ([D.E. 17, Ex. A-R4] at 575). This statement prompted the prosecutor to use a peremptory challenge because, while the juror corrected her statement later, the prosecutor believed that she would hold the State to a heightened standard of proof. (*Id.*). The state court has determined this issue and the record here does not reveal that the Court's deference to the state court's determination would be in anyway misplaced. This claim is rejected.

10 As this claim lacks merit, I do not address Mr. Reaves' argument that "[a] juror of Jewish descent is certainly a cognizable ethnic group" whose exclusion based solely on their minority status "violates the guarantees enumerated in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." ([D.E. 6] at 69).

C. Erroneous Cause Challenge

***10** Mr. Reaves contends that the trial court erroneously excluded a juror for cause despite the fact that the juror indicated that "she could set aside her personal views and apply the law as instructed by the Court." ([D.E. 6] at 70). Mr. Reaves made this claim on direct appeal of his conviction and sentence. *Reaves*, 639 So.2d at 4. The Florida Supreme Court found that "the transcript fairly and adequately supports the trial judge's findings and there was no abuse of discretion" because:

> Reaves further avers that the court improperly granted the state's challenge for cause regarding prospective juror Mills. During voir dire, Mills expressed reluctance in her ability to sentence someone to death, yet she also indicated that she could follow the judge's

> instructions relevant to a capital sentencing. We have previously held that a trial judge must determine if a prospective juror's opinions will act as an impediment in the proper performance of her duties. *Trotter v. State*, 576 So.2d 691, 694 (Fla. 1990). Our review of the record shows that the court granted the state's challenge based on what it considered Mills' "at best" equivocal answers.

Id. Mr. Reaves makes a compelling argument that this juror was unequivocal in her support of the death penalty and that it was not until the prosecutor asked her about ability to sign the actual death verdict form that her responses turned equivocal. Mr. Reaves argues that questioning a juror about whether or not she "can sign a death verdict is clearly improper, and has been specifically disapproved. *Alderman v. Austin*, 663 F.2d 558 (5th Cir. 1981)." ([D.E. 6] at 71). I have reviewed *Alderman* and agree. However, an opinion from the Fifth Circuit Court of Appeals is not the appropriate precedent on which habeas relief can be granted.

> Under § 2254(d)(1) habeas relief may be granted only when the state courts' adjudication of his federal claim "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." 28 U.S.C. § 2254(d)(1). The Supreme Court "has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Knowles v. Mirzayance*, — U.S. —— 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009). And federal law is "clearly established" only when it is "embodied in a holding" of the Supreme Court. *Thaler v. Haynes*, — U.S. ——, 130 S.Ct. 1171, 1173, — L.Ed.2d —— (2010) (per curiam). Dicta in Supreme Court opinions is not enough. *Carey v. Musladin*, 549 U.S. 70, 74, 127 S.Ct. 649, 653, 166 L.Ed.2d 482 (2006); *Yarborough v. Alvarado*, 541 U.S. 652, 661, 124 S.Ct. 2140, 2147, 158 L.Ed.2d 938 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 1172, 155 L.Ed.2d 144 (2003); *Ramdass v. Angelone*, 530 U.S. 156, 165-66, 120 S.Ct. 2113, 2119-20, 147 L.Ed.2d 125 (2000) (plurality opinion); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). Nor can anything in a federal court of appeals decision, even a holding directly on point, clearly establish federal law for § 2254(d)(1) purposes. *Renico v. Lett*, — U.S. ——, 130 S.Ct. 1855, 1865-66, 176 L.Ed.2d 678 (2010); *see Carey*, 549 U.S. at 74, 77, 127 S.Ct. at 652, 654; *see also Hammond v. Hall*, 586 F.3d 1289, 1340 n. 21 (11th Cir. 2009) ("The Supreme Court has also instructed us not to look to lower court decisions when we are deciding what is clearly established federal law for § 2254(d)(1) purposes.").

***11** *Bowles v. Sec'y, Dep't.of Corr.*, 608 F.3d 1313, 1315-16 (11th Cir. 2010). Here, Mr. Reaves has not shown, and I have not found, any clearly established law that would render the Florida Supreme Court's determination unreasonable. Further, the trial court did not grant the State's cause challenge because the juror had voiced a moral opposition to the death penalty, but rather because when asked if her "feelings about the death penalty [would] either interfere with or even substantially impair your ability to judge the guilt or innocence of the Defendant?" the juror responded, "I guess not." ([D.E. 17, Ex. A-R4] at 636-37). The trial judge found this response, in conjunction with her other responses (one which indicated that it would interfere, the other which indicated it would not), to be equivocal. (*Id.* at 638). This interpretation was not unreasonable. *See Uttecht v. Brown*, 551 U.S. 1 (2007) ("Courts reviewing claims of *Witherspoon-Witt* error, ... especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror."). This claim is rejected.

III. Whether the trial court erred in excluding the testimony of Dr. William Weitz, thereby depriving Mr. Reaves of the ability to present a defense and denying him a fair trial.

Mr. Reaves asserts in his third claim for relief that the trial court erred when it excluded defense expert, Dr. William Weitz, from testifying about a medical condition known as "Vietnam Syndrome." Mr. Reaves argues that this exclusion resulted in the deprivation of the ability to present a defense, denied him a fair trial, denied him the right to assistance of counsel and denied him due process of law. ([D.E. 6] at 73). On direct appeal of his conviction and sentence, the Florida Supreme Court found:

> Reaves argues that the trial judge erred when he refused to admit evidence of "Vietnam Syndrome" in the guilt phase of the trial to support his "excusable homicide" defense. We find no error. We said in *Bunny v. State*, 603 So.2d 1270, 1273 & n. 1 (Fla. 1992), that "evidence of certain commonly understood conditions that are beyond one's control ... should also be admissible" in the guilt phase of the trial; but "evidence relating to a general mental impairment or other esoteric condition" is not. There is no evidence in this record to support Reaves' assertion that "Vietnam Syndrome" is a commonly understood condition; it therefore was properly excluded in the guilt phase. We find, moreover, that even if this evidence's exclusion was error, it was harmless. There is no reasonable possibility that it would have affected the jury's verdict. *State v. Dodgily*, 491 So.2d 1129 (Fla. 1986).

Reaves, 639 So.2d at 4-5 (footnote omitted). At trial, Mr. Reaves' defense was excusable homicide, pursuant to Florida Statute § 782.03. In support of this defense, Dr. Weitz was retained to examine Mr. Reaves, and then testify regarding a condition known as "Vietnam Syndrome." ([D.E. 6] at 72). The trial court, however, determined that Dr. Weitz's testimony would not be admissible because Mr. Reaves had not put on a defense of insanity. ([D.E. 17, Ex. A-R10] at 1474). Mr. Reaves made a proffer to the court and again attempted to persuade the trial court to permit this testimony. The motion was again denied. (*Id.*). Mr. Reaves argued that Dr. Weitz's testimony would show that, due to Mr. Reaves' experiences in Vietnam, when the police officer reached for his firearm, a sudden and sufficient provocation resulted, which constituted excusable homicide. Florida defines excusable homicide as follows:

> Excusable homicide.-Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

***12** FLA. STAT. ANN. § 782.03 (West 1991). Mr. Reaves' motion to present evidence of a Vietnam Syndrome was denied based on a state evidentiary ruling. "It is fundamental that federal courts possess only limited authority to consider state evidentiary rulings in a habeas proceeding by a state prisoner." *Nordskog v. Wainwright*, 546 F.2d 69, 72 (5th Cir. 1977). "Our inquiry must be limited to determining whether the evidentiary ruling was so prejudicial 'as to deny fundamental fairness to the criminal trial, thus violating the due process clause.' " *Phillips v. Wainwright*, 624 F.2d 585, 588 (11th Cir. 1980) (internal citations omitted). In addition, Mr. Reaves' claim is governed by AEDPA. Under AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "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 "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). This is an "exacting standard." *Maharaj v. Secretary, Dept. of Corrections*, 432 F.2d 1292, 1308 (11th Cir. 2005).

The exclusion of Dr. Weitz's testimony regarding Vietnam Syndrome did not deny Mr. Reaves fundamental fairness at his trial. It is unfortunate that trial counsel sought to prove Mr. Reaves' defense of excusable homicide almost entirely by Dr. Weitz's testimony because when the trial court denied his motion to present this evidence, Mr. Reaves' sole defense was weakened to the point of implausibility. However, that does not, in and of itself, make the trial "fundamentally unfair" such that it offends due process. *See Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir.) (stating that we "inquire only to determine whether the error was of such magnitude as to deny fundamental fairness to the criminal trial") (citations omitted), *cert. denied*, 516 U.S. 946, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995); *McCoy*, 953 F.2d at 1265. The Florida Supreme Court's determination was not contrary to established federal law. Habeas relief is denied on this claim.

IV. Whether the trial court erred in denying Mr. Reaves' motion to disqualify the office of the State Attorney in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

Mr. Reaves' fourth claim for relief is that "the trial court erred by denying appellant's motion to disqualify the office of the state attorney." ([D.E. 1] at 10). Mr. Reaves made this claim on direct appeal. The Florida Supreme Court denied the claim finding

> Reaves argues that the state attorney's office should have been disqualified from prosecuting him on his retrial. We disagree. The trial judge found that Reaves was properly shielded from his former prosecutor, Mr. Colton (who was earlier Reaves' public defender). The judge's findings are supported by competent, substantial evidence and we affirm them.

Reaves, 639 So.2d at 5. Mr. Reaves was first tried for this crime in 1987. At the time of his first trial, Mr. Reaves filed a motion to disqualify the Office of the State Attorney for the Nineteenth Judicial Circuit. "The motion was based on the fact that State Attorney Bruce Colton had previously represented Mr. Reaves while an Assistant Public Defender in 1973." ([D.E. 6] at 76). While the trial court denied the motion, the Florida Supreme Court reversed Mr. Reaves' conviction and sentence. *See Reaves*, 574 So.2d 105 (1991). Mr. Reaves' case was remanded for a new trial, and he again made another motion to disqualify the Office of the State Attorney. The trial court held an evidentiary hearing on July 26, 1991. ([D.E. 17, Ex. A-R1] at 29). At that hearing, defense counsel argued that "the cat's out of the bag, the deed is done, the dye is cast" despite the fact that the State's Attorney had implemented screening procedures following the remand from the Florida Supreme Court. ([D.E. 17, Ex. A-R1] at 63). The trial court rejected that argument finding that there was no evidence that there had been communication between the prior assistant state attorneys and the current assistant state attorneys assigned to prosecute Mr. Reaves at the retrial. (*Id.* at 69). As such, the trial court found that the evidence supported the integrity of the shield in place and the appearance of propriety had been upheld. (*Id.*) The Florida Supreme Court affirmed.

***13** Here, Mr. Reaves argues that the denial of this motion was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. ([D.E. 1] at 10). The State argues that Mr. Reaves had not presented this claim as one of a constitutional dimension to the state courts and, therefore, this claim is unexhausted and should be denied. ([D.E. 14] at 54). I agree. Mr. Reaves' direct appeal to the state supreme court, challenging the trial court's denial of his motion to disqualify, provided no citation to the United States Constitution nor to any case that might have alerted the state courts to any federal nature of his claim. (*See* [D.E. 17, Ex. A] at 51-54). Further, there was no written opinion on the petition indicating that the affirmance did not rest solely on state law. *See Reaves*, 639 So.2d at 5. While Mr. Reaves did present the state court with the facts underlying his federal claims, his brief failed to indicate that he was seeking relief under any specific federal constitutional guarantee. The omission is fatal. Mere similarity between a claim of state error and a claim of federal error is insufficient to establish exhaustion. *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (noting petitioner's failure to apprise state courts that evidentiary challenge was based in part on federal due process concerns was insufficient to exhaust § 2254 due process claim; further noting mere similarity of claims was insufficient). Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

Based upon the foregoing principles regarding exhaustion, Mr. Reaves' fourth claim is unexhausted. *See Baldwin v. Reese*, 541 U.S. 27, 30-2 (2004). Habeas relief is denied as to this claim. [11]

11 While this claim is both unexhausted and procedurally barred from federal review, I also find that the claim lacks merit, as there is nothing in the record to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or that there was an unreasonable determination of the facts. *See Fotopoulos*, 516 F.3d at 1232.

V. Whether the trial court erred by denying Mr. Reaves' motion for corrected instruction on first degree murder from premeditated design.

Mr. Reaves asserts in his fifth claim for relief that the trial court "erred by denying appellant's motion for a corrected instruction on first degree murder from premeditated design and excusable homicide." ([D.E. 1] at 11). Mr.

Reaves argued this claim on direct appeal of his conviction and sentence. The Florida Supreme Court denied the claim because it found "no merit to Reaves' assertions that the jury instructions on premeditation and excusable homicide were inadequate; the standard jury instructions were given." *Reaves*, 639 So.2d at 5.

Mr. Reaves argues that the Florida "standard jury instruction on premeditated murder read to the jury here offends constitutional standards" because it "unconstitutionally relieves the State of its burdens of proof and persuasion as to the statutory element of 'premeditated design.' " ([D.E. 6] at 80). Mr. Reaves made this claim to the Florida Supreme Court and it was denied. Mr. Reaves has failed to provide the Court with any federal law which would show that the state court's determination was an unreasonable interpretation of clearly established federal law. "Clearly established federal law" refers to the holdings, as opposed to dicta, of the United States Supreme Court as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). At trial, the court gave the jury the standard jury instruction in Florida for premeditated murder. The instruction advised the jury that "the State must prove the following three elements beyond a reasonable doubt." ([D.E. 17, Ex. A-R10] at 110). The third element was that "there was a premeditated killing of Richard Raczkowski." (*Id.*). The instruction defined premeditation as "killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing." (*Id.*).

Mr. Reaves' argument regarding the constitutional deficiency of the instruction is without merit and the claim is rejected. Even if the Court did not have to afford the state court's determinations great deference pursuant to AEDPA, the constitutionality of a challenged jury instruction must be determined by reviewing the entire jury charge. *Francis v. Franklin*, 471 U.S. 307 (1985). Upon a careful reading of the complete jury instructions given by the court in Mr. Reaves' trial, I find that the State was not relieved of its burden of persuasion. The instruction was clear that the State must prove three elements beyond a reasonable doubt, and the element of premeditation was clearly defined for the jury. There is no clearly established federal law which supports Mr. Reaves' argument, and this claim is rejected.

***14** Mr. Reaves also argues as a sub-claim of this claim that "the trial court erred in overruling Mr. Reaves' objection to the standard jury instruction on reasonable doubt and failing to give his proposed special jury instruction." ([D.E. 6-1] at 1). This claim suffers a similar fate. The trial court gave the jury the standard instruction on reasonable doubt in Florida. Mr. Reaves takes issue with the "abiding conviction of guilt" language in the instructions. ([D.E. 6-1] at 2). Mr. Reaves argues that this language could eliminate the requirement of proof beyond a reasonable doubt. Mr. Reaves offers no legal support for this argument.

Taken as a whole, the instruction given conveyed the concept of reasonable doubt to the jury. *Victor v. Nebraska*, 511 U.S. 1 (1994) (citing *Holland v. United States*, 348 U.S. at 140, 75 S.Ct. at 137). Further, there is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution. *See id.* A reasonable juror would not have interpreted the instruction given at Mr. Reaves' trial to be burden shifting, due to the judge's use of language emphasizing the state's burden of proof. In his charge, the judge stated that the state was required to prove the elements of the offense beyond a reasonable doubt. The trial judge explained to the jury that Mr. Reaves "was not required to prove anything." ([D.E. 17, Ex. A-R10] at 63). The record demonstrates the judge directed the jury to use its common sense to decide what evidence was reliable when considering its verdict. The judge did not use any burden shifting language in his instructions to the jury and thus no unconstitutional mandatory rebuttable presumption was created. *See Santiago Sanchez Defuentes v. Dugger*, 923 F.2d 801, 803-04 (11th Cir. 1991) (finding that a jury instruction that did not relieve the state of its burden of persuasion did not create an unconstitutional mandatory rebuttable presumption). Habeas relief is denied.

VI. Whether the trial court erred by refusing to appoint co-counsel for Mr. Reaves thereby forcing him to be represented by a single attorney.

In his sixth claim for relief, Mr. Reaves argues that the trial court erred when it denied a defense motion to appoint co-counsel. ([D.E. 6-1] at 2-3). Mr. Reaves argues that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases requires the appointment of two attorneys so that the capital defendant receives "the best possible representation." ([D.E. 6-1] at 3).

Mr. Reaves first made this claim on direct appeal of his conviction and sentence. The Florida Supreme Court denied the claim because it found "no error in the trial judge's decision not to appoint co-counsel for Reaves. There is no general requirement that a defendant must have co-counsel in capital cases, and the judge did not abuse his discretion in failing to appoint additional counsel." *Reaves*, 639 So.2d at 6. While in a complicated capital case two attorneys would be the preferred appointment of counsel, it is not constitutionally mandated and the Florida Supreme Court's determination was reasonable. Mr. Reaves does not cite to any law in support of this claim, other than the general proposition under the Sixth Amendment's entitlement to effective assistance of counsel. [12] Mr. Reaves has failed to show that the denial of his motion to appoint counsel was error, let alone, that the error was not harmless. Habeas relief is denied.

12 The Florida Rules of Criminal Procedure do not require co-counsel in every case, and, in any event, Rule 3.112 became effective on July 1, 2000, after Mr. Reaves was already tried and convicted. Rule 3.112 of the Florida Rules of Criminal Procedure provides that "[a] court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel." FLA. R. CRIM. P. 3.112(e).

VII. Whether the trial court erred by denying appellant's motion to compel discovery.

***15** Mr. Reaves' seventh claim for relief is that the trial court erred by denying his motion to compel discovery of letters from the state attorney to the state's expert witness, Dr. Cheshire. ([D.E. 1] at 12). Mr. Reaves first made this claim on direct appeal of his conviction and sentence. The Florida Supreme Court found "no error in the trial judge's determination that letters between the prosecutor and an expert witness that contained work product were privileged and not subject to discovery." *Reaves*, 639 So.2d at 6. Mr. Reaves argues that the concealment of these documents and the "trial court's complicity therewith is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)." ([D.E. 6-1] at 7).

Under *Brady*, "the prosecution is required to disclose to the defense evidence favorable to the accused if the evidence is material to guilt or punishment." *United States v. Starred*, 55 F.3d 1525, 1555 (11th Cir. 1995) (per curiam). To obtain a new trial based on a *Brady* violation,

> the defendant must show that (1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002). By its very nature, this claim is not a cognizable *Brady* claim. There is no evidence that the prosecution "suppressed the favorable evidence." Mr. Reaves was aware of these documents during the deposition of Dr. Cheshire. He filed a motion to compel discovery in an attempt to obtain the communication the State Attorney's office argued was privileged. The court held a hearing and conducted an *in camera* inspection. The trial court denied the motion, finding the communication to be work product. [13] ([D.E. 17, Ex. A-R7] at 1100). Mr. Reaves argued on direct appeal that this determination was in error, due to a state procedural rule and Florida law regarding waiver of privilege. Mr. Reaves did not make any reference to *Brady* or any state equivalent.

13 Given the ultimate conclusion of this claim, I do not comment on the reasonableness of the work product determination.

While Mr. Reaves attempts to assert this claim under the guise of a constitutional protection, at its core it is really a claim challenging the state court's interpretation of state law. Mr. Reaves filed a Motion to Compel/Motion for Sanctions with the trial court. ([D.E. 17, Ex. A-R17] at 2838). Mr. Reaves argued that "[t]he discovery rules in Florida were created in an attempt to foster full and fair disclosure prior to trials in criminal cases." (*Id.*). This claim is not one that is entitled to relief in a federal habeas petition. "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992). Mr. Reaves' attempt to cure this problem by haphazardly citing *Brady* is ineffective, and habeas relief is denied as to this claim.

VIII. Whether Florida's capital sentencing procedure deprived Mr. Reaves of his Sixth, Eighth and Fourteenth Amendment rights to notice, a jury trial, and his right to due process.

Mr. Reaves' eighth claim for habeas relief argues that "Florida's capital sentencing scheme is unconstitutional and deprived Mr. Reaves of his right to notice, to a jury trial, and of his right to due process under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution." ([D.E. 6-1] at 7). This claim appears to have two components. First, Mr. Reaves argues that the Florida capital sentencing statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). Second, Mr. Reaves argues that "Florida's death penalty statute is being administered in violation of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Proffit v. Florida*, 428 U.S. 242 (1976)." ([D.E. 6-1] at 9).

A. *Ring v. Arizona*, 536 U.S. 584 (2002)

***16** Mr. Reaves argues that Florida's death penalty scheme—in which a jury recommends a sentence of life imprisonment or death, but the trial court actually decides what sentence to impose—and his death sentence are unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* held that, under the Sixth Amendment, a sentencing court cannot, over a defendant's objections, make factual findings with respect to aggravating circumstances necessary for the imposition of the death penalty. Such findings must, as a constitutional matter, be made by a jury. *See id.* at 609. Mr. Reaves argues that his death sentence must be set aside under *Ring* because it was imposed by the trial court; it was the trial court that made the necessary factual findings as to the existence of aggravating factors because the jury's findings are only advisory.

On direct appeal, Mr. Reaves did not raise his *Ring* claim. Indeed, he could not have because *Ring* was not decided until 2002, and Mr. Reaves' conviction was final in 1994. While Mr. Reaves did raise this claim in a successive Rule 3.851 motion on June 24, 2003, *Reaves*, 942 So.2d at 877, he did not raise this claim on appeal to the Florida Supreme Court. *Id.* Therefore, this claim is unexhausted. To exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court. Castille v. Peoples*, 489 U.S. 346, 351 (1989). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (internal citations omitted). Therefore, this claim is unexhausted and barred from federal habeas review. *See id.*

Regardless, Mr. Reaves' *Ring* claim is foreclosed by Supreme Court precedent. In *Schiro v. Summerlin*, 542 U.S. 348, 355-57 (2004), the Supreme Court ruled that *Ring* would not be retroactively applied to cases that had become final before *Ring* was decided. Mr. Reaves' current death sentence became final (for retroactivity purposes) in November of 1994, when the Supreme Court denied certiorari. *See Reaves v. Florida*, 513 U.S. 990 (1994). Because *Ring* was not decided until 2002, Mr. Reaves cannot obtain the benefit of that decision in this habeas corpus proceeding. *See Sibley v. Culliver*, 377 F.3d 1196, 1207-08 (11th Cir. 2004) (explaining that a petitioner seeking to challenge a conviction or death sentence based on *Ring* violations may not do so if the conviction or death sentence was imposed before *Ring* was handed down, as *Ring* is not retroactive). The *Ring* claim is therefore denied.

B. *Furman v. Georgia*, 408 U.S. 238 (1972) and *Profit v. Florida*, 428 U.S. 242 (1976)

Mr. Reaves also asserts that Florida's death penalty statute was administered in violation of federal law because of the jury instructions on the heinous, atrocious and cruel aggravators ("HAC"), the majority sentencing rule, and the advisory role of the jury. ([D.E. 6-1] at 9-10).[14] Mr. Reaves argued this claim on direct appeal. The Florida Supreme Court denied this claim because it found "no constitutional infirmity in the statute." *Reaves*, 639 So.2d at 6.

14 Mr. Reaves also asserts that counsel, the trial court and appellate review violated the rule of lenity. ([D.E. 6-1] at 10). Mr. Reaves provides no specific allegation of this occurring. To the extent this constitutes a cognizable claim, it is insufficiently pled. Further, Mr. Reaves vaguely asserts that "other problems with the statute, including the trial court's inability under Florida statute to know what aggravating and

> mitigating circumstances the jury found." ([D.E. 6-1] at 10). Mr. Reaves makes no cogent constitutional argument as to why this claim should be granted. He cites no law in support of this claim, and this claim is rejected.

***17** The Supreme Court has held that the words "especially heinous, atrocious, or cruel," when used alone as an aggravating factor, are so vague as to offend the Eighth Amendment. *See Maynard v. Cartwright*, 486 U.S. 356, 365 (1988). In *Bradley v. Nagle*, 212 F.3d 559 (11th. Cir. 2000), the Eleventh Circuit interpreted *Maynard* to mean that in order to apply the HAC aggravating circumstance in a constitutional manner, the sentencing court must give a limiting instruction to the jury. *Id.* at 570. Here, the trial court advised the jury as to the meaning of "heinous," "atrocious" and "cruel." ([D.E. 17, Ex. A-R15] at 2314). The trial court also advised the jury "[t]he kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim." (*Id.*). This exact instruction was previously found to be constitutional. *See Marquard v. Sec'y, Dep't. of Corr.*, 429 F.3d 1278, 1316 (11th Cir. 2005). Therefore, the Florida Supreme Court's determination was not contrary to, nor did it involve an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). This claim is rejected.

Mr. Reaves also argues that "Florida's majority verdict sentencing rule in capital cases violates due process under the 8th Amendment." ([D.E. 6-1] at 9). The constitutionality of the Florida capital sentencing statute, including the majority vote of the jury, was previously argued to the United States Supreme Court. *See Proffitt v. Florida*, 428 U.S. 242 (1976). The statute was found constitutional. This claim is rejected.

Finally, Mr. Reaves argues that the jury's advisory role violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Mr. Reaves does not make any legal argument as to how the jury's advisory role violates *Caldwell*, other than by making this conclusory statement. (*See* [D.E. 6-1] at 9). I am not inclined to guess. Further, to the extent that Mr. Reaves' contention can be discerned, in that the Supreme Court held in *Caldwell* that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," 472 U.S. at 328-29, this type of claim has been argued and rejected by the Eleventh Circuit Court of Appeals on more than one occasion. *See Davis v. Singletary*, 119 F.3d 1471, 1481-85 (11th Cir. 1997) (finding references to, and descriptions of, the jury's sentencing verdict as advisory and as a recommendation to the judge, were not error under *Caldwell*); *Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998) (same). Habeas relief is denied.

IX. Whether counsel for Mr. Reaves was ineffective during the penalty phase of his trial in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

In his ninth claim for relief, Mr. Reaves contends that his counsel was ineffective during the penalty phase of his trial. ([D.E. 1] at 14). Specifically, Mr. Reaves asserts that his counsel failed to investigate and present available evidence about two mental health mitigating circumstances, certain expert witnesses who could have testified about Mr. Reaves' substance abuse issues, his Vietnam-era combat related post-traumatic stress disorder, and testimony about his horrible childhood. (*Id.* at 15). Mr. Reaves first made this claim in his Rule 3.850 postconviction motion. The Florida Supreme Court denied this claim as follows:

> Reaves first contends that counsel unreasonably failed to introduce various mitigating circumstances, like Reaves's impoverished childhood, his military background, his drug addiction, his sister's death which occurred shortly after he returned from Vietnam, and his giving assistance to a jail guard in 1973. The trial court denied this claim, finding that "[a]ny of the proposed additional evidence would have been either irrelevant or cumulative." We agree. Defense counsel presented numerous witnesses who discussed Reaves' childhood in detail and further testified as to his drug addiction when he returned home from Vietnam. Two men who served with Reaves also testified as to the conditions of fighting the war in Vietnam, including drug usage. A review of the record supports the trial court's finding that the evidence which he now seeks to introduce is cumulative.FN12 The only evidence identified in Reaves' postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a venereal disease, that one of his sisters died shortly after he returned from

Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances.FN13 The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer.

***18** FN12. *See, e.g., Jennings v. State*, 583 So.2d 316, 321 (Fla. 1991) ("It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position.").

FN13. *Occhicone v. State*, 768 So.2d 1037, 1049 (Fla. 2000) ("In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show 'both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." ').

Reaves, 826 So.2d at 941.

Counsel is ineffective if his performance "fell below an objective standard of reasonableness," and that but for this deficient performance there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To support his claim, Mr. Reaves requested an evidentiary hearing on the claims argued in his Rule 3.850 motion, and filed this request on February 17, 1999. *Reaves*, 826 So. 2d at 936. On February 9, 2000, the trial court summarily denied his motion without granting a hearing on any claim. *Id.* Under Florida Rule of Criminal Procedure 3.850, a movant is entitled to an evidentiary hearing unless it is clear from the record that he is entitled to no relief. *State v. Crews*, 477 So. 2d 984 (Fla. 1985). On appeal, the Florida Supreme Court, remanded the case for an evidentiary hearing on the claim that counsel was ineffective for failing to raise a voluntary intoxication defense during the guilt phase of the trial. *Id.* However, the Florida Supreme Court denied Mr. Reaves an evidentiary hearing on the claim that counsel was ineffective at the penalty phase of the trial for unreasonably failing to introduce evidence of various mitigating factors. *Id.* at 941.

Because the state court found that Mr. Reaves was not entitled to an evidentiary hearing, this Court may only grant a hearing if the decision 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). The Florida Supreme Court, affirming the trial court, found that any additional mitigating evidence "would have been either irrelevant or cumulative." *Reaves*, 826 So. 2d at 941. Further, the court determined that there was "no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances." *Id.*

In the absence of holding an evidentiary hearing to ascertain the scope of the evidence that could have been presented, it was unreasonable for the Florida Supreme Court to determine that the proffered witnesses would be cumulative, or their testimony irrelevant, and that, therefore, Mr. Reaves would be entitled to no relief. After the enactment of AEDPA, the applicable federal habeas statute provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> ***19** (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder

> would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The Eleventh Circuit has explained that:

> The provisions of §§ 2254(e)(2)(A) and (B) apply only where a petitioner contributes "to the absence of a full and fair adjudication in state court" by failing to develop a claim's factual basis. *Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 1491, 146 L.Ed. 2d 435 (2000). We have interpreted a "failure to develop" as the petitioner's lack of diligence in presenting the factual bases of his habeas claims in state court or in seeking the opportunity to develop evidence in a state hearing. *Breedlove v. Moore*, 279 F.3d 952, 959-60 (11th Cir. 2002). An evidentiary hearing, therefore, is not barred where the failure to develop the factual basis is attribute to the state court's refusal to provide any hearing. *Id.* at 960. Even where a federal evidentiary hearing is not barred by a failure to develop the facts, "it would still be appropriate to deny [a diligent petitioner] an evidentiary hearing if such a hearing would not assist in the resolution of his claim." *Id.* at 960. Additionally to be entitled to an evidentiary hearing on a claim, the petitioner must proffer additional evidence that, if true, would entitle him to relief. *Chandler v. McDonough*, 471 F 3d 1360 1362.63 (11th Cir. 2006), cert. denied, — U.S. —— 127 S. C. 2269, 167 L.Ed. 2d 1107 (2007).

Slater v. Sec'y, Dep't of Corr., 260 Fed.Appx. 177, 178-79 (11th Cir. 2007). Here, Mr. Reaves made a reasonable attempt to pursue an evidentiary hearing in state court and his request was refused. Further, such a hearing would assist in the resolution of his claim; accordingly, § 2254(e)(2) does not bar this Court from holding an evidentiary hearing. *See Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002). Until I hear the testimony that would be offered, I cannot say if the state courts' determination that the proffered testimony was "irrelevant or cumulative" was an unreasonable determination of the facts as mandated by AEDPA. Granting an evidentiary hearing is at the discretion of the district court. *Schiro v. Landrigan*, 550 U.S. 465 (2007). If a prisoner "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989) (internal quotations omitted).

Mr. Reaves has proffered evidence that may entitle him to habeas relief after the claim is more thoroughly examined at an evidentiary hearing. Mr. Reaves seeks to introduce the testimony of medical experts and family members that can speak to his "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." ([D.E. 6] at 11). Some of these witnesses were before the state court at the 2003 evidentiary hearing. ([D.E. 6] at 22). The testimony provided by these witnesses at the evidentiary hearing is not cumulative to the testimony given during the sentencing phase of the 1992 retrial. Nor is it irrelevant. It was, however, limited to the defense of voluntary intoxication-a defense would have been asserted during the guilt phase, not as mitigation during the penalty phase.

***20** An evidentiary hearing is required now to ascertain the extent of evidence that could have been presented to the jury during the penalty phase as additional mitigating factors. "The description, details, and depth of abuse" might "far exceed[ ] what the jury was told." *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011). "[T]he jury might find mitigating the intense stress and mental and emotional toll that combat took," *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009), including the "death in his arms of a white soldier comrade," ([D.E. 6] at 47), and his unique experience as an African-American soldier, (*id.*). "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought in the front lines." *Porter*, 130 S. Ct. at 455. Further, testimony from his family members may give insight into his "desperately poor" childhood with absent parents. ([D.E. 17, Ex. C-PCR1-4] at 103). Mr. Reaves' adult life contained traumatic family events, including the murder of his sister and abandonment by his father. ([*Id.*] at 114).

In this case, when Mr. Reaves was apprehended in Georgia, he confessed to the murder. His confession was admissible at trial. Therefore, "any reasonable attorney would have known" that the sentencing phase of the trial would be probably the most crucial stage of the proceedings, so a thorough investigation and presentation of evidence was critical. *Johnson*, 643 F.3d at 932. ("Given the overwhelming evidence of guilt ... the sentence stage was the only part of the trial in which Johnson had a reasonable chance of success."). An evidentiary hearing is required to determine whether and why counsel failed to adequately investigate Mr. Reaves' background for presentation as mitigating evidence, and why counsel presented the evidence he did during the penalty phase. This hearing will aid in the resolution of the issue of ineffective assistance of counsel. The petitioner diligently pursued an evidentiary hearing on this claim, but the state court unreasonably denied this request. Mr. Reaves is granted an evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase of the trial for unreasonably failing to introduce evidence of various mitigating factors. However, given the disposition of Claim XXII, the evidentiary hearing is stayed pending final resolution of that claim.

X. Whether the prosecutor in Mr. Reaves trial made improper and inflammatory statements to the jury. Trial counsel's failure to object to those statements was ineffective and violated Mr. Reaves's Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

Mr. Reaves' tenth claim for relief is one of prosecutorial misconduct. (*See* [D.E. 6-1] at 19-24). Mr. Reaves argues that the prosecutor's improper and inflammatory statements to the jury violated Mr. Reaves' Fifth, Sixth, Eighth and Fourteenth Amendment rights. (*Id.*). Mr. Reaves did not make this claim on direct appeal. This claim also purports to be a claim for ineffective assistance of counsel. Mr. Reaves attempts to do so by simply adding "[t]o the extent trial counsel did not preserve any portion of this issue, Mr. Reaves received ineffective assistance of counsel" to his argument on prosecutorial misconduct.

On appeal from the denial of his Rule 3.850 postconviction motion, the Florida Supreme Court denied this, and other claims, because "they either were raised or should have been raised on direct appeal and accordingly are procedurally barred." *Reaves*, 826 So.2d at 936, n.3. [15] Mr. Reaves argues that this was "contrary to and an unreasonable application of established law." ([D.E. 6-1] at 19-20). Mr. Reaves attempts to establish this by simply cutting and pasting the exact argument he made to the Florida Supreme Court into the instant petition. (*Compare* [D.E. 17, C-PCR-1] at 50-55 and [D.E. 6-1] at 19-24). Mr. Reaves does not argue why the Florida Supreme Court's determination that his claim was procedurally barred was error. Indeed, Mr. Reaves does not address it. Presumably, Mr. Reaves, having not made the prosecutorial misconduct claim on direct appeal, attempted to resurrect this claim (knowing it was procedurally barred from review under Florida law) by styling it as one of ineffective assistance of counsel, which could be made in a Rule 3.850 postconviction motion. [16] This he cannot do.

15 Why the Florida Supreme Court thought this claim was one of prosecutorial misconduct is understnable, as it was titled "The Prosecutor's Misconduct Argument" in Mr. Reaves' initial brief to the court. It was not included with the other claims for ineffective assistance of counsel in his brief, but instead was in its own separate argument section. (*See* [D.E. 17, Ex. C-PCR1] at ii). Further, Mr. Reaves did assert a claim of prosecutorial misconduct during the *guilt phase* in his direct appeal of his conviction and sentence. *See Reaves,* 639 So.2d at 5.

16 In Florida, issues which could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850 motion for post-conviction relief. *Kennedy v. State,* 547 So.2d 912 (Fla. 1989).

***21** Further, even if this claim were not procedurally barred, it is insufficiently pled. As articulated above, ineffective assistance of counsel claims are governed by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, Mr. Reaves has not only failed to show either one of the *Strickland* components, he has failed to even allege them. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, *see* 28 U.S.C. § 2254 Rule 4." *McFarland v. Scott*, 512 U.S. 849 (1994). Habeas relief as to this claim is denied.

XI. Whether the record established that Mr. Reaves is innocent of the death penalty and first degree murder in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

In his eleventh claim for relief, Mr. Reaves asserts that he is innocent of first degree murder and innocent of the death penalty. ([D.E. 6-1] at 24). Mr. Reaves first raised this claim in his Rule 3.850 postconviction motion. (*See* [D.E. 17, Ex. C-PCR-1] at 56-58). Mr. Reaves asserts that the Florida Supreme Court found this claim procedurally barred. ([D.E. 1] at 18). I disagree. Mr. Reaves made this identical claim on appeal from the denial of his Rule 3.850 motion. In the opinion from the Florida Supreme Court, it is clear that this claim was the fourth claim asserted by Mr. Reaves on appeal. *Reaves*, 826 So.2d at 936, n.2.

A review of the opinion shows that the Florida Supreme Court did not determine that this claim was procedurally barred. Indeed, the Florida Supreme Court's opinion is silent as to the disposition of this claim, thus I must review this claim *de novo*. *Mason v. Allen*, 605 F.3d 1114, 1122-23 (11th Cir. 2010) (citing *Cone v. Bell*, 129 S.Ct. 1769 (2009)).

In support of his claim, Mr. Reaves cites *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992). This reliance is misplaced. *Sawyer* articulated the standard for actual innocence claims that are the prerequisite to a habeas court considering the merits of successive or procedurally barred claims, not a freestanding claim of innocence. Whether a federal right to a freestanding actual innocence claim exists remains an open question. *See Dist. Atty's Office v. Osborne*, 129 S.Ct. 2308 (2009). "We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. *House*, 547 U.S., at 554-555, 126 S.Ct. 2064; *Herrera*, 506 U.S., at 398-417, 113 S.Ct. 853; *see also id.*, at 419-421, 113 S.Ct. 853 (O'Connor, J., concurring); *id.*, at 427-428, 113 S.Ct. 853 (Scalia, J., concurring); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L.REV. 142, 159, n. 87 (1970)." *Id.* at 2322. This specific claim has been argued to the United States Supreme Court several times and the Court has "declined to resolve this issue." *House v. Bell*, 547 U.S. 518, 554 (2006). The Eleventh Circuit Court of Appeals recognizes the continued debate.

> We begin by observing that it is not clear at all under the case law whether the claim that [Petitioner] now raises-a freestanding actual innocence claim-is viable on federal habeas corpus review. In *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993), the Supreme Court assumed "for the sake of argument in deciding [the] case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."4 We likewise have recognized the possibility of freestanding actual innocence claims, *see Felker v. Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996), *cert. granted*, 517 U.S. 1182, 116 S.Ct. 1588, 134 L.Ed.2d 685 (1996) and *cert. dismissed*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), ("[*Herrera*] left open the difficult question of whether federal habeas courts may entertain convincing claims of actual innocence."), but have also recognized that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding;" *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (quoting *Herrera*, 506 U.S. at 400, 113 S.Ct. at 860).

***22** *In re Davis*, 565 F.3d 810, 816-17 (11th Cir. 2009) (footnote omitted); *see also In re Lambrix*, 624 F.3d 1355 (11th Cir. 2010). A habeas petitioner attempting to establish "actual innocence" must meet a high standard. *Bousley v. United States*, 523 U.S. 614 (1998); *see also House v. Bell*, 547 U.S. 518 (2006). A petitioner must demonstrate that "in light of all the evidence, 'it is more likely than not that no reasonable juror would have convicted him.' " *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995)). To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup v. Deb*, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. *Id.* at 316. Mr. Reaves has failed to meet the high standards for actual innocence claims brought to overcome procedural bars, let alone unarticulated standards for freestanding actual innocence claims. Assuming the standards for such a claim would be similar to, if not more stringent than, those for gateway claims, Mr. Reaves' claim fails. [17] Habeas relief is denied.

17 Mr. Reaves also asserts that the he is innocent of the death penalty because he disputes the applicability of the three aggravators found by the trial court. In Florida, to be eligible for the death penalty, the co-sentencers must find at least one aggravating factor enumerated in the statute. Here, the trial court found three, including that Mr. Reaves had a prior violent felony conviction. Mr. Reaves suggests because the conviction was almost twenty years old that somehow it should be excluded as an aggravating factor. Mr. Reaves cites no law in support of this contention. This claim is without merit.

XII. Whether Mr. Reaves' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated by juror misconduct and the court's denial of his motion to interview jurors.

In his twelfth claim for relief, Mr. Reaves argues that "actual juror misconduct occurred." ([D.E. 6-1] at 26). Mr. Reaves further asserts that the trial court erred in denying his request to interview jurors. (*Id.*). Mr. Reaves first raised this claim on appeal of the denial of his postconviction motion. The Florida Supreme Court affirmed, explaining:

> In the instant case, Reaves has alleged that one juror attempted to discuss guilt prematurely. This contention does not involve any agreement among the other jurors to disregard their oaths and ignore the law, nor does it imply that the jury was influenced by external sources or improper material. Reaves' assertion, which involves a lone juror's understanding of the jury instructions, is "a matter which essentially inheres in the verdict itself"; hence, juror interviews are not permissible *See, e.g., Sims v. State*, 444 So.2d 922, 925 (Fla. 1983) ("A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself.... Therefore the court did not err in refusing to allow further questioning of the juror."); *see also Devoney v. State*, 717 So.2d 501, 504 (Fla. 1998) (discussions of matters which the jury was explicitly instructed to disregard does not constitute an overt act of misconduct that would permit inquiry into the verdict); *Johnson*, 593 So.2d at 210 (questioning the jury foreman about misunderstandings of the jury instructions during their deliberations in the penalty phase of a capital case is testimony which "essentially inheres in the verdict" and hence is inadmissible). Consequently, as Reaves has not sufficiently alleged any fact which involves an overt prejudicial act that would necessitate a new trial, the trial court was correct in prohibiting juror interviews.

***23** *Reaves*, 826 So.2d at 943-44. While the Florida Supreme Court denied this claim on the substance of the allegations made by Mr. Reaves regarding specific juror misconduct, here, this is unnecessary here because the record shows that Mr. Reaves did not comply with the very rule he now complains violates the United States Constitution.[18]

18 This is not to say that I disagree with the Florida Supreme Court. I concur that the allegations made by Mr. Reaves did not sufficiently allege any fact which involves an overt prejudicial act that would necessitate a new trial.

In Florida, the Rules of Professional Conduct require

> Rule 4-3.5(d)(4) states: "A lawyer shall not ... after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose *unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror* ... to be interviewed."

Evans, 955 So.2d at 952, n. 27 (emphasis added). The record does not reflect that Mr. Reaves filed a notice of intention to interview the juror at issue. Rather, he chose to make this claim in his Rule 3.850 postconviction motion. At that time, Mr. Reaves made a claim challenging the constitutionality of the rule of professional conduct. Mr. Reaves devoted five pages of his motion to this argument. In those five pages, he makes one singular statement which, perhaps, could constitute a vague request: "Mr. Reaves' counsel seeks to interview jurors in order to prepare his post-conviction pleadings." ([D.E. 17, Ex. C-PCR1-4] at 504). The trial court found that this was not the appropriate procedure to invoke to question jurors, explaining "[t]his issue is not cognizable in a motion for post-conviction relief. Without passing on the merits of a potential motion, if the Defendant believes that juror misconduct occurred, he can seek an order permitting a juror interview." ([D.E. 17, Ex. Ex. C-PCR1-7] at 1095-96). Mr. Reaves was informed that there was a procedural mechanism through which he could attempt to interview the jurors in his case. He chose not to do so. Regardless, Rule 4-3.5(d)(4) operates in a similar manner to S.D. Fla. L.R. 11.1(e), which previously has been found to be constitutional. *See United States v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991); *see also United States v. Griek*, 920 F.2d 840 (11th Cir. 1991). Therefore, Mr. Reaves' claim is denied.

XIII. Whether Mr. Reaves was denied his right to confront state witnesses against him when the trial court allowed

Eugene Hinton's prior trial testimony to be read on the grounds that Hinton was unavailable.

Mr. Reaves' thirteenth claim for relief is similar to, and based on the same set of facts as, his first claim for relief. (*Compare* [D.E. 1] at 6-7; [D.E. 1] at 20). The subtle difference is that in his first claim for relief, Mr. Reaves argues that his Confrontation Clause rights were violated when he was unable to present to the jury Hinton's "numerous prior inconsistent statements" and the trial court only allowed Hinton's testimony from the 1987 trial to be read into the record. (*See* [D.E. 6] at 61). Here, Mr. Reaves is arguing, *inter alia*, that it was error to allow the prosecution to read the testimony into the record because it "gave the credibility of [the prosecutor's] office to [Mr.] Hinton's prior statements." ([D.E. 6-1] at 29). Mr. Reaves also seems to argue that it was error to have found that Hinton was "unavailable" to testify. (*See* [D.E. 6-1] at 30).

***24** Candidly, Mr. Reaves acknowledges that this claim was not made until his Rule 3.850 postconviction motion. ([D.E. 1] at 20). Mr. Reaves also acknowledges that the Florida Supreme Court "found this claim to be procedurally barred. *Reaves v. State*, 826 So.2d 932, 936 at/3.(Fla. 2002)." ([D.E. 1] at 20). Specifically, the Florida Supreme Court denied this, and other claims, because "they either were raised or should have been raised on direct appeal and accordingly are procedurally barred." *Reaves*, 826 So.2d at 936, n.3. Despite his candor, Mr. Reaves fails to demonstrate objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the error complained of. [19] *See United States v. Frady*, 456 U.S. 152, 168 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Indeed, when given the opportunity to address this procedural bar in his reply, Mr. Reaves failed to do so. (*See* [D.E. 18] at 16-17). Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the Court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See House v. Bell*, 547 U.S. 518 (2006); *Dretke v. Haley*, 541 U.S. 386 (2004). *See also United States v. Frady*, 456 U.S. 152, 168 (1982). Since Mr. Reaves has not alleged, let alone established, cause to excuse his default, it need not be determined whether he suffered actual prejudice. *Weeks v. Jones*, 26 F.3d 1030, 1046 (11th Cir. 1994); *see also Glover v. Cain*, 128 F.3d 900, 904 n.5 (5th Cir. 1997). Habeas relief is denied.

19 To establish cause for a procedural default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate that there is at least a reasonable probability that the outcome of the proceeding would have been different. *See Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

XIV. Whether Counsel's failure to object to unconstitutional jury instructions violated Mr. Reaves rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Mr. Reaves' fourteenth claim for relief is that his trial counsel was ineffective for failing to object during the judge's instruction to the jury during the sentencing hearing when the judge gave "inaccurate and dispensed misleading information regarding who bore the burden of proof as to whether a death or life recommendation should be returned." ([D.E. 1] at 22). Mr. Reaves first raised this claim in his Rule 3.850 postconviction motion. The Florida Supreme Court denied this, and other claims, because "they either were raised or should have been raised on direct appeal and accordingly are procedurally barred." *Reaves*, 826 So.2d at 936, n.3. The court categorized this claim as one of "improper penalty phase jury instructions." *Id.*

It would appear that the Florida Supreme Court found this claim procedurally barred because, in Florida, claims regarding jury instructions must be raised on direct appeal. *See Rodriguez v. State*, 919 So.2d 1252, 1280 (Fla. 2005) (claims that address the adequacy or constitutionality of jury instructions must be raised on direct appeal). However, in his appellate brief in the Florida Supreme Court, the claim was entitled "Counsel's Failure to Object to Unconstitutional Jury Instructions" and Mr. Reaves did argue as to certain jury instructions that his counsel failed either to object to, or properly preserve for appeal. (*See* [D.E. 17, Ex. C-PCR-1] at 63-68). This claim was properly brought in Mr. Reaves' Rule 3.850 postconviction motion. *See McKinney v. State*, 579 So.2d 80, 82 (Fla. 1991) (holding that "[c]laims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised in a motion for postconviction relief."). Why the Florida Supreme Court may not have viewed this claim as one for ineffective assistance of counsel is understandable, since the claim failed entirely to cite *Strickland* v. *Washington.* Indeed, had the Florida Supreme Court denied the claim as insufficiently pled, such a determination would have been reasonable; instead, I find that the Florida Supreme Court's application of a procedural bar misplaced. Therefore, I will review the merits of the claim. *See Brown v. Sec'y, Dep't. of Corr.*, 200 Fed.Appx. 885 (11th Cir. 2006) (federal claims are not barred by procedural default when the state court incorrectly applies its own procedural default law).

***25** Mr. Reaves claims that five specific jury instructions given by the trial court violated Mr. Reaves' constitutional rights. Mr. Reaves argues that his counsel should have voiced an objection to those instructions. Mr. Reaves asserts that failure to do so constitutes ineffective assistance of counsel. The objections are as follows: (1) the "avoiding arrest" aggravating factor was unconstitutionally vague; (2) the "victim was a law enforcement officer" aggravating circumstance was improperly applied; (3) violation *of Johnson v. Mississippi*; (4) jury's diminished responsibility instruction; and (5) burden shifting instruction. ([D.E. 6-1] at 33-36). A review of the record and Mr. Reaves' own assertions show that two of these claims are refuted by the record. As to the second and third sub-claims, defense counsel did in fact object to the jury instruction as given. ([D.E. 6-1] at 33-34). Therefore, Mr. Reaves' counsel was not ineffective for failing to object. Those two sub-claims are rejected.

So too is Mr. Reaves' fourth sub-claim. Although, Mr. Reaves does not concede that his counsel objected, the record reflects that counsel for Mr. Reaves filed a motion to modify jury instructions. Included in that motion was a request to modify the standard jury instruction because it diminished "the jury's sense of responsibility under *Caldwell.*" ([D.E. 17, Ex. A-R12] at 1835). The trial court denied the motion. This issue was properly preserved for direct appeal. To the extent that this claim should be that Mr. Reaves' appellate counsel failed to make a claim on direct appeal, that is an entirely different claim not argued here. This sub-claim is rejected.

As to the first sub-claim, it is insufficiently pled. In this sub-claim, Mr. Reaves fails to even argue that his counsel was ineffective. This claim appears to be a claim of trial error, not one of ineffective assistance of counsel, which should have been raised on direct appeal, and accordingly is rejected.

Finally, Mr. Reaves' fifth sub-claim is that his trial counsel should have objected to an instruction that shifted the burden to the defendant. This sub-claim is denied as insufficiently pled and meritless. Mr. Reaves fails to cite to the record, and makes no concrete argument as to how or what occurred that led him to assert that the jury instruction improperly shifted the burden. Mr. Reaves argues that he was required to prove whether he should live or die, as opposed to the State proving that the aggravating circumstances outweighed the mitigating circumstances. He provides no basis for this argument. Rather, Mr. Reaves simply makes the conclusory statement without any record support. ([D.E. 6-1] at 35). The record shows that the trial court instructed the jury that "each aggravating circumstance must be established beyond a reasonable doubt before it can be considered by you in arriving at your decision." ([D.E. 17, Ex. A-R15] at 2315). The trial court also instructed the jury that "[a] mitigating circumstance need not be proved beyond a reasonable doubt by the defendant if you are reasonably convinced that a mitigating circumstances exists. You may consider it established." (*Id.* at 2316). Mr. Reaves has not shown, and nothing in the record reflects, how this instruction improperly shifted the burden. Counsel cannot be ineffective for failing to make a meritless objection. Habeas relief is denied.

XV. Whether the State's decision to seek the death penalty against Mr. Reaves was based upon racial considerations in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Mr. Reaves fifteenth claim for relief is two-fold. First, Mr. Reaves argues that the State's decision to seek the death penalty was "based upon racial considerations." ([D.E. 1] at 23). Second, Mr. Reaves asserts that there was "exclusion of non-whites from the jury pool" and that the trial court and his counsel failed to keep a record of the racial make-up of the jurors. (*Id.*). Mr. Reaves contends that this constitutes ineffective assistance of counsel. Mr. Reaves first made this claim as two separate and distinct claims in his Rule 3.850 postconviction motion. ([D.E. 17, Ex. C-PCR-1] at 68, 72). On appeal, from the denial of these claims, the Florida Supreme Court found that the claim arguing that the State's decision to pursue the death penalty was racially motivated was "insufficiently pled."

Reaves, 826 So.2d at 936, n.4. The court found his claim regarding the racial make-up of the jury was procedurally barred. *Id.* at 936, n.3.

***26** As to the first sub-claim, I agree with the Florida Supreme Court. This claim encompasses a single paragraph of Mr. Reaves' petition. (*See* [D.E. 6-1] at 37). The claim is simply conclusory allegations with no record support whatsoever. "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Habeas relief must be denied.

As to his second sub-claim, I disagree with the Florida Supreme Court's determination that this claim was procedurally barred. The record reflects that Mr. Reaves did assert as part of this claim that, "[t]o the extent trial counsel did not properly preserve this claim, Mr. Reaves received ineffective assistance of counsel." ([D.E. 17, Ex. C-PCR-1] at 73). In Florida, "[c]laims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised in a motion for postconviction relief." *See McKinney v. State*, 579 So.2d 80, 82 (Fla. 1991). Similar to Mr. Reaves' fourteenth claim for relief, had the Florida Supreme Court denied the claim as insufficiently pled, such a determination would have been reasonable. However, the Florida Supreme Court's application of a procedural bar misplaced. Therefore, the claim will be reviewed. *See Brown v. Sec'y, Dept of Corr.*, 200 Fed.Appx. 885 (11th Cir. 2006) (federal claims are not barred by procedural default when the state court incorrectly applies its own procedural default law).

Here, Mr. Reaves' current claim is identical to that of his initial brief filed with the Florida Supreme Court. Mr. Reaves provides no argument as to how his trial counsel's "failing to make an accurate record of the race, gender, and national origins of the jury venire made it impossible for Mr. Reaves to obtain reliable appellate review of this claim." ([D.E. 17, Ex. C-PCR-1] at 73). Similarly, he fails to articulate how he was prejudiced by counsel's failure. Therefore, this claim is insufficiently pled and is denied. *See Spillers v. Lockhart*, 802 F.2d 1007, 1010 (8th Cir. 1986) (holding that it is proper to dismiss a petitioner's claims that do not provide "any specifics to identify precisely how his counsel failed to fulfill those obligations").

XVI. Whether the presence of uniformed law enforcement personnel at Mr. Raeves' trial unduly prejudiced the jury and violated his right to a fair trial before an impartial jury in violation of the Sixth, Eight and Fourteenth Amendments.

Mr. Reaves' sixteenth claim for habeas relief is that the presence of uniformed police officers in the courtroom "exert[ed] pressure upon Judge Balsiger as well as intimidat[ed] Mr. Reaves, defense counsel, and most importantly, the jury." ([D.E. 6-1] at 38). The record reflects that at trial, there were five fully dressed Indian River County sheriff's deputies present in the courtroom. ([D.E. 17, A-R5] at 703-04). Defense counsel objected and asked that they be removed from the courtroom. The trial court overruled the objection. (*Id.*) Mr. Reaves argues that their presence was prejudicial and "resulted in his conviction of first degree murder and sentence of death." ([D.E. 6-1] at 38). Mr. Reaves first made this claim in his Rule 3.850 postconviction motion. On appeal, the Florida Supreme Court found this claim procedurally barred. *Reaves*, 826 So.2d at 936, n.3. I agree.

This claim is plainly one of trial court error for overruling defense counsel's objection to the presence of uniformed police officers (presumably colleagues of the deputy who was shot by Mr. Reaves) during the trial. In Florida, this claim should have been made on direct appeal. *See Baker v. State*, 878 So.2d 1236, 1242 (Fla. 2004) (explaining that rule 3.850 is the exclusive remedy for raising collateral attacks to a conviction and is not available to review ordinary trial court errors cognizable on direct appeal). Instead, Mr. Reaves attempted to raise his claim regarding the presence of uniformed sheriff's deputies at his trial for the first time in a manner not permitted by the Florida courts, namely, in a Rule 3.850 postconviction motion. Mr. Reaves did not present his trial court error claim in the procedurally correct manner in state court on direct appeal. *See Baker v. State*, 878 So.2d at 1246. Here, this claim is denied as procedurally defaulted under 28 U.S.C. § 2254(b)(1)(A) because Mr. Reaves did not first exhaust his claim in state court, and "it is apparent that the Florida courts would now refuse to hear this claim ..." *Smith v. Sec'y Dep't of Corr.*, 572 F.3d 1327, 1342 (11th Cir. 2009) (*citing Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998)). Habeas relief is denied. [20]

20 Even if this claim was reviewed on its merits, it would still be denied. The law Mr. Reaves cites in support of

his argument that the Florida Supreme Court made an unreasonable application of clearly established federal law provides little support. Mr. Reaves cites *Holybrook v. Flynn,* 106 S.Ct. 1340 (1986) ("All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over."). Because Mr. Reaves has not shown actual prejudice, he has failed to carry his burden here.

XVII. Whether Florida's death penalty is unconstitutional and its application to Mr. Reaves violates his Fifth, Sixth, Eighth and Fourteenth Amendment rights. Florida's lethal injection statute and procedures are unconstitutional and violate Mr. Reaves' rights guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments.

*27 In his seventeenth claim for habeas relief, Mr. Reaves argues "Florida's death penalty statute and its mechanism for lethal injection violates Mr. Reaves's Fifth, Sixth, Eighth and Fourteenth Amendment rights and habeas corpus relief should lie." ([D.E. 6-1] at 40). Mr. Reaves fails to argue exactly why or how this statement is true. Rather, Mr. Reaves simply reaches this conclusion without support of any kind—legal, technical, or scientific. Mr. Reaves' claim is sorely lacking in substance, as he has failed to articulate a basis for the claim, let alone any grounds for relief. While I am inclined to deny the claim as legally insufficient, in light of the United States Supreme Court's ruling in *Baze v. Rees,* 128 S.Ct. 1520 (2008), [21] it is clear that the claim is meritless. Mr. Reaves' argument that Florida's death penalty unconstitutionally permits cruel and unusual punishment fails, and accordingly habeas relief on this claim is denied. [22]

21 The three-drug lethal injection protocol, similar to the one used in the State of Florida, was held to be constitutional and did not constitute cruel and unusual punishment. *See Baze,* 128 S.Ct. at 1537; *see also Schwab v. State,* 995 So.2d 922 (Fla. 2008).

22 Mr. Reaves also argues that because the Eleventh Circuit Court of Appeals has found that a death row inmate should challenge the lethal injection procedures in a § 1983 civil rights challenge as opposed to a § 2254 habeas petition, and because Mr. Reaves' court appointed counsel CCRC is prohibited from filing § 1983 challenges under state law, Mr. Reaves is placed in "an untenable position." ([D.E. 6-1] at 41). Mr. Reaves argues that the denial of court appointed counsel in order to represent him on his Eighth Amendment claim would violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. I am not convinced that this claim is cognizable in a federal habeas petition. Regardless, the fatal flaw in Mr. Reaves argument is that he has put forth no argument that he sought court appointed counsel for a § 1983 challenge and his request was denied. This claim, even if it were cognizable, is not ripe. Further, this claim very well may have been mooted by the Florida Supreme Court in *Darling v. State,* 45 So.3d 444, 445 (Fla. 2010) ("We interpret chapter 27 to permit CCRC attorneys to represent a death-sentenced individual in a section 1983 injunctive claim if, and only if, that claim challenges the State's intended of [sic] method of execution.").

XVIII. Whether the numerous acknowledged errors in Mr. Reaves' trial when taken together cumulatively caused error that so vitiated the trial as to cause it to be fundamentally unfair in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Mr. Reaves contends, in his eighteenth claim for relief, that his trial "was so infected with error that the cumulative nature of those errors rendered the trial unfair and its verdict and sentence unreliable." ([D.E. 6-1] at 42). Mr. Reaves argued this claim for relief in his postconviction motion. The Florida Supreme Court found this claim to be moot, "in light of [its] decision to remand this case for an evidentiary hearing. *See, e.g., Thompson v. State,* 796 So.2d 511, 515 n. 5 (Fla. 2001)." *Reaves,* 826 So.2d at 944. Thereafter, Mr. Reaves returned to the trial court for an evidentiary hearing. Mr. Reaves did not raise this claim again for consideration in the state courts. Similar to Mr. Reaves *Ring* claim, which was not argued to the Florida Supreme Court on appeal, it is unexhausted and procedurally barred from further review. *Castille v. Peoples,* 489 U.S. 346, 351 (1989) (to exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court.*).

Regardless of the exhaustion and procedural bar findings, this type of claim is not cognizable for federal habeas review except in very limited circumstances not applicable here. Unless the trial was rendered fundamentally unfair, the Eleventh Circuit Court of Appeals has declined to entertain "cumulative error" claims. *See Cargill v. Turpin*, 120 F.3d 1366, 1386-87 (11th Cir. 1997). Habeas relief is denied.

XIX. Whether Mr. Reaves was denied an adversarial testing of the State's evidence before an impartial magistrate because of the presence of judicial bias in violation of his Fifth, Sixth Eighth and Fourteenth Amendment rights.

***28** Mr. Reaves fifteenth claim for relief is that he was "denied an adversarial testing due to the presence of judicial bias." ([D.E. 1] at 27). Mr. Reaves did not argue this claim on direct appeal of his conviction and sentence. He did, however, raise this in his Rule 3.850 postconviction motion. The Florida Supreme Court found the claim procedurally barred. "We deny the following claims as they either were raised or should have been raised on direct appeal and accordingly are procedurally barred: ... (12) alleged judicial bias based on various rulings during the trial." *Reaves*, 826 So.2d at 936, n.3. The Florida Supreme Court is correct. In Florida, issues that could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850 motion for post-conviction relief. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (internal citations omitted). Here, because it was not until his Rule 3.850 postconviction motion that Mr. Reaves raised this judicial bias claim, consideration of its merits is unwarranted.

Mr. Reaves, however, also asserts that his counsel was ineffective for "failing to object or move for a mistrial when the bias and misconduct of the court was obviously prejudicing the jury, constitut[ing] deficient performance." ([D.E. 6-1] at 45). Mr. Reaves made this argument in his appeal of the denial of his Rule 3.850 motion. A Rule 3.850 motion is the appropriate vehicle to make ineffective assistance of counsel claims in Florida. *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001) ("A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal.").

The Florida Supreme Court's denial of this claim as one that should have been brought on direct appeal is understandable because, in Mr. Reaves' initial brief, this claim was titled "The Judicial Bias Argument" and was located in an entirely different section of the brief than his ineffective assistance of counsel claims. (*See* [D.E. 17, Ex. C-PCR1] at 71). In truth, this claim was most likely one where postconviction counsel was attempting to assert a claim that should have been made (but was not) on direct appeal by couching it as an ineffective assistance of counsel claim. Mr. Reaves made enough of an argument in his Rule 3.850 motion such that the claim was "fairly presented" to the state court. Nonetheless, the claim lacks merit.

> [M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588-1589, 89 L.Ed.2d 823 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. *See, e.g., Aetna, id.*, at 820-821, 106 S.Ct., at 1584-1585; *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); 28 U.S.C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980). But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *See, e.g., Aetna, supra*, at 821-822, 106 S.Ct., at 1585-1586; *Turney, supra*, at 523, 47 S.Ct., at 441.

Bracy v. Gramley, 520 U.S. 899 (1997). Mr. Reaves did not have an unfair trial in a biased tribunal. Thus, any alleged deficiencies of counsel in failing to raise or adequately pursue a motion for mistrial on these grounds cannot constitute ineffective assistance of counsel. *See Ladd v. Jones*, 864 F.2d 108, 110 (11th Cir. 1989) ("[S]ince these claims were meritless, it was clearly not ineffective for counsel not to pursue them."); *Owen v. Sec'y, Dep't of Corr.*, 568 F.3d 894 (11th Cir. 2009). Habeas relief is denied.

XX. Whether Mr. Reaves was denied his right to effective assistance of counsel during the pretrial and guilt phase

in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. [23]

23 While this claim is entitled "assistance of counsel during the pretrial *and guilt phase,*" Mr. Reaves makes no specific claims regarding the guilt phase other than a general argument that counsel was ineffective because the trial court denied his request to have co-counsel appointed. This claim is denied because failure to appoint co-counsel is not *per se* ineffective. In *United States v. Cronic,* the United States Supreme Court articulated the four situations where courts have found *per se* ineffectiveness: (1) where there has been a "complete denial of counsel;" (2) where the accused is denied the presence of counsel at "a critical stage" such as arraignment; (3) "[when] counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (4) where circumstances are so prejudiced against the defendant that competent counsel could not render effective assistance. 466 U.S. 648 (1984). "We note first that inexperience does not constitute ineffectiveness *per se:* a defendant who relies on allegations of counsel's inexperience in support of an ineffective-assistance-of-counsel claim must still make the two-part showing of deficient performance and prejudice." *Burden v. Zant,* 903 F.2d 1352, 1361 (1990). Mr. Reaves has failed to make the requisite showing. Habeas relief is denied.

***29** In his twentieth claim for relief, Mr. Reaves asserts that his trial counsel was ineffective during jury selection. ([D.E. 6-1] at 45-50). Specifically, Mr. Reaves contends that his counsel requested additional peremptory challenges. This request was denied by the trial judge unless "[defense counsel] really needs them." (*Id.* at 47). Mr. Reaves then alleges that, rather than re-asserting his need for additional peremptory challenges, trial counsel stated for the record which jurors he would have excluded had he been given the additional challenges and then moved on with *voir dire.* [24] Mr. Reaves also asserts that his counsel was ineffective for failing to make cause challenges, although he does not identity which jurors his counsel should have moved to challenge. Finally, Mr. Reaves asserts that his counsel was ineffective for failing to properly question the jurors, in particular, failing to follow-up with certain jurors. Mr. Reaves argued this claim in his Rule 3.850 postconviction motion. The Florida Supreme Court affirmed the denial, stating:

> We find that this claim does not provide a sufficient ground for relief since Reaves cannot show that his counsel's performance was deficient.FN10 Specifically, Reaves has not shown that trial counsel had a reasonable basis to assert for-cause challenges. He attempts to surmount this problem by alleging that if counsel had "followed up" during voir dire with more specific questions, there would have been a basis for a for-cause challenge.FN11 This is mere conjecture. We accordingly find that the trial court properly denied relief as to this subissue.
>
> FN10. Since Reaves fails to establish the deficiency prong which is a prerequisite under *Strickland,* it is not necessary to address whether he has made a showing of prejudice. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.").
>
> FN11. Although trial counsel indicated during the jury selection that he would have struck these four jurors if he had had any peremptory challenges left, there is no basis to find that trial counsel could have challenged these jurors for cause.

Reaves, 826 So.2d at 939. As an initial matter, Mr. Reaves' claim regarding peremptory challenges is not one which is cognizable for federal habeas relief. The United States Supreme Court has " 'long recognized' that 'peremptory challenges are not of federal constitutional dimension.' " *Rivera v. Illinois,* 129 S.Ct. 1446 (2009) (quoting *United States v. Martinez-Salazar,* 528 U.S. 304, 311 (2000)). "States may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.' " *Id.* at 1450 (quoting *Georgia v. McCollum,* 505 U.S. 42, 57 (1992)).

24 The record belies this assertion. Trial counsel renewed his motion for additional peremptory challenges prior to the seating of the jury. ([D.E. 17, Ex. A-R4] at 641).

As to the remaining sub-claims regarding jury selection, I agree with the Florida Supreme Court that Mr. Reaves' argument is conjecture. At the heart of Mr. Reaves' claim is that "his [counsel's] questions were formalistic and routine, simply read from a laundry list questionnaire that he used throughout *voir dire.* In the few instances that he asked questions that arguably might have revealed prejudice or bias, he simply failed to follow-up." ([D.E. 6-1] at 47). Mr. Reaves implies that had trial counsel asked different questions then maybe counsel could have asserted a challenge for cause, which would have left peremptory challenges for use on other unwanted jurors. Speculation regarding what, if anything, could have been said by these jurors that would have constituted a challenge for cause is not the proper basis for an ineffective assistance of counsel claim. Further, having reviewed the *voir dire* of the jurors listed by trial counsel as those he would have exercised a peremptory challenge for had he been granted additional peremptory challenges, their responses are insufficient to have demanded additional *voir dire* by counsel. This claim is rejected.

XXI. Whether Mr. Reaves is not competent and therefore cannot be executed in accordance with the Fifth, Sixth, Eighth and Fourteenth Amendments.

***30** Mr. Reaves' twenty-first claim for habeas relief is that he is insane, and thus incompetent to be executed. ([D.E. 6-1] at 50). Mr. Reaves acknowledges that he simply made this claim "in order to be preserved for review in future proceedings and in federal court should that be necessary." (*Id.*).

"The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). While Mr. Reaves has asserted a *Ford* claim in the instant petition, Mr. Reaves correctly acknowledges that such a claim is premature as execution is not imminent and no death warrant has issued. *See Panetti v. Quarterman*, 551 U.S. 930 (2007); *ShisInday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007); *Pierce v. Blaine*, 467 F.3d 362, 367 n.2 (3d Cir. 2006). Thus, because it is premature, this claim will be denied without prejudice.

XXII. Whether the trial court erred when it denied a new trial following a postconviction evidentiary hearing that demonstrated trial counsel's deficient performance in failing to investigate, prepare, or present a voluntary intoxication defense and that deficiency operated to the severe prejudice of Mr. Reaves in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

In his twenty-second claim for relief, Mr. Reaves argues that his counsel was ineffective for failing to assert a voluntary intoxication defense. ([D.E. 6-1] at 51-66). Mr. Reaves first argued this claim in his Rule 3.850 postconviction motion. The trial court summarily denied this claim but the Florida Supreme Court reversed and remanded "to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the related subclaims." *Reaves*, 826 So. 2d at 944. Mr. Reaves' related sub-claim [25] was "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." *Id.* at 939.

25 Mr. Reaves had asserted an additional sub-claim that "his counsel was ineffective during voir dire for failing to question jurors about their reaction to the defense of voluntary intoxication, substance abuse, and mental defects." *Id.* However, the Florida Supreme Court disposed of this claim finding that "[t]he voluntary intoxication defense was not advanced at trial, so counsel was not ineffective in failing to question the jurors relative to a defense which he never utilized." *Id.*

The Evidentiary Hearing

On March 4-6, 2003, the trial court held an evidentiary hearing on this claim. During that hearing, Mr. Reaves offered the testimony of several expert witnesses regarding his alleged intoxication. Dr. William Weitz, a licensed psychologist, testified that he had diagnosed Mr. Reaves with a poly substance disorder. ([D.E. 17, Ex. E-PCR2-3A] at 99). Dr. Weitz testified that although he had been retained and was planning to testify regarding Mr. Reaves and Vietnam Syndrome (in support of his excusable homicide defense) that he also could have testified as to a voluntary intoxication defense. (*Id.* at 103). Dr. Weitz concluded that Mr. Reaves had a severe cocaine problem that would have impaired his ability to form specific intent. Dr. Weitz testified that Mr. Reaves told him on the day of the murder that he had "smoked and snorted one and three quarter grams of cocaine." (*Id.* at 132). Dr. Weitz previously testified during his deposition that he was not asked by defense counsel to consider if Mr. Reaves was able to form specific intent until later in the proceedings for possible mitigation. (*Id.* at 129).

***31** Dr. Richard Dudley, a clinical and forensic psychiatrist, testified at the hearing that he reviewed a variety of materials and met personally with Mr. Reaves.

He opined that Mr. Reaves was suffering from "poly substance abuse, a poly substance dependance [sic]. Also from post traumatic stress disorder, and that on the night of the crime, he was intoxicated with cocaine." ([D.E. 17, Ex. E-PCR2-3A] at 166). In support of his diagnosis, Dr. Dudley referenced psychological testing from 1976 which shows that Mr. Reaves was suffering from psychiatric problems, including substance abuse problems. (*Id.* at 182). Dr. Dudley concluded that Mr. Reaves was "acutely intoxicated with cocaine on September 23, 1986, at the time of the offense." (*Id.* at 191). He also concluded that Mr. Reaves was not able to form the intent to kill Deputy Raczkowski. (*Id.*) Finally, Dr. Dudley testified that he would have testified to this conclusion had he been called to testify at the retrial in 1992.

Dr. Barry Crown, a neuropsychologist, testified that he was retained to conduct a neuropsychological evaluation of Mr. Reaves. Dr. Crown reviewed three volumes of background materials and a prior neuropsychological report conducted on Mr. Reaves, and interviewed Mr. Reaves. ([D.E. 17, Ex. E-PCR2-3B] at 242). Dr. Crown concluded that Mr. Reaves has organic brain damage, primarily anterior and bilateral. (*Id.* at 243). Dr. Crown opined that the interaction between Mr. Reaves' underlying brain damage and cocaine use resulted in a phenomenon called "cocaine kindling." This process causes a person to have disrupted reasoning, judgment, particularly short-term memory, and to become impulsive and paranoid. (*Id.* at 247). Dr. Crown concluded that Mr. Reaves was not able to form specific intent on the night of the murder due to his brain damage aggravated by substance abuse. (*Id.* at 250). Dr. Crown testified that he was available in 1992 to testify in this case.

Dr. Deborah Mash, a neuropharmacologist, testified that she reviewed other experts' reports regarding Mr. Reaves, Mr. Reaves' military records, witness statements, trial testimony, and affidavits; and that she also interviewed Mr. Reaves. ([D.E. 17, Ex. E-PCR2-3B] at 277). Dr. Mash's testimony outlined a long history of substance abuse by Mr. Reaves. Dr. Mash concluded that, on the night of the murder, Mr. Reaves was "altered, markedly altered. He was in a markedly altered state of intoxication. My expert opinion is that he was paranoid and fully delusional. This was due to the effects of a severe amount of cocaine abuse." (*Id.* at 286). She further concluded that she would have testified in 1992 that Mr. Reaves "was in the state of voluntary intoxication and would not have been able to form the intent to commit murder." (*Id.* at 293)

Dr. Irving Parsons, a clinical psychologist, testified that he reviewed expert reports, listened to Mr. Reaves' confession, and read the affidavits of witnesses. Dr. Parsons also personally interviewed Mr. Reaves on three separate occasions. ([D.E. 17, Ex. E-PCR2-3B] at 342). Dr. Parsons found that Mr. Reaves was "suffering from the symptoms of chronic substance abuse." ([D.E. 17, Ex. E-PCR2-3B] at 355). Dr. Parsons' ultimate conclusion was that a "combination of post traumatic stress disorder, substances, dissociation, the numbing effect, combined to negate any intent to kill...." (*Id.* at 388).

Dr. Thomas Hyde, a behavioral neurologist, testified that he interviewed Mr. Reaves extensively and performed a full neurological evaluation. ([D.E. 17, Ex. E-PCR2-3B] at 459). Dr. Hyde concluded that Mr. Reaves "had major recurring depression, poly substance abuse, probably met the criteria for cocaine dependance [sic] and alcohol dependance [sic] under the general term poly substance abuse. He certainly had strong elements for post traumatic stress disorder, and he had a post concussive brain injury." (*Id.* at 465).

Also during the hearing, Mr. Reaves proffered evidence from Eugene Hinton. Mr. Hinton provided the defense with an affidavit that stated, among other things, that "Fat [Mr. Reaves] came to my house after the police got shot. He was scared and thought people wanted to kill him. Fat was all strung out. He had been smoking crack and pretty much out of his head...." ([D.E. 17, Ex. E-PCR2-3B] at 426). This affidavit contradicted his 1987 trial testimony. At the 1992 retrial, Mr. Hinton's 1987 testimony was read into the record because Mr. Hinton was ruled unavailable after he refused to testify. In advance of the evidentiary hearing, Mr. Reaves had filed a motion for a writ of habeas corpus ad testificandum seeking to have Mr. Hinton appear and testify. "The motion was denied, but the trial court allowed Hinton's affidavit to be used and argued." *Reaves*, 942 So. 2d at 874.

***32** In rebuttal, the State called Dr. McKinley Cheshire, a psychiatrist, who testified that he had reviewed the testimony from the 1992 retrial, the reports of all defense experts, and, perhaps, the statement that Mr. Reaves gave to the police. Dr. Cheshire had never met Mr. Reaves. ([D.E. 17, Ex. E-PCR2-3B] at 485). Dr. Cheshire opined that Mr. Reaves has an anti-social personality disorder. Dr. Cheshire also testified that he believed Mr. Reaves "had himself under the influence of cocaine. The degree of intoxication, I don't know." (*Id.* at 493). Nevertheless, it was Dr. Cheshire's ultimate opinion that he did not "know of any law that says you are excused from killing someone because you have taken some cocaine. That is self administered misbehavior." (*Id.* at 494).

Mr. Reaves trial counsel, Jay Kirschner, Esq., testified at the evidentiary hearing regarding the presentation of a voluntary intoxication defense. ([D.E. 17, Ex. E-PCR2-3A] at 13). Mr. Reaves' 1992 retrial was the first capital murder case that Mr. Kirschner had ever tried. (*Id.* at 14). Mr. Kirschner testified that he knew of Mr. Reaves' cocaine use on the day of the murder well before the retrial began. Mr. Kirschner testified that the defense of excusable homicide would not have prevented him from also putting forth a defense of voluntary intoxication. (*Id.* at 31). Mr. Kirschner conceded that the focus of the case was excusable homicide and that he did not really consider a voluntary intoxication defense. (*Id.* at 32). Mr. Kirschner did not question any of Mr. Reaves' family and friends about any recent drug use. (*Id.* at 37). Mr. Kirschner did not make a request for funds to retain any other experts who could have testified how drugs might have affected Mr. Reaves' ability to form specific intent on the night of the murder. For Mr. Reaves' defense, Mr. Kirschner retained one expert. That expert, Dr. Weitz, was the same expert witness who had previously evaluated Mr. Reaves prior to his initial trial in 1987.

Mr. Kirschner further testified that although he did not present a voluntary intoxication defense, he did request (and was granted) a jury instruction on voluntary intoxication. ([D.E. 17, Ex. E-PR2-3 A] at 53). Mr. Kirschner testified that he requested the instruction as a "fail-back position." (*Id.*). He opined that this was because "[s]ometimes there are defenses that you don't suggest, that you let the jury reach through their own logic, you have them available." (*Id.* at 62). As such, Mr. Kirschner testified that the defense of voluntary intoxication was not completely excluded, but it was not the primary defense. (*Id.* at 61). On rebuttal, Mr. Kirschner testified he did not *voir dire* the jury, nor did he make an opening statement regarding voluntary intoxication. (*Id.* at 77). Mr. Kirschner presented no witnesses to testify as to a voluntary intoxication defense.

The most crucial point is that Mr. Kirschner did not offer any specific strategic reason for why he did not put forth a voluntary intoxication defense. Rather, he did not even consider the defense. Second-guessing of an attorney's performance is not permitted, *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992), and "[r]eview of counsel's conduct is to be highly deferential" where counsel's decisions are based on an appropriate investigation of the facts, *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). However, when counsel fails to conduct an investigation into a viable defense and does not make a strategic decision to do so, a court may find that decision to be deficient representation. *See Ferrell v. Hall*, 640 F.3d 1199, 1226 (11th Cir. 2011) (citing *Strickland v. Washington*, 466 U.S. at 690-91; *accord Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003); *Ford v. Hall*, 546 F.3d 1326 (11th Cir. 2008); *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008)).

The Decision of the Florida Supreme Court

*33 After the evidentiary hearing, the trial court denied the claim. On appeal of that denial, the Florida Supreme Court, applying *Strickland*, affirmed.

> Reaves has failed to show how counsel's performance at retrial was deficient, i.e that he did not function as 'counsel' guaranteed by the Sixth Amendment. In order to assert the defense of voluntary intoxication, Reaves must present evidence of intoxication at the time of the offense that would show his inability to form the requisite specific intent. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998); *Linehan v. State*, 476 So.2d 1262, 1264 (Fla. 1985). Reaves did not present any evidence at the evidentiary hearing to show his level or state of intoxication at the time of the murder. There was no evidence to corroborate Reaves' assertions that he was "high" at the time of the offense. Importantly, although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions.
>
> Other than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense. During his confession, Reaves said he was "high" at the time he shot Deputy

Raczkowski, but he also made statements indicating he knew exactly what he was doing at the time of the shooting. These statements essentially negated any voluntary intoxication defense that trial counsel could have presented on Reaves' behalf on retrial. *See Pace v. State*, 854 So.2d 167, 177 (Fla. 2003) (finding counsel's rejection of an intoxication defense was not deficient performance where Pace's confession "indicated a clear recollection of the facts of the offense and involved deliberate behavior"); *Davis v. State*, 875 So.2d 359, 367 (Fla. 2003) (finding competent, substantive evidence supported trial court's determination that counsel made an informed, strategic decision not to pursue an intoxication defense where defendant gave detailed confessions as to the circumstances of the crime that "substantially undermined the viability of a voluntary intoxication defense"); *Damren v. State*, 838 So.2d 512, 517-18 (Fla. 2003) (holding counsel's strategic decision not to present a voluntary intoxication defense did not constitute ineffective assistance of counsel where counsel determined the murder was not committed while Floyd was under the influence of cocaine).

Furthermore, Hinton, the first person to see Reaves after the shooting, testified at the 1987 trial that Reaves came to his house and said he had shot a cop. Reaves told him the officer begged Reaves not to shoot him but Reaves said, in essence, "One of us has to go." Hinton also testified that Reaves' speech was not slurred and he appeared to be in full control of his faculties. Because Hinton made himself unavailable to testify at retrial, this testimony was read into the record and further negated the use of a voluntary intoxication defense.

Trial counsel Kirschner testified at the evidentiary hearing that his theory of defense at the time of retrial in 1992 was excusable homicide, which was based on his investigation of the case. He recalled discussing available defenses with Reaves and discussing Reaves' cocaine use around the time of the incident. Kirschner testified he would look for lab reports, lay observations of how defendant was behaving, and toxicology reports to determine whether there was sufficient evidence to argue the defense of voluntary intoxication. Kirschner stated his thought process led him to believe that excusable homicide was "the right fit for the defense in this case," and based on the record, the trial court found his strategic decisions were competent.

***34** In its order denying relief, the trial court found the ability to offer evidence of the combined effect of intoxication and a mental defect was not fully articulated or established in law until *State v. Bias*, 653 So.2d 380 (Fla. 1995), which was issued three years after the retrial. Thus, the trial court found no error in the court's reliance during the retrial on *Chestnut v. State*, 538 So.2d 820 (Fla. 1989), to deny trial counsel's request to present Dr. William Weitz's mental health testimony at the guilt phase. In *Chestnut*, this Court held that an abnormal mental condition not constituting legal insanity was inadmissible for the purpose of proving that an accused did not or could not form the specific intent to commit an offense. *See Chestnut*, 538 So.2d at 820. Dr. Weitz diagnosed Reaves as having an antisocial personality disorder,FN5 polysubstance abuse (particularly cocaine), and Vietnam Syndrome. FN6 This diagnosis did not rise to the level of legal insanity, and trial counsel would have known that it could not support a voluntary intoxication defense at the time.

FN5. Dr. Weitz defined antisocial personality disorder as having difficulty relating to authority figures. Anger, irritability, and rage are components of this disorder.

FN6. Vietnam Syndrome is defined as a series or a set of personality characteristics and behavioral patterns of changes that have occurred in combat veterans as a result of combat experience. The qualities of the syndrome include rage reactions, alienation, and isolation from the social environment, hypervigilant type alertness known as "startle response," a potential increase in alcohol and drug use, and some depression.

Furthermore, during the proffer of Dr. Weitz's testimony during the guilt phase, he revealed that Reaves' consumption of cocaine and beer did not raise his level of intoxication to a point that would prevent Reaves from knowing right from wrong. Dr. Weitz further testified that Reaves knew to flee the area, hide in the woods, and take evasive action, all of which indicated Reaves knew what he was doing.

There is competent, substantial evidence in the record supporting the trial court's conclusion that trial counsel provided reasonably effective assistance of counsel. Without the distorting effect of hindsight, trial counsel's strategic choice of excusable homicide as a defense over involuntary intoxication was reasonable under the facts of the case and the law at the time. Thus, Reaves has not demonstrated that trial counsel's performance was deficient under *Strickland.* Because counsel's performance was not deficient, we need not address the prejudice prong. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.

Reaves, 942 So.2d at 879-81,[26] After an extensive review of the record, I find that, while the Florida Supreme Court correctly applied clearly established federal precedent, it made several unreasonable determinations of fact.[27] In *Strickland v. Washington,* 466 U.S. 668 (1984), the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." *Strickland,* 466 U.S. at 688. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances ... [as this attorney did]-whether what ... [this attorney] did was within the 'wide range of reasonable processional assistance.' " *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland,* 466 U.S. at 689) (citation omitted). Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. For the reasons that follow, I conclude that trial counsel's performance was deficient.

26 Involuntary intoxication is a separate and distinct defense in Florida.

> In order to establish an involuntary intoxication defense, a defendant must first present sufficient evidence that an intoxicated condition was brought about by the introduction into the defendant's body "of any substance which he does not know and has no reason to know has a tendency to cause an intoxicated or drugged condition." *Brancaccio,* 698 So.2d at 600 n.4. The defendant would then have the burden to prove that this involuntary intoxication rendered him unable to understand what he was doing and to understand the consequences of his actions, or if he did understand, that he was unable to know that his actions were wrong. *See generally Hall v. State,* 568 So.2d 882 (Fla. 1990). "If a defendant introduces evidence sufficient to present a reasonable doubt about sanity, the presumption of sanity vanishes and the state must prove the accused's sanity beyond a reasonable doubt." *Id.* at 885 n.6.

Brancaccio v. State, 27 So.3d 739, 741 (Fla. Dist. Ct. App. 2010). Given the facts of the instant case, the Court assumes the Florida Supreme Court made a clerical error when using "involuntary".

27 Justice Anstead reached a similar conclusion.

> Try as I may, I cannot conclude, as the majority has done, that this testimony represents a reasonable and adequate investigation by counsel of the circumstances that would support this defense. As we have noted in our past opinions, this case involves tragic and bizarre circumstances that included the defendant calling 911 at 3 a.m. from a Zippy Mart apparently in an effort to get a taxicab. When a police officer responded to this call for help, he was killed as a result of a struggle over a gun that fell out of Reaves' clothing. Reaves' confession was replete with statements that he was high on cocaine at the time. Reaves was also seen by a mental health expert who, while acknowledging that Reaves knew right from wrong, was prepared to testify on the voluntary intoxication defense. Because even more evidence of appellant's cocaine addiction was presented in the postconviction hearing, and defense counsel provided no reasonable explanation for his failure to investigate and present this defense, I cannot join in the majority's conclusion that counsel provided competent representation.

Reaves, 942 So. 2d at 884. (Anstead, J., dissenting).

I. Deficiency

*35 Under AEDPA, an application under Section 2254 may not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication 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 "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Florida Supreme Court made unreasonable determinations of facts when it found that (1) there was no direct evidence that Mr. Reaves was intoxicated at the time of the crime, (2) trial counsel made a strategic decision regarding a voluntary intoxication defense, and (3) Dr. Weitz' testimony disproved a voluntary intoxication defense. These unreasonable determinations of facts led the Florida Supreme Court to the erroneous conclusion that counsel's performance was not deficient.

a. Evidence of Intoxication

First, the Florida Supreme Court denied Mr. Reaves' involuntary intoxication claim because "[o]ther than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense." [28] *Id.* at 879. This is, perhaps, true. At the time of the crime, the only two people who knew or could have testified regarding Mr. Reaves' ingestion of drugs were Mr. Reaves and Mr. Hinton. Mr. Reaves has always said that he had ingested cocaine, indeed, large amounts of cocaine, on the day of the murder. When he was apprehended in Georgia, Mr. Reaves repeatedly told the police deputies that he was intoxicated at the time of the murder. Mr. Hinton, on the other hand, has sometimes sworn that Mr. Reaves was under the influence of drugs on the night of the murder and sometimes not. Mr. Hinton's statements, trial testimony, and affidavits have varied over time. At the 1992 retrial, Mr. Hinton refused to testify, was found in criminal contempt, and his 1987 testimony had to be read into the record. Mr. Hinton's prior statements and deposition testimony were often in contradiction with his 1987 testimony. This conflicting testimony formed the basis for one of the reasons why the Florida Supreme Court did not find counsel's performance deficient. However, the Florida Supreme Court's conclusion that there is no direct evidence that Reaves was intoxicated cannot be reconciled with the State's own concessions, or the trial court's findings, in 2003.

28 This may be, in large part, because trial counsel did not pursue a voluntary intoxication defense. Therefore, he did not request the examination of certain physical evidence, i.e., hairs, blood samples, and a marijuana cigarette taken into evidence but not tested at the state laboratory. ([D.E. 17, Ex. E-PCR2-3A] at 32-35).

At the close of evidence at the 2003 hearing, when postconviction counsel renewed its Motion to Conduct Drug Metabolite Testing, the trial court found the testing unnecessary because the State "has all but stipulated that he [Mr. Reaves] ingested cocaine on the date of the incident." ([D.E. 17, Ex. E-PCR2-3B] at 435). Additionally, the court found "that there is no evidence controverting the fact that your client ingested cocaine on the date of the shooting. There' [sic] nothing." (*Id.*). "I think both sides presented evidence that the defendant was under the influence of cocaine at the time of the shooting. I don't think that's an issue. It's a non issue as far as I am concerned." (*Id.* at 526). The State also argued that "the only difference between the testimony of the State's expert and the defense expert is the psychological or psychiatric significance of Mr. Reaves' drug use." (*Id.* at 517). Consequently, the Florida Supreme Court's determination that there was no direct evidence that Reaves was intoxicated cannot be considered reasonable. While the exact level of intoxication is not entirely clear from the record, there was enough evidence of intoxication that counsel should have investigated this as a possible defense. "The duty to investigate requires that counsel ' conduct a substantial investigation into any of his client's plausible lines of defense.' " *Fortenberry v. Haley*, 297 F.3d 1213, 1226 (11th Cir. 2002) (citing *House v. Balkcom*, 725 F.2d 608, 617-18 (11th Cir. 1984)).

b. Strategic Decision

***36** In 1992, premeditated murder was a specific intent crime for which a defense of voluntary intoxication may have been interposed in Florida. [29] To convict an individual of premeditated murder the State must prove, among other things, a "fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." *Blackwood v. State*, 777 So. 2d 399, 406 (Fla. 2000) (internal quotations omitted). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. *E.g.*, *Snipes v. State*, 17 So. 2d 93 (Fla. 1944); *Chisolm v. State*, 76 So. 329 (Fla. 1917). Likewise, specific intent to kill is an element to be proved by the state in a charge of attempted first-degree premeditated murder. *Fleming v. State*, 374 So. 2d 954 (Fla. 1979).

29 On October 1, 1999, the Florida Legislature essentially eliminated voluntary intoxication as a defense.

> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

FLA. STAT. § 775.051 (2010).

At the 2003 evidentiary hearing, Mr. Kirschner testified that the defense theory of excusable homicide and the defense of voluntary intoxication are not mutually exclusive. Mr. Kirschner also testified that excusable homicide was a defense on which he would have won an acquittal for his client, whereas voluntary intoxication could have reduced the severity of the charge to, perhaps, second degree murder. He agreed that he could have asserted both without appearing inconsistent.

Contrary to the determination made by the Florida Supreme Court, trial counsel did not make a strategic decision regarding a voluntary intoxication defense. Mr. Kirschner did not even recall discussing the defense with Mr. Reaves. ([D.E. 17, Ex. PCR 2-3A] at 16). Mr. Kirschner offered no concrete reason why he did not investigate a possible voluntary intoxication defense:

> Q: Would there have been any disadvantage—Let me put it to you this way, in using that defense, that theory, would it have also prohibited you from using a defense of voluntary intoxication?
>
> A: No.
>
> Q: Do you know why you might not have decided to go that route?
>
> A: I remember focusing on excusable homicide, and that the whole thrust, I think I told the jury in opening statement, was this case was about excusable homicide. I tried to use the language of the excusable homicide statute to the facts of Mr. Reaves' case.
>
> The short answer would be no. The focus of the case clearly was excusable homicide. I don't even think I mentioned voluntary intoxication in opening or closing statements.
>
> Q: Is it fair to say it could have been used as well?
>
> A: Yes.
>
> Q: It would be fair to say that voluntary intoxication goes directly towards Mr. Reaves' ability to form specific intent to commit premeditated murder?
>
> A: Yes.

([D.E. 17, Ex. E-PCR2-3A] at 31). The record demonstrate that voluntary intoxication was something Mr. Kirschner did not genuinely consider until after his excusable homicide was "gutted." ([D.E. 17, Ex. E-PCR2-3A] at 83). It was not until then that he asked the trial judge to give an instruction on voluntary intoxication and referenced Mr. Reaves' cocaine use in his closing argument. (*Id.*). This evidences that, at some point, Mr. Kirschner *did* think that a voluntary intoxication defense was a meaningful defense theory. However, by waiting until the eleventh hour, Mr. Kirschner failed to present the defense in any meaningful way. When Mr. Reaves was apprehended in Georgia, he confessed to shooting and killing the sheriff's deputy. As such, the defenses available to him were very limited. Given the facts in the record, I conclude that Mr. Kirschner's failure to investigate voluntary intoxication as a possible defense was deficient.

***37** Further, the Florida Supreme Court's determination that Mr. Kirschner "would have known" that a voluntary intoxication defense could not be supported by offering evidence of the combined effect of intoxication and a mental defect was likewise unreasonable. *Reaves*, 942 So.2d at 880. The record directly refutes the contention that Mr. Kirschner would have known, and in fact shows that Mr. Kirschner believed the exact opposite.[30]

30 In its opinion, The Florida Supreme Court blurs the line between the defense of excusable homicide which was asserted by counsel and the defense of voluntary intoxication which was not asserted by counsel. "[T]he trial court found no error in the court's reliance during the retrial on *Chestnut v. State*, 538 So.2d

820 (Fla. 1989), to deny trial counsel's request to present Dr. William Weitz's mental health testimony at the guilt phase. In *Chestnut*, this Court held that an abnormal mental condition not constituting legal insanity was inadmissible for the purpose of proving that an accused did not or could not form the specific intent to commit an offense. *See Chestnut*, 538 So.2d at 820." *Reaves*, 942 So. 2d at 880. This statement is accurate, but it does not address the actual claim, which is whether counsel was ineffective for not pursuing a voluntary intoxication defense at all, not whether the trial court erred by denying trial counsel's request to have Dr. Weitz testify as to Mr. Reaves' excusable homicide defense.

After the close of the State's case, Mr. Kirschner again attempted to persuade the trial court to allow Dr. Weitz to testify regarding Mr. Reaves and Vietnam Syndrome. ([D.E. 17, Ex. A-R10] at 1470). Mr. Kirschner acknowledged that, standing alone, abnormal mental conditions that do not constitute legal insanity are not admissible. However, in support of Mr. Reaves' excusable homicide defense, Mr. Kirschner argued the following:

> That's not the question. There's a difference between that kind of testimony and testimony where you're offering expert testimony to directly explain and justify criminal conduct as opposed to if you're offering it, extra testimony on the elements of an affirmative defense.
>
> And Florida case law is replete with examples where such testimony is admissible if it's offered in order to buttress a certain affirmative defense. *We know that it is admissible on involuntary [sic] intoxication case under Graganus* (phonetic) and—
>
> THE COURT: But we're not talking about a voluntary intoxication case.

Id. (emphasis added). This exchange makes clear that Mr. Kirschner believed this exact type of testimony was admissible in the pursuit of a voluntary intoxication defense pursuant to *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984). In fact, Mr. Kirschner argued by way of analogy that since this evidence was admissible for a voluntary intoxication defense, specifically arguing that "we know it is admissible," therefore, it should be admissible for an excusable homicide defense too. This argument makes it all the more egregious that Mr. Kirschner did not pursue a voluntary intoxication defense, since he thought (mistakenly or otherwise) it would have allowed the abnormal mental condition he hoped to offer to the jury to be admitted.[31] As such, the Florida Supreme Court's determination that Mr. Kirschner's performance was not deficient because he would have known that he could not present this type of evidence in support of a voluntary intoxication claim is unreasonable.

31 Indeed, at the hearing on the State's Motion to Exclude Abnormal Mental Condition to Negate the Specific Intent required to convict for first degree premeditated murder, the prosecutor advised the court "the only other recognized defense in the State of Florida for this would be one of voluntary intoxication, the *Gagangis* (Phonetic) case, Florida Supreme Court case in 1984." The Court responded "Oh, yes, yeah." ([D.E. 17, Ex. A-R2] at 212).
Attached to the State's Motion was the expert report drafted by Dr. Weitz before Mr. Reaves' initial 1987 trial:

> It must also be noted that Mr. Reaves reported a continuous use of cocaine on the day the event occurred. His own subjective perceptions of the impact of cocaine on his system is that of increased fear, paranoia & a generally cautious mode of interacting with his environment. If one can establish that the subject did in fact utilize cocaine on the day in question, then one might reasonably expect an impairment in judgment, perception, and reasoning. In combination with emotional experiences learned in a combat situation, there is a strong possibility that his response to his altercation with the police officer was one he perceived as survivor orientated.
>
> * * * *
>
> It may also be argued that, while I do believe the defendant was able to *appreciate the criminality of his conduct*, his psychological predisposition to life threatening situations and his reported use of cocaine inhibited his ability to conform his conduct to the requirements of the law.

([D.E. 17, A-R17] at 2589) (emphasis added). Appreciating the criminality of conduct is the legal standard for insanity not for the negation of specific intent due to voluntary intoxication. *See Hall v. State*, 568 So. 2d 882 (Fla. 1990). Essentially, Dr. Weitz opined that Mr. Reaves did not meet the definition of legal insanity. The State used this information to argue that because he was not insane, Mr. Reaves could not present evidence of a mental condition to negate specific intent. The report does show that, even in 1987, Dr. Weitz seemed to suggest the plausability of a voluntary intoxication defense.

> Despite having this report, Mr. Kirschner continued to assert excusable homicide as Mr. Reaves' sole defense.

***38** Additionally, the Florida Supreme Court's determination that "Kirschner testified he would look for lab reports, lay observations of how defendant was behaving, and toxicology reports to determine whether there was sufficient evidence to argue the defense of voluntary intoxication" is misleading. While Mr. Kirschner did testify to this, it was in response to a hypothetical question about what he would have done *if* he had chosen to pursue a voluntary intoxication defense, not that he had considered or performed those tests before making a strategic decision to reject voluntary intoxication as a defense. ([D.E. 17, Ex. E-PCR2-3A] at 56).

Finally, I find unreasonable the Florida Supreme Court's determination that "trial counsel's strategic choice of excusable homicide as a defense over involuntary [sic] intoxication was reasonable under the facts of the case and the law at the time." The trial court informed Mr. Kirschner *before* the trial started that the sole witness who could support his defense of excusable homicide could not testify.[32] ([D.E. 17, Ex. A-R2]). On the day of trial, Mr. Kirschner knew he would be unable to prove excusable homicide. Yet he continued to pursue this defense, filing a memorandum of law in support of admitting Dr. Weitz's testimony on February 24, 1992. Mr. Reaves' trial began on February 17, 1992. Mr. Kirschner's reliance on an unprovable excusable homicide defense over a plausible voluntary intoxication defense was not reasonable.

32 The trial court conditionally granted the State's Motion to Prohibit Testimony of Abnormal Mental Condition Not Constituting Legal Insanity on January 16, 1992. ([D.E. 17, Ex. A-R2] at 208). The trial judge specifically ordered that Mr. Reaves would not be able to present mental health testimony regarding Mr. Reaves' service in Vietnam. One month later, Mr. Reaves' trial began with almost his entire defense resting on precluded testimony. Counsel proceeded anyway.

c. Dr. Weitz's testimony

The Florida Supreme Court also found that "during the proffer of Dr. Weitz's testimony during the guilt phase, he revealed that Reaves' consumption of cocaine and beer did not raise his level of intoxication to a point that would prevent Reaves from knowing right from wrong. Dr. Weitz further testified that Reaves knew to flee the area, hide in the woods, and take evasive action, all of which indicated Reaves knew what he was doing." *Reaves*, 942 So. 2d at 878-81. This statement is true. However, this statement all but ignores Dr. Weitz's testimony at the 2003 evidentiary hearing where he testified that, for the 1992 retrial, he was retained *solely* for the purposes of determining "competency, insanity, and in particularly whether or not the military experience may have affected the case." Dr. Weitz's testimony at the 2003 evidentiary hearing was markedly different. The difference stems from the fact that Dr. Weitz was not asked to evaluate Mr. Reaves for a voluntary intoxication defense before his retrial. It was not until 2003 that Dr. Weitz was ever asked to consider Mr. Reaves' ability to form specific intent based on his voluntary intoxication.

> Q: Do you believe based on your interview with him then, and still today, that because of William Reaves' intoxication, that he was unable to form specific intent the night of the incident?
>
> A: Based solely and evenly on the amount of cocaine, alcohol, beer used, and the way in which his behavior was described, yes, I believe clearly that the way the alcohol and drugs affected his behavior would give rise legitimately to an intoxication defense.
>
> Q: Would it have helped Mr. Reaves' case with his voluntary intoxication defense to add in the Vietnam syndrome?
>
> ***39** A: Yes. It does.
>
> * * *
>
> A: Together it would complete the process, although certainly I could describe the alcohol/drug effects independently, but here it helps to explain the kinds of behaviors that took place in addition to the impairments.
>
> Q: So let me be clear about this for the record. The testimony would have been that he had a severe cocaine problem that would have impaired his ability to form specific intent?
>
> A: Correct.

Q: And then at least there could have been a proffer if the Judge wouldn't have allowed it in, although the argument could have been made, and then you could have added in the Vietnam syndrome behavior on top of that?

A. Yes ...

* * *

Q: Okay. Turning to page 191 of your deposition in the middle of the page on line 15 you were asked, do you have an opinion as to whether the defendant knew when he shot the police officer what he was doing and the consequences, and knew what he was doing was wrong when he did it, and you answered yes.

A: That's correct. That's strictly a *Mc Naughton* based response for the Florida statute. Given the fact that I believe he was sane at the time, my response is he could distinguish right from wrong.

Was he impaired? If the issue was diminished capacity, if the issue was, was he able to form specific intent, my answer would have been different. The criteria for *Mc Naughton* was right from wrong, and I testified accordingly.

Q: The question included, knew what he was doing.

A: Knew what he was doing to me is very, very consistent with right from wrong, which is, did he have the cognitive ability to know? The answer is yes. Did he form a specific intent, was there diminished capacity? They were also equally true, but I wasn't asked that.

([D.E. 17, Ex. E-PCR2-3A] at 105-06, 137-38). The legal standards for insanity and those for the negation of specific intent are quite different. However, they are often confused. In Mr. Reaves' case, they were confused as a matter of course.

To be clear, "[i]t is well established in Florida that the test for insanity, when used as a defense to a criminal charge is the *McNaughton* Rule. Under *McNaughton* the only issues are: (1) the individual's ability at the time of the incident to distinguish right from wrong; and (2) his ability to understand the wrongness of the act committed." *Gurganus v. State*, 451 So. 2d 817, 820 (Fla. 1984). In contrast, voluntary intoxication is a defense only to crimes involving "a specific or particular intent [which] is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration ... with reference to the capacity or ability of the accused to form or entertain the particular intent, or ... whether the accused was in such a condition of mind to form a premeditated design." *Linehan v. State*, 476 So. 2d 1262, 1264 (Fla. 1985), *superseded by* FLA. STAT. § 775.051 (2010). Based on Dr. Weitz's testimony at the 2003 evidentiary hearing, the Florida Supreme Court's determination that "Dr. Weitz's testimony during the guilt phase, ... revealed that Reaves' consumption of cocaine and beer did not raise his level of intoxication to a point that would prevent Reaves from knowing right from wrong" was an unreasonable application of the law, as it relied on the legal standard for insanity instead of the standard for negation of specific intent. For all the reasons above, counsel rendered ineffective assistance of counsel because his performance was deficient. The first prong of *Strickland* has been met.

II. Prejudice

***40** The inquiry, however, does not end there. Mr. Reaves must show that he was prejudiced by the deficient performance of counsel, the second prong of *Strickland.* Specifically, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

On appeal, the Florida Supreme Court declined to analyze the second prong of *Strickland.* "Because counsel's performance was not deficient, we need not address the prejudice prong." *Reaves*, 942 So.2d at 881 (citations omitted). Therefore, I must review the claim *de novo.* "Where the state court did not reach the merits of the claim, however, 'federal habeas review is not subject to the deferential standard that applies under AEDPA to any claim that was adjudicated on the merits in State court proceedings," ' and instead, "the claim is reviewed *de novo.*" *Cone v. Bell*, 129 S.Ct. 1769, 1784 (2009).

In Florida, voluntary intoxication is not a complete defense. *Harris v. Sec'y, Dep't of Corr.*, 189 Fed.Appx. 904, 906 (11th Cir. 2006). Therefore, it does not provide that if Mr. Reaves was found to be intoxicated at the time of the crime, such that he lacked the capacity or ability to form or entertain the particular intent, he would have been acquitted of all charges and released. Rather, voluntary intoxication had long been recognized in Florida as a defense to specific intent crimes. *Linehan*, 476 So.2d at 1262. While the defense could not have exonerated Mr. Reaves from responsibility for the death of the officer, it could have resulted in a jury finding of guilt to a lesser degree. Therefore, a prejudice analysis must determine whether there is a reasonable probability that if Mr. Kirschner had put forth a voluntary intoxication defense, Mr. Reaves would have been found guilty, not of premeditated first degree murder, but rather of one of the lesser included offenses. In making that determination, the Court must find that the outcome of the trial is sufficiently undermined by the evidence presented not only at trial but also in the postconviction proceedings. *See Lawhorn v. Allen*, 519 F.3d 1272, 1296 (11th Cir. 2008).

A federal habeas petitioner has a most difficult task in establishing prejudice on a claim of ineffective assistance of counsel for failing to present a voluntary intoxication claim. This task is rarely accomplished; that is so because voluntary intoxication defenses are disfavored. *See Boehme v. Crosby*, 146 Fed.Appx. 422, 425 (11th Cir. 2005). To determine that there is a reasonable probability that a jury would have found Mr. Reaves guilty of a lesser included offense rather than the premeditated murder of a police officer—whom he shot seven times, some of those times in the officer's back—because he was voluntarily intoxicated, is highly unlikely. This, however, is not the typical voluntary intoxication case. Indeed, the facts of Mr. Reaves' case are distinguishable from the precedent that controls this claim.

Often, deficiency and prejudice are not established because there is not enough evidence in the record to show that a defendant's intoxication reached a level high enough to negate specific intent. *See Pietri v. Fla. Dep't of Corr.*, 641 F.3d 1276, 1284 (11th Cir. 2011) (finding that evidence of prior drug use was not evidence of intoxication at the time of the crime to negate specific intent, and could not be admitted alone to show a mental defect). Other times, deficiency and prejudice do not exist when there is ample evidence on the record of defendant's actions before the crime demonstrating an ability to form specific intent to contradict defendant's intoxication. *See Williams v. Allen*, 598 F.3d 778 (11th Cir. 2010) (finding that "deliberate and purposeful" actions including the commission of a series of home invasions before the murder, and driving after the murder, indicate the ability to form intent despite drug use); *White v. Singletary*, 972 F.2d 1218 (11th Cir. 1992) (finding evidence of defendant's parking his car in the direction for a getaway, and leading customers into a freezer, ample to rebut a voluntary intoxication defense and sufficient to show specific intent in the planning of a burglary); *Lobosco v. Thomas*, 928 F.2d 1054, 1058 (11th Cir. 1991) ("We also note that LoBosco was driving a car just prior to the murder and had complained that the drugs he had been sold were ineffective. Both of these facts indicate that LoBosco would have had a difficult time showing that his voluntary intoxication rose to a level sufficient to negate intent."). The evidence on the record is sufficient to distinguish the circumstances of Mr. Reaves' case from other examples of voluntary intoxication defenses that were unsuccessful.

***41** William Reaves is a Vietnam veteran. His case involves tragic and bizarre circumstances that included Mr. Reaves calling 911 at 3 a.m. from a Zippy Mart while trying to get a taxicab. When Deputy Sheriff Raczkowski answered this call for help, he was killed as a result of a struggle over a gun that fell out of Mr. Reaves' shorts. In addition to the evidence establishing that Mr. Reaves was under the influence of cocaine on the night of the murder, available evidence also established that Mr. Reaves has brain damage, post-traumatic stress disorder, polysubstance abuse and disorder, paranoia and delusions (at least on the night of the murder), major recurring depression, and a post-concussive brain injury. ([D.E. 17, Ex. PCR2-3 A-B]). All six of the defense expert witnesses called to testify at the 2003 evidentiary hearing agreed that Mr. Reaves was not able to form the specific intent on the night of the murder. Their testimony was unrebutted. The state's expert witness did not challenge this contention but rather opined on the law in Florida regarding the negation of specific intent and whether you are "excused from killing someone because you have taken some cocaine." ([D.E. 17, Ex. E-PCR2-3B] at 485). None of the defense witnesses who testified in 2003 were called to testify before the jury during the guilt phase of Mr. Reaves' trial. [33]

33 Dr. Weitz testified only during the penalty phase of Mr. Reaves' trial.

For Mr. Reaves' defense, Mr. Kirschner called two witnesses. The first witness was Mr. Joel Charles. ([D.E. 17, Ex. A-R10] at 1535). Mr. Charles is a tape analyst who testified about the timing of the calls placed to 911 by Mr. Reaves, the call to the Vero Beach police department by Deputy Raczkowski, and the call that reported that an officer was down. (*See id.* at 1543-47). The second witness was Mr. Henry Huerta. Mr. Huerta is an expert in firearms. He testified about the firing mechanisms of certain guns. The State did not cross-examine. The defense rested. Mr. Reaves' entire defense encompassed twenty-one pages of the trial transcript.

Given the specific facts and circumstances of this case, a reasonable probability exists that the jury (or at least one member of the jury, which is all that is needed for a different result), while still holding Mr. Reaves culpable for his actions, would have found that he did not possess the specific intent required to establish premeditated murder, an element that the State must establish *beyond a reasonable doubt.* The presentation of overwhelming expert testimony of his intoxication and inability to form specific intent creates a reasonable probability sufficient to undermine the outcome of the trial. I recognize that voluntary intoxication defenses are often considered a double-edged sword because they can be more harmful than helpful. *See Tompkins v. Moore*, 193 F.3 d 1327, 1338 (11th Cir. 1999). However, in Mr. Reaves' case, it would be difficult to imagine a scenario where the testimony presented at the 2003 evidentiary hearing could have been anything but neutral, at worst, and helpful, at best. [34] Mr. Reaves admitted to killing the police officer. He did not meet the criteria to assert a defense of legal insanity. At trial, his lawyer put on only two witnesses who testified to nothing that would have exonerated Mr. Reaves or excused his conduct. I cannot conclude that a voluntary intoxication defense was likely to have been hurtful to a defense that was otherwise virtually non-existent.

34 The dissenting justice in *Reaves* also found this to be the case.

> As this Court explicitly detailed in our prior opinion, on this record, with its bizarre facts, voluntary intoxication jumps out as an explanation for the defendant's bizarre and deadly actions. And, while even that defense could not have exonerated the defendant from responsibility for the death of the officer, it could have resulted in a jury finding of guilt of a lesser degree of homicide. In a very real sense, the advancement of this defense represented a chance to save the appellant's life. *It is simply not enough for counsel, as he admitted below, to leave it to the jury to figure out such an important defense on its own.*

Reaves, 942 So. 2d at 884. (Anstead, J., dissenting) (emphasis added).

Mr. Reaves' retrial was in 1992. At that time, Florida law regarding testimony about voluntary intoxication was governed by *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984). The *Gurganus* court found that despite the fact that the "state's evidence was substantial, ... the exclusion of the [expert] testimony was [not] harmless beyond a reasonable doubt." *Id.* "When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant." *Id.* at 822-23 (citations omitted). *Gurganus* was thought to be the law governing this issue until *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989), called *Gurganus* into question. However, in *Chestnut*, the Florida Supreme Court answered the limited certified question:

> ***42** Is evidence of an abnormal mental condition not constituting legal insanity admissible for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense, in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed?

538 So. 2d at 820. The *Chestnut* Court answered in the negative. While *Chestnut* dismissed certain statements made in *Gurganus* as dicta, it did so because "*Gurganus* simply reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent." *Id.* The *Chestnut* Court found that "[p]ersons with less serious mental deficiencies should be held accountable for their crimes just as everyone else. If mitigation is appropriate, it may be accomplished through sentencing, but to adopt a rule which creates an opportunity for such persons to obtain immediate freedom to prey on the public once again is unwise." *Id.* at 825. This is a difference with significant distinction.

The result in *Chestnut* did not exclude expert testimony in the assertion of voluntary intoxication defenses. As a voluntary intoxication defense only negates the specific intent required for premeditated murder, not the lesser included offenses, and is therefore not a complete defense, *Gurganus* governed whether this type of evidence should be admitted as part of a voluntary intoxication defense. [35]

35 This was made clear when the Florida Supreme Court later decided *Bias v. State,* 653 So. 2d 380 (Fla. 1995). The Florida Supreme Court issued *Bias* to "synthesize[ ] our decisions" and "set forth these limitations regarding the admissibility of evidence of mental disease or defect within the defense of voluntary intoxication." *Bias* was issued after Mr. Reaves' retrial in 1992. Yet, *Bias* does make clear is that this type of testimony was admissible in 1992 when Mr. Reaves could have asserted a voluntary intoxication defense.

Indeed, the Florida Supreme Court remanded Mr. Reaves' case "to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the related subclaims as addressed above." *Reaves*, 826 So. 2d 932, 944 (Fla. 2002). The Florida Supreme Court characterized the related subissue as "Reaves argues 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." *Id.* at 939. The trial court found the remand less than clear, so it sought clarification as to both parties' understanding of the extent of testimony to be presented at the hearing. The State informed the court that it interpreted the Florida Supreme Court's remand to mean a "[s]ub claim of voluntary intoxication. It's not like it's mitigation in general, a mental disease, the experts regarding that issue as it relates to the combination of mental disease and defect and drugs or alcohol as to voluntary intoxication." ([D.E. 17, Ex. E-PCR2-3A] at 9). Thereafter, the defense presented multiple mental health experts who testified regarding the combination of Mr. Reaves' mental disease and his use of cocaine on the night of the murder to negate specific intent. The evidence now in the record strongly establishes a voluntary intoxication defense. During the 2003 evidentiary hearing, Mr. Reaves presented the testimony of six expert witnesses, all of who independently testified that Mr. Reaves was not able to form the specific intent to have committed premeditated murder. [D.E. 17, Ex. E-PCR2-3A-B]. If Mr. Kirschner's performance had not been deficient, the jury would have had this testimony to consider when it deliberated about Mr. Reaves' guilt and culpability for this crime. Instead, they did not. In particular, the jury never heard Dr. Crown testify that:

> ***43** A: He has an underlying condition. As a result of that condition, stressors, such as drugs, alcohol, lack of sleep, generalize stress, depression, anxiety, and so on, will have a greater affect on him. And in addition, as a result of the underlying condition, *a smaller amount of substance has a greater affect* [sic].
>
> Q: Underlying condition meaning the brain damage.
>
> A: The brain damage. As a result of that, *a smaller amount of substance has a greater affect* [sic], has a greater impact.

([D.E. 17, Ex. PCR2-3B] at 244-45) (emphasis added). This testimony directly addresses the issue regarding the amount of cocaine consumed and its effect on Mr. Reaves' intoxication level. At a minimum, the jury would have heard that Mr. Reaves had brain damage that would have affected his intoxication level on the day of the crime. Also, the jury never heard Dr. Dudley testify that:

> Q: Now, in your report you note that Mr. Reaves in your opinion was acutely intoxicated with cocaine on September 23, 1986 at the time of this offense. In your opinion, was he able to form the intent to kill Deputy Raczkoski?
>
> A: No.
>
> Q: Why is that?
>
> A: It's my opinion the combination of the effect of the acute intoxication of cocaine on him and as it interacted with his other psychiatric difficulties, that his actions were simply reflective than thought through decisions when he took that action.
>
> Q: When you say the other psychiatric difficulties, you are talking about the post traumatic stress disorder and anti-social depression?
>
> A: Correct.

([D.E. 17, Ex. E-PCR2-3A] at 191-92). Dr. Dudley could have given the jury an overall picture of the effect of acute intoxication of cocaine on Mr. Reaves. The jury was not presented with this evidence either.

Mr. Kirschner did not present a single witness who testified as to Mr. Reaves' intoxication and his ability to form specific intent, despite the fact that there were at least six experts available in 1992 to do so. After the close of testimony, Mr. Kirschner did request that the trial judge instruct the jury on voluntary intoxication, but this was only after Mr. Kirschner had failed to present any evidence that Mr. Reaves was intoxicated. The prosecution seized the opportunity to use this to Mr. Reaves' disadvantage.

> MR. BARLOW: Think back to the opening statements in this case. The defense counsel told you the defense was this was a mistake, accident, misfortune.
>
> Don't allow them to shift now and tell you that the defense is really voluntary intoxication because there was no evidence that the Defendant was ever intoxicated in any point of this, certainly not to any degree that he didn't know what he was doing.

([D.E. 17, Ex. A-R11] at 1672). The likelihood is that Mr. Kirschner's half-hearted attempt at a belated voluntary intoxication defense did more harm than good. Yet, despite counsel's complete lack of any meaningful defense (let alone a viable defense which could have negated specific intent and spared Mr. Reaves a death sentence), the jury still had questions before rendering its verdict. (*See id.* at 1787-1810). The three relevant questions were

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

*44

* * *

> "If a hung jury, will there be a retrial?"

* * *

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

(*Id.*). While these questions standing alone may not show prejudice, the jury deliberated for approximately ten hours before reaching a guilty verdict, and had questions regarding a lesser included offense, a hung jury, and premeditated murder. These questions reflect indecision and concern about whether the requisite intent for first degree murder had been established. Had the proper evidence been put before the jury—evidence that was available, but not presented—these questions suggest there is a reasonable probability the jury would have been persuaded to find guilt to a lesser degree. [36]

36 These doubts are all the more compelling because Mr. Reaves' jury was not questioned during voir dire about their ability to impartially consider a voluntary intoxication defense, as they would have been had a voluntary intoxication defense been asserted at the outset of trial. *See Wells v. State,* 766 So.2d 1129 (Fla. 2000). Had this defense been asserted, Mr. Reaves would have been judged by a jury of his peers who were all able to impartially consider this defense. *Id.* at 1130-31.

Having found that Mr. Kirschner's performance was deficient, I cannot say that, given the overwhelming evidence of Mr. Reaves' intoxication and accompanying mental state, the complete absence of any real defense at trial, and the state's burden to prove the existence of premeditation *beyond a reasonable doubt*, Mr. Reaves was not prejudiced by his attorney's failure to put on a voluntary intoxication defense. There is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694. Habeas relief is granted.

XXIII. Whether the lower court's failure to allow the testimony of witness Eugene Hinton to be heard at the evidentiary hearing was erroneous and prejudicial to Mr. Reaves' case where Hinton was prepared to testify that Mr. Reaves was intoxicated at the time of the offense. Likewise, the court erred in denying forensic testing of evidence in the possession of the State for drug metabolites.

Mr. Reaves' twenty-third claim for habeas relief is that the trial court erred when it precluded Mr. Reaves from calling Eugene Hinton to testify at his postconviction evidentiary hearing. ([D.E. 6-1] at 67). In his Rule 3.850 postconviction motion, Mr. Reaves argued that his trial counsel was ineffective for failing to investigate, prepare, and present a voluntary intoxication defense. The trial court summarily denied this claim; however, the Florida Supreme Court remanded the case back to the trial court "for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and related sub-claims." *Reaves*, 942 So. 2d at 877. It was at that hearing that Mr. Reaves sought to have Eugene Hinton testify, and proposed to have forensic testing done to supplement the evidence available to the defense for presentation to a jury at a new trial, "where finders of fact could make a decision as to whether or not Mr. Reaves was intoxicated enough at the time of the offense to negate specific intent for premeditated murder." ([D.E. 6-1] at 80). Mr. Reaves first made this claim in a postconviction motion following the evidentiary hearing. The Florida Supreme Court affirmed:

> *45 Reaves sought to have Hinton testify at the evidentiary hearing in regards to Hinton's 1999 affidavit wherein he described Reaves as "all strung out, he had been smoking crack and pretty much out of his head." The affidavit was created seven years after Hinton refused to testify at the retrial and is significantly different from his 1987 trial testimony. The issue before the trial court at the evidentiary hearing was, however, ineffectiveness of counsel at retrial in 1992. Trial counsel had reviewed the statements Hinton made prior to the 1987 trial, and he had reviewed Hinton's 1987 trial testimony as well. Hinton's account at the time was that he had no trouble understanding Reaves; Reaves' speech was not slurred, and Reaves seemed to be in control of his faculties. At retrial that was the only information, other than Reaves' statements, available to counsel in regards to Reaves' level of intoxication at the time of the murder. Hinton made himself unavailable to testify at the retrial, and his previous trial testimony in 1987 did not indicate that Reaves was intoxicated when Hinton saw him after the murder. The trial court properly found that the affidavit contained the sum and substance of any testimony that would have been procured from Hinton if he had testified at the evidentiary hearing. That testimony in effect was irrelevant to the ineffectiveness of counsel issue because the information now being posited by Hinton was not available to counsel in 1992.
>
> Furthermore, the trial court did not err in denying the motion for testing for drug metabolites. Reaves failed to show how the additional testing would reveal material evidence to show his level of intoxication at the time of the crime. At the hearing, Reaves' own expert, Dr. Debra Mash, testified that, at most, testing could reveal the presence of drugs. However, testing could not reveal the actual time the drugs were taken or in what amount. Therefore, any drugs, drug paraphernalia, hair sample, or clothing seized could not provide competent evidence relating to Reaves' level of intoxication at the time of the crime.
>
> In light of these circumstances, the trial court did not abuse its discretion in denying Reaves' request to have Hinton testify at the evidentiary hearing and did not abuse its discretion in denying his request to have items tested for the presence of drug metabolites.

Reaves, 942 So.2d at 881-82. Mr. Reaves is not entitled to habeas relief on this claim. "[D]efects in state collateral proceedings do not provide a basis for habeas relief." *See, e.g., Anderson v. Sec'y, Dep't. of Corr.*, 462 F.3d 1319, 1330(11th Cir. 2006) (per curiam). Here, Mr. Reaves complains of defects within his postconviction collateral proceedings regarding admission of evidence. This is not a cognizable claim for review. "The reasoning behind this well-established principle is straightforward: a challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment —i.e., the conviction itself—and thus habeas relief is not an appropriate remedy." *See Quince v. Crosby*, 360 F.3d 1259, 1261-62 (11th Cir. 2004). Habeas relief is denied. [37]

37 Even if the claim was cognizable, it is without merit. Neither the revised testimony of Mr. Hinton, nor the denial of the request for testing of drug metabolites would have been relevant to trial counsel's conduct during the 1992 retrial. The limited issued before the trial court on remand was trial counsel's conduct with respect to the ineffective assistance of counsel claim for failure to pursue a voluntary intoxication defense.

XXIV. Whether the lower court's failure to provide access to the "Mirman Letter" was a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In his twenty-fourth claim for habeas relief, Mr. Reaves asserts that the trial court erred when it denied his public records request for a letter drafted by the state attorney, but sent to Mr. Reaves' trial counsel prior to the postconviction evidentiary hearing. ([D.E. 6-1] at 83). The letter purportedly contained responses to areas of questioning to be asked by post-conviction counsel at the evidentiary hearing. Mr. Reaves filed a public records request to obtain this information pursuant to the state rules of criminal procedure, FLA. R. CRIM. P. 3.851 & 3.852(i). ([D.E. F-PCR3-2] at 157). Mr. Reaves argues that even if this letter was work product, the privilege was waived when the assistant state attorney disseminated it to defense counsel. Mr. Reaves raised this claim in a successive postconviction motion. The Florida Supreme Court, citing two prior opinions regarding similar letters, [38] found that "[t]his Court has previously rejected the issue regarding the public records request of a letter from the assistant state attorney to defense counsel." *Reaves*, 27 So.3d 661 (2010).

38 This appears to have been the pattern and practice of Assistant State Attorney, Mr. Mirman. This was at least the third such claim presented to the Florida Supreme Court on a death sentence from Indian River County. *See Kearse v. State,* 969 So.2d 976 (2007); *Evans v. State,* 995 So.2d 933 (2008); *Reaves v. State,* 27 So.3d 661 (2010).

***46** This claim challenges the state court's interpretation of state law. Therefore, this claim is not cognizable in Mr. Reaves' federal habeas petition. "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992). The reasoning behind this well-established principle is straightforward: a challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment—i.e., the conviction itself—and thus habeas relief is not an appropriate remedy. *See Quince*, 360 F.3d at 1261-62; *Spradley*, 825 F.2d at 1568. Even if the letter did create a question of constitutional nature, it would not undermine the legality of the detention or imprisonment, as it was purported to coach defense counsel on how to testify during the postconviction proceeding, not how to represent Mr. Reaves during trial. [39] Habeas relief is denied.

39 This does not imply that the document in question was attorney work product. The document was not produced and has not been made part of this record. I make no determination as to the application of the privilege.

XXV. Whether Mr. Reaves was not afforded effective assistance of appellate counsel where numerous meritorious issues properly preserved by objection were not argued in his direct appeal of the 1992 retrial.

Mr. Reaves' final claim for relief is that he received ineffective assistance of appellate counsel following his retrial in 1992. ([D.E. 6-1] at 88-103). Mr. Reaves argues three specific areas of deficiency and prejudice, asserting that his appellate counsel failed to raise preserved objections and the erroneous denial of motions during the pre-trial period, the guilt phase, and the penalty phase. (*Id.*).

During the pre-trial period, Mr. Reaves argues that his appellate counsel failed to raise a preserved objection after the trial court denied Mr. Reaves' motion to compel discovery of Deputy Raczkowski's personnel records, and failed to raise on appeal the denial of the admission of any psychological testimony from Dr. Weitz as to intent issues related to intoxication defense at the guilt phase. ([D.E. 6-1] at 88-92). During the guilt phase, Mr. Reaves contends that his appellate counsel failed to argue trial error in prohibiting the admission of Dr. Weitz's psychological testimony during the guilt phase, failed to properly argue on appeal issues pertaining to Eugene Hinton's prior inconsistent statements, and failed to properly argue Mr. Reaves's claim relating to the admissibility of evidence relating to his attempt to sell cocaine in Georgia. ([D.E. 6-1] at 92-102). Finally, during the penalty phase, Mr. Reaves argues his appellate counsel was ineffective when he failed to raise a trial court error when the court did not find certain mitigating factors. ([D.E. 6-1] at 102).

Mr. Reaves argues that these numerous meritorious issues were properly preserved by objection but were not raised on direct appeal. ([D.E. 1] at 33-35). Here, Mr. Reaves advises the Court that this claim was made in his "February 17, 1999 post-conviction motion." ([D.E. 1] at 34). Mr. Reaves notified the Court that the Florida Supreme Court found this claim to be "procedurally barred, as [it] should have been raised on direct appeal." (*Id.*). I disagree with Mr. Reaves' interpretation.

This claim, as presented in Mr. Reaves' current petition for writ of habeas corpus by a person in state custody, is similar to Claim I in Mr. Reaves' state petition for writ of habeas corpus, which was denied by the Florida Supreme Court. ([D.E. 17, Ex. D] at 4-34). The Florida Supreme Court denied four of the sub-claims (Dr. Weitz's psychological testimony, Mr. Hinton's prior inconsistent statements, Georgia cocaine sales, and trial error on mitigating factors) because "[t]hese claims, or variants to the claims, have already been raised and addressed by this Court on direct appeal. *See Reaves*, 639 So.2d at 3. As we have repeatedly held, 'it is improper to argue in a habeas petition a variant to a claim previously decided.' " *Reaves*, 837 So.2d at 397-98. As such, the State argues these sub-claims are procedurally barred from federal review. ([D.E. 14] at 153). The State is incorrect.[40] *See Jones v. Sec'y of the Dep't. of Corr.*, 607 F.3d 1346, 1351 (11th Cir. 2010) (when a state court declines to reconsider its prior ruling on an issue that it found determinative of the claim rather than employ a state procedural rule, federal habeas review is not barred). Therefore, I must review these claims *de novo. Mason v. Allen*, 605 F.3d 1114, 1122-23 (11th Cir. 2010) (citing *Cone v. Bell*, 129 S.Ct. 1769 (2009)).

> *47 In order to establish ineffectiveness, [petitioner-appellant] would need to show (1) that his appellate counsel's conduct was deficient (i.e., fell below the minimum objective standard of reasonable competence and professionalism); and (2) that such deficient performance resulted in material prejudice such that there is a reasonable probability-sufficient to undermine confidence in the outcome-that, but for counsel's unprofessional errors, the result of the proceeding would have been different (i.e., that if not for his appellate counsel's ineffectiveness, the Supreme Court of Florida, on direct appeal, would have reversed the trial court's denial of his motion to suppress). *See Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984).

Philmore v. McNeil, 575 F.3d 1251, 1273-74 (11th Cir. 2009) (Tjoflat, J., specially concurring). It is under this standard that Mr. Reaves' claims must be reviewed.

40 In his Reply, Mr. Reaves seems to concede the State's argument by acknowledging that the State argued that this claim was procedurally barred and then chose only to continue to argue the single sub-claim regarding the motion to compel discovery. (*See* [D.E. 18] at 25).

In the majority of these sub-claims, Mr. Reaves contends that it was error to not have asserted certain arguments on direct appeal because they would have provided critical information to the jury regarding voluntary intoxication. This argument is flawed in many respects. In particular, Mr. Reaves did not assert a voluntary intoxication defense at trial. Indeed, that very issue is the subject of one of his ineffective assistance of trial counsel claims. Accordingly, it is understandable that some confusion about the exact nature of this claim exists. This argument is essentially a claim for ineffective assistance of appellate counsel for failure to assert claims which would have supported a defense which was not asserted at trial.

First, Mr. Reaves argues that his appellate counsel failed to raise the trial court's error in disallowing Dr. Weitz's testimony regarding Mr. Reaves' intoxication defense. This claim appears to be a hybrid of his third sub-claim regarding his defense of excusable homicide and "Vietnam Syndrome." Mr. Reaves attempts to incorporate his current argument that Dr. Weitz would have also testified about Mr. Reaves' intoxication had he been allowed to testify. However, a review of the record shows that the trial court did not specifically exclude Dr. Weitz's testimony about intoxication. This is so because trial counsel never asked. Instead, trial counsel proffered to the court that Dr. Weitz's testimony was going to show that Mr. Reaves suffered from Vietnam Syndrome resulting in excusable homicide. Incidental to this testimony was that Mr. Reaves used intoxicating drugs. Ultimately, the trial court disallowed the psychological testimony regarding Vietnam Syndrome. ([D.E. 17, Ex. A-R10] at 1533). In this instance, for appellate counsel to be ineffective, there must have been an error made by the trial court that appellate counsel failed to raise on direct appeal. The limited issue of whether or not Dr. Weitz could testify regarding Mr. Reaves' intoxication on the night of the murder was not raised at trial, and thus there can be no trial error. This claim is rejected.

In regards to the sub-claim that appellate counsel was ineffective for failing to "properly" raise Eugene Hinton's prior inconsistent statements, I agree with the Florida Supreme Court.[41] While Mr. Reaves now argues that appellate counsel did not argue the nuanced assertion regarding the specific intoxication statements within Mr. Hinton's statements, Mr. Reaves' appellate counsel did in fact raise the issue of the appropriateness of the exclusion of Mr. Hinton's prior statements on direct appeal. It was rejected. *Reaves*, 639 So.2d at 4. As this issue was properly raised on direct appeal, appellate counsel's conduct was not deficient. Even if appellate counsel had failed to raise this issue, however, this claim would have been rejected because Mr. Reaves fails to establish the second prong of *Strickland*.

> ***48** In determining prejudice in ineffective-assistance-of-appellate-counsel cases, we review the merits of the claim the petitioner asserts his appellate counsel erroneously failed to raise. *Id.* at 1264-65. Counsel's performance is prejudicial if we find that "the neglected claim would have [had] a reasonable probability of success on appeal." *Id.* at 1265 (quotations omitted). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004).

Jones v. United States, 357 Fed.Appx. 253, 254 (11th Cir. 2009). This issue could not have been successful because the defense of voluntary intoxication was not argued at trial. This claim is rejected.

41 AEDPA deference does not apply to this determination because it is a *de novo* review.

Mr. Reaves next claim suffers a similar fate. Mr. Reaves again argues, not that his appellate counsel failed to raise the issue of the admissibility of evidence relating to his attempt to sell cocaine in Georgia, but that his appellate counsel did not "properly" do so. Mr. Reaves argues that his appellate counsel "failed to plead or argue the prejudice to Mr. Reaves that resulted from him being portrayed as a big-time drug dealer through law enforcement testimony at the same time the evidence of his personal substance abuse and intoxication was withheld from the jury." ([D.E. 6-1] at 100). Having reviewed the claim as asserted on direct appeal, I disagree that appellate counsel failed to assert prejudice. (*See* [D.E. A] at 58). Indeed, Mr. Reaves' appellate counsel clearly argued that this admission created "the danger of unfair prejudice ..." (*Id.*) This claim is rejected.

Finally, Mr. Reaves contends that his appellate counsel improperly argued the trial court's error in failing to find certain mitigating factors. The basis of this claim appears to be that, although appellate counsel did raise this claim on direct appeal, counsel "failed to include argument concerning the proffered statements of Hinton noted *supra* as unrebutted support for a finding of the statutory and non-statutory mitigation that had been argued." ([D.E. 6-1] at 102). Even if this constituted deficient assistance of counsel (which it does not), Mr. Reaves has failed to show prejudice. There was no reasonable probability of success had this issue been added to the existing claim on appeal. *Butcher*, 368 F.3d at 1293. This claim is rejected.

Mr. Reaves' remaining claim was reviewed by the Florida Supreme Court and denied on the merits. [42] Here, Mr. Reaves claims that his trial counsel was ineffective when he failed to raise as error the trial court's denial of his motion to disclose Officer Raczkowski's personnel records. The court rejected this claim.

> The record reveals that the trial court denied Reaves' motion to compel based in part on the judge's belief that this information may be available in public records:
>
> > [B]efore I determine whether [the records are] in the quasi custody of the prosecution through another government agency encompassed within the Nineteenth Circuit, I want you to explore the public records requirements, and in the event that all other avenues fail, pursuant to the [public records] statute, then I'll allow you to refile.
>
> Defense counsel did not pursue the matter further, so this issue was not preserved for appeal.FN4 As this issue does not concern a fundamental error, "appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim." *Asay v. Moore*, 828 So.2d 985, 993 (Fla. 2002). We deny this claim.

***49** *Reaves*, 837 So.2d at 398 (footnote omitted). As this is claim for ineffective assistance of appellate counsel, Mr. Reaves must show that (1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal. *Shere*, 537 F.3d at 1310. Mr. Reaves has not done so. Trial counsel did not properly preserve this issue for appeal. Therefore, appellate counsel had no issue to raise on direct appeal, and counsel's performance cannot be deficient. Further, Mr. Reaves does not show prejudice. Even if appellate counsel did argue on direct appeal that trial counsel was ineffective for failing to pursue the personnel files of the slain deputy to obtain "probative information on the issue of how that officer tends to respond in certain situations," there was insufficient probability to undermine confidence in the outcome on appeal. Habeas relief is denied.

42 In his state petition for writ of habeas corpus, Mr. Reaves also argued that appellate counsel was ineffective for failing to argue that his prior convictions should not have been considered as an aggravating factor. *Reaves*, 837 So.2d at 398. Mr. Reaves did not assert that claim here.

V. CONCLUSION

For all the reasons set forth above, it is hereby

ORDERED AND ADJUDGED that William Reaves' Petition for Writ of Habeas Corpus [D.E. 1] **is GRANTED IN PART**, as to Claim IX and XXII, and the remaining claims are **DENIED**. It is the Order of this Court that William Reaves, should receive a new trial before an untainted jury within ninety (90) days of the date of this Order, unless Respondent files a timely appeal and obtains a stay of this Order. Further, William Reaves' request for an evidentiary hearing is granted solely as to Claim IX of the petition. The Court will not hear testimony regarding any other claim in the petition. The hearing is stayed until notice from the Court.

DONE AND ORDERED in Chambers at West Palm Beach Florida on this 12 day of August, 2011.

All Citations

Slip Copy, 2011 WL 13243586

End of Document

APPENDIX E

717 F.3d 886
United States Court of Appeals,
Eleventh Circuit.

William REAVES, Petitioner–Appellee,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent–Appellant.

No. 12–11044.
|
May 30, 2013.

Synopsis
Background: Following affirmance of his conviction and capital sentence, 639 So.2d 1, Florida state prisoner petitioned for federal habeas corpus relief, alleging ineffective assistance of trial counsel. The United States District Court for the Southern District of Florida, No. 2:10–cv–14046–DMM, Donald M. Middlebrooks, J., granted petition as to prisoner's guilt-phase claims. State appealed.

Holdings: The Court of Appeals, Carnes, Circuit Judge, held that:

[1] petitioner failed to satisfy prejudice prong of his guilt-phase ineffective assistance claim, and

[2] court lacked appellate jurisdiction over state's appeal from grant of evidentiary hearing on penalty-phase claim.

Vacated and remanded.

West Headnotes (15)

[1] **Habeas Corpus**
Review de novo
Habeas Corpus
Clear error

When reviewing a district court's grant or denial of habeas relief, the Court of Appeals reviews questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error.

3 Cases that cite this headnote

[2] **Habeas Corpus**
Federal Review of State or Territorial Cases
Habeas Corpus
Federal or constitutional questions

Ordinarily, federal habeas review of claims adjudicated on the merits in state court is greatly circumscribed by the Antiterrorism and Effective Death Penalty Act (AEDPA), which precludes relief unless the state court's decision involved an unreasonable application of clearly established federal law or was based on a unreasonable determination of the facts. 28 U.S.C.A. § 2254(d).

1 Cases that cite this headnote

[3] **Habeas Corpus**
Adequacy and Effectiveness of Counsel

To prove prejudice in support of a habeas corpus claim for ineffective assistance of counsel, the petitioner must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[4] **Habeas Corpus**
Adequacy and Effectiveness of Counsel

Inquiry into prejudice prong of a habeas corpus claim for ineffective assistance of counsel requires the court to evaluate the totality of the evidence, both that adduced at trial and the evidence adduced in the habeas proceedings. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[5] **Homicide**
Deliberation and premeditation

Homicide

Sufficiency of deliberation;time required

Under Florida law, "premeditation" to support a conviction for first-degree murder is not a mere intent to kill, but instead is a fully-formed, conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. West's F.S.A. § 782.04(1)(a).

1 Cases that cite this headnote

[6] **Criminal Law**

Capacity to commit crime;insanity or intoxication

Defendant failed to demonstrate that he would have obtained different result had his trial counsel actively pursued voluntary intoxication defense in his Florida prosecution for first-degree murder of sheriff's deputy, and thus he failed to satisfy prejudice prong of his *Strickland* claim for ineffective assistance; expert testimony supporting such defense was largely, if not entirely, inadmissible under Florida law because it was based on combined effect of defendant's drug use and his underlying medical condition that did not rise to level of legal insanity, and trial evidence indicated that defendant was not only capable of formulating premeditated design to kill victim, but also did so, and that he acted deliberately and was motivated to avoid going back to prison. U.S.C.A. Const.Amend. 6; West's F.S.A. § 782.04(1)(a).

2 Cases that cite this headnote

[7] **Federal Courts**

State constitutions, statutes, regulations, and ordinances

State courts are the ultimate expositors of state law, and federal courts are bound by their constructions except in rare and extreme circumstances.

4 Cases that cite this headnote

[8] **Federal Courts**

Determination of question of jurisdiction

Court of Appeals is obligated to address jurisdictional questions *sua sponte* whenever jurisdiction may be lacking.

2 Cases that cite this headnote

[9] **Federal Courts**

In general;necessity

Federal Courts

What constitutes finality in general

Generally, the jurisdiction of the Court of Appeals is limited to reviewing "final decisions of the district courts," meaning those that end the litigation on the merits and leave nothing for the court to do but execute the judgment. 28 U.S.C.A. § 1291.

Cases that cite this headnote

[10] **Habeas Corpus**

Decisions reviewable

In the context of habeas corpus proceedings, a judgment granting a writ of habeas corpus on less than all grounds asserted in a petition is a final, appealable decision. 28 U.S.C.A. § 1291.

Cases that cite this headnote

[11] **Habeas Corpus**

Decisions reviewable

District court's grant of evidentiary hearing on habeas corpus petitioner's penalty-phase ineffective assistance of counsel claim did not constitute final decision on merits, and thus, alone, did not confer jurisdiction to Court of Appeals to hear state's appeal from that decision, even though court also granted petition as to petitioner's guilt-phase claim, because court's decision necessarily anticipated further proceedings on substantive matters. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. §§ 1291, 2254.

2 Cases that cite this headnote

[12] **Federal Courts**
Interlocutory and Collateral Orders
Collateral order doctrine applies only to non-final decisions that conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and are effectively unreviewable on appeal from a final judgment.

Cases that cite this headnote

[13] **Habeas Corpus**
Decisions reviewable
District court's grant of evidentiary hearing on habeas corpus petitioner's penalty-phase ineffective assistance of counsel claim did not fall within statute regarding Court of Appeals jurisdiction over interlocutory orders, and did not satisfy collateral order doctrine, precluding Court of Appeals from hearing state's interlocutory appeal from that decision, even though court also granted petition as to petitioner's guilt-phase claim, because granting that hearing was not completely separate from merits of petitioner's penalty-phase claim and, should district court ultimately grant relief on that claim, state would have opportunity to challenge propriety of district court's action in conducting evidentiary hearing and, if successful, any evidence admitted at hearing would be disregarded. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. §§ 1292, 2254(e)(2).

2 Cases that cite this headnote

[14] **Federal Courts**
Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pendent Appellate Jurisdiction
Under the doctrine of pendent appellate jurisdiction, the Court of Appeals may review an otherwise non-appealable decision that is inextricably intertwined with an appealable decision or when review of the former decision is necessary to ensure meaningful review of the latter.

Cases that cite this headnote

[15] **Habeas Corpus**
Decisions reviewable
District court's grant of evidentiary hearing on habeas corpus petitioner's penalty-phase ineffective assistance of counsel claim did not satisfy doctrine of pendent appellate jurisdiction, precluding Court of Appeals from hearing state's interlocutory appeal from that decision; issue of whether court properly granted evidentiary hearing was not inextricably intertwined with merits of its decision to grant petitioner relief on his distinct guilt-phase claim, and Court of Appeals would have no difficulty resolving latter issue without addressing former. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

2 Cases that cite this headnote

Attorneys and Law Firms

***888** Neal A. Dupree (Court–Appointed), William McKinley Hennis, III (Court–Appointed), Craig Joseph Trocino (Court–Appointed), Capital Collateral Regional Counsel–South, Fort Lauderdale, FL, for Petitioner–Appellee.

Leslie Teresa Campbell, Atty. Gen.'s Office, West Palm Beach, FL, for Respondent–Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, CARNES and MARCUS, Circuit Judges.

Opinion

***889** CARNES, Circuit Judge:

Despite his repeated assertions that he was "high" on cocaine at the time he shot a law enforcement officer to death, the jury convicted the habeas petitioner in this case of first-degree murder and sentenced him to death. Under Florida law, first-degree murder requires a "premeditated design" to kill, which consists of a specific intent to kill coupled with premeditation. *See* Fla. Stat. § 782.04(1)(a); *Anderson v. State,* 276 So.2d 17, 18 (Fla.1973). As the case comes to us, the issue is whether there is a reasonable probability that the jury would have found the petitioner incapable of forming a premeditated design to kill had his trial attorney actively pursued a defense of voluntary intoxication.

I. FACTUAL BACKGROUND

In the early morning hours of September 23, 1986, William Reaves walked from his girlfriend's home to a nearby convenience store in Indian River County, Florida, where he placed three calls from a pay phone to a taxi service in order to get a ride home. Reaves grew impatient waiting for a taxi to arrive and, not having any more change to make another call, he dialed 911 shortly after 3:00 a.m., hoping to have the operator call a cab for him. For some reason he hung up the phone before speaking to the 911 operator.

Deputy Richard Raczkoski was dispatched to investigate the hang-up call. After arriving at the convenience store and talking with Reaves for a while, the deputy contacted the 911 dispatcher and learned that Reaves had no outstanding warrants. The deputy asked the operator to contact the taxi service and find out if one was coming for Reaves, and the operator confirmed that a taxi was on its way. All seemed to be going well.

But events sometimes tumble toward tragedy "as if the devil himself had shaved the dice." [1] What tumbled in this case was a .38–caliber pistol, which had been concealed on Reaves but somehow slipped from the waistband of his short pants and fell to the ground. The record does not show how that happened, but it does show that Reaves had prior felony convictions for conspiracy to commit robbery, for grand larceny, and for grand theft. The record also shows that Reaves believed that if he were arrested and convicted for being a felon in possession of that firearm he would face mandatory prison time. He did not want to go back to prison.

1 Rick Bragg, *The Prince of Frogtown* 177 (Alfred A. Knopf 2008).

When Reaves reached for the pistol on the ground Deputy Raczkoski tried to stop him. Reaves pushed the deputy, grabbed him by the throat, picked up the pistol, and pointed it in the deputy's face. Pleading with Reaves not to kill him, the deputy managed to back away, turn, and run. Reaves emptied the entire seven-round clip of his pistol, each shot requiring a separate pull of the trigger, and four of those shots struck the deputy, hitting him in the back. As the deputy lay bleeding on the ground, he fired several shots from his weapon, but none of them hit Reaves. Later that morning Deputy Raczkoski died on the operating table.

After the shooting, Reaves fled into dense woods behind the convenience store and made the seven-mile trek to the home of a friend, Erman Eugene Hinton, all the while eluding a police manhunt that involved dozens of officers, a K–9 unit, and a police helicopter. Reaves arrived at Hinton's home, woke him up, and asked to take a shower and for a change of clothes. Hinton obliged. According to Hinton's trial ***890** testimony, [2] Reaves told him that as the deputy attempted to draw his own weapon he had pointed the gun in the deputy's face and warned him, "I wouldn't do that if I were you." Reaves recounted to Hinton how the deputy had pleaded for his life, begging Reaves not to shoot him, to which Reaves had responded: "One of us got to go, me or you." Hinton testified that he had no difficulty understanding Reaves, whose speech was not slurred and who appeared to be in full control of his faculties that morning.

2 Hinton testified at Reaves' first trial in 1987 but refused to testify at the 1992 retrial, even in the face of criminal contempt sanctions. The trial court deemed Hinton unavailable to testify at the retrial and allowed his testimony from the earlier trial to be read into the record.

Later that day Reaves offered a half ounce of cocaine to Jerry Bryant, his niece's husband, in exchange for a ride to a motel in Melbourne, Florida. Bryant agreed and Reaves directed him to retrieve some cocaine that he had hidden in his mother's house. After retrieving the cocaine, Bryant drove Reaves to a motel in Melbourne, some 30 to 40 miles away, and rented a room for Reaves to use. On the afternoon of the following day, Reaves boarded a Greyhound bus for Albany, Georgia. When he arrived there, Reaves was arrested by Georgia authorities, who had been notified that he was suspected of killing Deputy Raczkoski.

At the time of his arrest, which was not quite two full days after he killed the deputy, Reaves had four-and-a-half ounces of cocaine with him, at least a portion of which he intended to sell in order to finance his continued flight, and he also had a newspaper bearing the headline, "Indian River Deputy on Emergency Call Killed in Shooting." Reaves initially lied to the Georgia authorities, telling them his name was "Randy Martin" and giving them a false home address and place of employment. He did not appear to be intoxicated to any of the officers who encountered him.

Detectives from the Indian River Sheriff's Department arrived in Albany the following morning to interview Reaves. During a taped confession, which was later played for the jury at trial, Reaves admitted to shooting Deputy Raczkoski and recounted the incident, including his ensuing flight, in considerable detail. Reaves, however, told the officers that he had ingested an unspecified amount of cocaine before the incident, and he made over a dozen references to being "coked up," "high," and "wired out" at the time of the shooting. Although Reaves repeatedly blamed the shooting on drug-induced panic and paranoia, he also explained that he "couldn't let that officer get that gun" because he believed that, as a convicted felon, he was facing "a mandatory three years" for possessing a firearm. Reaves confirmed telling Hinton about the shooting, although he said that what he told Hinton was that he thought he had shot a police officer.

II. PROCEDURAL HISTORY

A. REAVES' TRIAL, RETRIAL, AND DIRECT APPEALS

Reaves was originally tried before a Florida jury in 1987, convicted of premeditated first-degree murder, and sentenced to death. The Florida Supreme Court reversed that conviction because the State prosecutor had represented Reaves as a public defender in an earlier grand larceny case. *See Reaves v. State,* 574 So.2d 105, 106–08 (Fla.1991). At the outset of Reaves' 1992 retrial, Jonathan Jay Kirschner was appointed to represent him. ***891** At defense counsel's request, the trial court reappointed Dr. William Weitz, the mental health expert who had examined Reaves before his first trial, to evaluate Reaves' competency to stand trial and sanity at the time of the offense, as well as to assist in the preparation of his defense.[3] Dr. Weitz, a clinical psychologist specializing in military psychology and post-traumatic stress disorder, diagnosed Reaves as suffering from antisocial personality disorder, poly-substance abuse (particularly cocaine), and "Vietnam Syndrome," which he defined as a "sub-clinical" variety of PTSD characterized by rage reactions, alienation, hypervigilance, some depression, and a potential increase in drug and alcohol use.

3 Reaves was represented by a different attorney, Clifford Barnes, at his original trial and in connection with that trial Dr. Weitz was appointed to evaluate Reaves with regard to issues of competency, insanity, and the need for involuntary hospitalization. Barnes also had Dr. Weitz consider whether Reaves was able to form the intent required for first-degree murder, whether he was acting under the influence of extreme mental or emotional disturbance at the time of the shooting, and whether he had the capacity to either appreciate the criminality of his conduct or conform his actions to the requirements of the law.

During a pretrial deposition, Dr. Weitz testified that Reaves informed him that he "smoked and snorted" 1.75 grams of cocaine and consumed an unspecified amount of beer during the daytime or early evening before the shooting. He expressed the opinion that Reaves' judgment and perception "may have been impaired by the use of alcohol and drugs" at the time of the shooting, though he promptly clarified, "I'm not suggesting he was [legally] intoxicated or not, that I don't know. What I am suggesting is that the possibility of judgment and perception being impaired which is psychological phenomena and not legal, certainly are possible in this situation." Dr. Weitz also concluded that Reaves knew what he was doing at the time of shooting, understood the nature and consequences of his actions, and possessed the ability to distinguish right from wrong.

During the guilt phase of the retrial, defense counsel pursued a defense of excusable homicide, based largely on Reaves' Vietnam Syndrome, and tried to have Dr. Weitz's testimony admitted in support of that defense.[4] The proffered testimony of Dr. Weitz largely reiterated his deposition testimony. He acknowledged that the existence of Vietnam Syndrome, though accepted in "the psychological community," was not recognized as a disorder in the Diagnostic and Statistical Manual of Mental Disorders, which is the authoritative diagnostic source for psychiatrists and psychologists. Dr. Weitz also conceded that Reaves did not meet the criteria for a formal diagnosis of PTSD because, among other things, he did not report flashbacks or re-experiencing trauma. Dr. Weitz was of the opinion that, as result of Vietnam Syndrome, Reaves was more likely to perceive his encounter with the deputy as life threatening, to exhibit diminished impulse control, and to react quickly to eliminate any perceived threat. Still, he concluded that Reaves was not so intoxicated at the time of the offense that he was unable to distinguish right from wrong. Reaves had immediately fled the scene of the shooting, had hidden in the woods, and had taken other evasive action, all of which indicated to Dr. Weitz that Reaves "knew what he was doing."

4 A homicide is excusable under Florida law when, among other things, it is committed "by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation." Fla. Stat. § 782.03.

After hearing the proffered testimony of Dr. Weitz, the court barred it from the ***892** guilt phase of the 1992 retrial, ruling it inadmissible under *Chestnut v. State,* 538 So.2d 820 (Fla.1989). The *Chestnut* decision had held that evidence of an abnormal mental condition that does not rise to the level of legal insanity is inadmissible for the purpose of proving that an accused either could not or did not possess the specific intent to commit an offense. 538 So.2d at 820.

At the retrial Reaves' attorney did not present any evidence about the amount of drugs and alcohol that Reaves had consumed before the crime or the impact it would have had on his mental state. Nor did he argue to the jury that Reaves had been too intoxicated to form the premeditated design to kill that is required for first-degree murder. He did, however, request a jury instruction on that defense because of the statements in Reaves' confession about ingesting cocaine before the shooting. The trial court granted the request and instructed the jury that, while the use of drugs does not excuse the commission of a criminal act "to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment," the jury should acquit Reaves of first-degree murder if it found that he had been "so intoxicated from the voluntary use of drugs as to be incapable of forming [the] premeditated design to kill." The court also instructed the jury on a number of lesser-included offenses of first-degree murder, including second-degree murder.

During closing arguments, the prosecutor discussed the issue of voluntary intoxication at length, arguing that Reaves' words, conduct, and underlying motives, especially as expressed in his statement, "One of us got to go, me or you," proved that he had made a conscious decision to kill the deputy in order to avoid prison time. He also argued that even if Reaves had consumed cocaine before the killing, Reaves was not so intoxicated that he was unable to formulate the premeditated intent to kill.

During his closing arguments, defense counsel did not expressly urge the jury to acquit his client of first-degree murder based on voluntary intoxication, focusing instead on the defense of excusable homicide and the shortness of time to form a premeditated design. Counsel did point out that in his confession Reaves had repeatedly referred to having used cocaine before the killing, and counsel argued that the case involved a panic shooting devoid of premeditation by a veteran of the Vietnam War. After nine hours of deliberations, during which the jury asked the judge about the definition of premeditation and what would happen if it could not reach a verdict, Reaves was convicted of first-degree murder.

At the penalty phase of the trial, defense counsel called Dr. Weitz as an expert witness. He testified much as his proffered testimony during the guilt stage had indicated that he would. Dr. Weitz also told the jury that as a result of Vietnam Syndrome, coupled with his use of cocaine, Reaves was acting under the influence of extreme mental or emotional disturbance at the time of the shooting—namely, a heightened sense of panic and fear—which substantially impaired his ability to conform his conduct to the requirements of the law (a statutory mitigating circumstance). Counsel also presented a number of witnesses who told the jury about Reaves' childhood, about his history of serious drug abuse dating back to his one-year tour of duty in Vietnam, and about the conditions of combat in Vietnam. The jury recommended a death sentence by a vote of ten to two and the trial judge followed that recommendation, finding that the aggravating circumstances of Reaves' ***893** offense outweighed the mitigating circumstances.[5] *Reaves v.*

State, 639 So.2d 1, 3 (Fla.1994). The Florida Supreme Court affirmed Reaves' conviction and capital sentence on direct appeal. *Id.* at 6.

5 The trial court found three aggravating circumstances: (1) Reaves was previously convicted of a felony involving the use or threat of violence to another person; (2) his capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and (3) the offense was especially heinous, atrocious, or cruel. *See Reaves v. State,* 639 So.2d 1, 3 n. 2 (Fla.1994). The court found no statutory mitigating factors but three non-statutory mitigating circumstances: (1) Reaves was honorably discharged from military service; (2) he had a good reputation in his community up to the age of 16 (he was 37 years old at the time he murdered the deputy); and (3) he was a considerate son to his mother and good to his siblings. *Id.* at 3 n. 3.

On direct appeal, the Florida Supreme Court rejected the finding that Reaves' offense was especially heinous, atrocious, or cruel in comparison to other capital cases, but found that error of the trial court to be harmless in light of the other two aggravating factors and the "relatively weak mitigation." *Id.* at 6.

B. REAVES' STATE COLLATERAL PROCEEDINGS

Reaves filed a state post-conviction motion under Fla. R.Crim. P. 3.850, raising a total of 27 grounds for relief and requesting an evidentiary hearing. In relevant part, he claimed that his attorney was ineffective during the guilt phase of his retrial for failing to investigate and pursue a voluntary intoxication defense, particularly one based on the combined effects of his mental health problems and substance abuse, in order to negate the intent required for first-degree murder. Reaves specifically faulted counsel for failing to: combine Dr. Weitz's opinion with evidence of his voluntary intoxication; investigate and present corroborative evidence of his intoxication at the time of the offense, including evidence of his history of substance abuse; prepare Dr. Weitz to testify as to the impact of substance abuse on his ability to form the necessary intent; and retain additional mental health experts who could testify about his chronic substance abuse and mental health problems.

Reaves also claimed that counsel was ineffective during the penalty phase of the retrial for failing to adequately investigate and introduce additional mitigating evidence, including evidence relating to his impoverished childhood, military experience, drug addiction, contraction of a venereal disease in Vietnam, the murder of his sister shortly after he returned from Vietnam, and his efforts to assist a jail guard during a 1973 attack by two other inmates.

Along with his motion for collateral relief, Reaves submitted a 1999 affidavit from Hinton. In that affidavit, Hinton stated that Reaves "was all strung out" and "had been smoking crack and was pretty much out of his head" when he came to his house after the shooting, which contradicted Hinton's earlier testimony that Reaves had appeared to be in full control of his faculties.

The state trial court denied all of Reaves' claims without an evidentiary hearing. *See Reaves v. State,* 826 So.2d 932, 936 (Fla.2002). The Florida Supreme Court affirmed all but one of the summary denials, including the denial of Reaves' claim of ineffective assistance of counsel at the penalty phase. It concluded that the trial court had properly denied that claim without an evidentiary hearing because the proposed mitigation evidence was either irrelevant, cumulative of evidence already presented at sentencing, or would not have affected the balance of aggravating and mitigating circumstances. *Id.* at 941. The Florida Supreme Court did, however, conclude that an evidentiary hearing was needed to resolve Reaves' claim that counsel ***894** was ineffective in failing to present a voluntary intoxication defense during the guilt phase of the trial, and it remanded the case for that purpose. *Id.* at 944.

1. The State Evidentiary Hearing

On remand, the state trial court held a three-day evidentiary hearing in March 2003 on Reaves' guilt phase ineffectiveness claim, during which Reaves called Kirschner, his counsel at the retrial, and six expert witnesses: Dr. Weitz, Dr. Richard Dudley, Dr. Barry Crown, Dr. Deborah Mash, Dr. Erwin Parsons, and Dr. Thomas Hyde.

Kirschner testified that before the retrial he was aware of Reaves' cocaine consumption and history of drug abuse and was certain that he had discussed the matter with Reaves, although he could not recall the specifics of their conversation, including whether they discussed a possible voluntary intoxication defense. Kirschner explained that, based on Dr. Weitz's diagnosis of Vietnam Syndrome, the primary focus of his defense effort had been excusable homicide, though he did not completely ignore a voluntary intoxication defense. While Kirschner repeatedly insisted that he had no recollection of what his thought process had been more than ten years earlier, he speculated that he had requested a jury instruction on voluntary intoxication "to leave that as an option for the jury, a fall-back position," and added that "[s]ometimes there are defenses that you don't suggest, that you let the jury reach through their own logic." He also noted that, at the time of the retrial, "jurors were less accepting of the idea that voluntary intoxication excuses criminal conduct." Still, Kirschner could not recall why he had elected not to actively pursue a defense of voluntary intoxication "other than the fact that I was thinking excusable homicide was the right fit for the defense in this case ... and what I should be presenting to the jury."

Kirschner acknowledged that a defense of excusable homicide was not necessarily inconsistent with a voluntary intoxication defense, although he noted that there could be some tension between the two defenses, stated that presenting a variety of defenses could lead the jury to believe that defense counsel was being disingenuous, and pointed out that some of the statements Reaves made during his confession indicated that he knew what he was doing at the time of the murder. Kirschner also noted that Dr. Weitz did not advise him about how cocaine may have affected Reaves at the time of the shooting, though he conceded that he could not recall whether he had specifically asked Dr. Weitz about the interactive effects of Vietnam Syndrome and cocaine use. Kirschner further conceded that, while he questioned Reaves' family and friends about his history of drug abuse, he did not ask them about Reaves' drug use around the time of the shooting, did not request the assistance of any other experts to help explain how drugs may have affected Reaves at the time, and did not request forensic drug testing on a marijuana cigarette and residue that were found at the home of Reaves' girlfriend following the shooting.

Dr. Weitz, who is not an attorney, testified that in his opinion Kirschner had pursued an excusable homicide defense that had been based on Dr. Weitz's own findings and "psychological perception" of the events, including his opinion that Reaves' military background had affected his behavior at the time. Dr. Weitz asserted that he could have testified in support of a voluntary intoxication defense at the retrial, but he had not been asked to evaluate whether Reaves was capable of forming the intent required for first-degree murder. ***895** In his opinion, Reaves had a "severe cocaine problem that would have impaired his ability to form specific intent," particularly in conjunction with his Vietnam Syndrome. [6] Dr. Weitz explained that the beer and 1.75 grams of cocaine that Reaves told him he had consumed during "almost a 24–hour period" before the shooting would have intensified the symptoms of Vietnam Syndrome, increasing Reaves' paranoia and suspiciousness, significantly distorting his perception and judgment, and enhancing his reactivity so as to render him unable to form the specific intent to commit murder.

6 Dr. Weitz testified that while he could have described the independent effects of drug and alcohol on Reaves' behavior and mental state, he believed the Vietnam Syndrome was a "critical factor" that helped explain Reaves' actions at the time of the shooting.

Although Dr. Weitz conceded that Reaves knew he was eliminating a threat when he fired at the deputy and admitted that Reaves' actions after the killing were a clear attempt to avoid being caught by law enforcement, he believed that Reaves' conduct during the shooting was a "conditioned reaction" to a distorted perception that his life was in mortal danger. He also testified that, while he was surprised by the detailed nature of Reaves' confession to the police, such a high level of recall was not necessarily inconsistent with the lack of specific intent at the time of the shooting. According to Dr. Weitz, while cocaine and alcohol impair information processing, Reaves' acuteness and sensitivity to detail would improve in a situation where he felt his life was at risk.

When asked whether Reaves' statement to the deputy, "One of us got to go," was itself inconsistent with his opinion that Reaves lacked specific intent, Dr. Weitz answered: "After the fact, I think it's very clear that he can say that he understood that he felt his life was threatened. That was exactly the situation, it was you or I, and I wasn't going to die. I think that's consistent with my opinion, not in contrast." [7]

7 The apparent premise of Dr. Weitz's answer ("[a]fter the fact ... he can say") is that Reaves made the statement after the killing, but the undisputed evidence is that he made the statement to the deputy before he shot him.

Dr. Dudley, a clinical and forensic psychiatrist, diagnosed Reaves with poly-substance dependence and PTSD, and he believed that Reaves was "acutely intoxicated with cocaine" at the time of the murder. Dr. Dudley was of the opinion that the combined effect of PTSD and acute intoxication prevented Reaves from being able to form the intent to kill the deputy. He explained that cocaine would have accentuated the paranoia and hypervigilance characteristic of PTSD, causing Reaves to respond reflexively without making a conscious decision to kill. Dr. Dudley also testified that Reaves' ability to recall the shooting with specificity was not inconsistent with the absence of intent, explaining that Reaves' "escalating hypervigilance" would have made him remarkably observant. Dr. Dudley conceded, however, that he was unaware of Reaves' statement, "One of us got to go," and admitted that he simply did not "know what to make of that."

Dr. Crown, a neuropsychologist, conducted a battery of tests on Reaves and concluded that he suffered from organic brain damage in a neural region associated with understanding the long-term consequences of immediate behavior. He did not know the origin, cause, or timing of the brain damage. Dr. Crown was of the opinion that Reaves' brain damage, aggravated by substance abuse, prevented him from forming the intent necessary for first-degree ***896** murder. He thought that the interaction between cocaine use and Reaves' underlying brain damage would have resulted in a phenomenon called "cocaine kindling," which causes a person to have disrupted "reasoning, judgment, particularly short-term memory," and to become impulsive and paranoid. Although Dr. Crown emphasized that Reaves' cocaine use and brain damage, both individually and in tandem, would disrupt short-term memory, he would not concede that Reaves' ability to vividly recall the details of the murder was inconsistent with his opinion and asserted instead that "the relationship between brain function and behavior is much like a lamp with a faulty switch, sometimes it goes on and sometimes it goes off."

Dr. Mash, a neuropharmacologist, testified that Reaves had a long history of substance abuse dating back to the Vietnam War and was using cocaine "every day, all day" around the time of the shooting, which left him in a near constant state of being "hyperaroused, completely paranoid, [and] completely wired." In Dr. Mash's opinion, because of a "severe amount of cocaine abuse," Reaves was in a paranoid and "fully delusional" state of "cocaine psychosis" at the time of the shooting, which left him unable to accurately perceive the threat posed by the deputy, rationally react to the situation, or form the intent to commit first-degree murder. She believed that years of substance abuse had effectively "damaged" Reaves' brain, disengaging the frontal lobes (i.e., the reasoning portions of the brain that delay reaction) and fully activating the limbic system, or "reptilian part of the brain," which governs fight or flight responses. Dr. Mash also testified that cocaine exacerbates the symptoms of PTSD, including irritability and hyperarousal, because both stimulate the same part of the brain, the amygdala. She said that, had she been asked in 1992, she would have testified that Reaves was in a "state of voluntary intoxication and would not have been able to form the intent to commit murder."

On cross-examination, Dr. Mash noted that Reaves told her that he ingested 10 grams of cocaine on the day of the shooting. She denied that there was anything unusual about Reaves' detailed description of the shooting in his confession, though her various explanations were somewhat contradictory. She initially testified that cocaine, while shifting perceptions of reality, makes people alert and does not "obliterate memory the way alcohol blackouts do." Yet, she also testified that short-term memory is "barred" when someone is hallucinating from the use of cocaine and, in her opinion, Reaves was hallucinating. Finally, Dr. Mash noted that clothing and hair taken from Reaves at the time of his arrest could be tested for the presence of drugs, but could not show the actual time that the drugs were used or in what quantities.

When questioned about Reaves' assertions in his confession that his actions were motivated by a desire to avoid returning to prison, as well as Hinton's testimony about Reaves' statements to the deputy, Dr. Mash testified that Reaves' confession was an attempt to rationalize his behavior in order to "make sense of something that went very badly." She did not, however, specifically explain the significance of Reaves telling the deputy just before shooting him four times that one of them had to go.

Dr. Parsons, a clinical psychologist, testified that Reaves was suffering from PTSD and had a history of chronic substance abuse. In his opinion, Reaves was experiencing "dissociation" at the time of the murder, and the combined effects of ***897** PTSD, substance abuse, and dissociation rendered him incapable of forming the specific intent to kill the deputy. While Dr. Parsons agreed that Reaves' confession described the incident in "exquisite detail," he believed that the level of recall did not demonstrate that Reaves was capable of forming specific intent because memory "becomes extremely sharp" in the "context of trauma." When asked whether Reaves' statements to the police regarding his motive for the shooting indicated that he made a conscious decision to kill the deputy, Dr. Parsons merely stated that there was a possible "different interpretation" of those statements. But he did not disclose what that different interpretation was.

Dr. Hyde, a behavioral neurologist, testified that Reaves had a history of poly-substance abuse, particularly involving alcohol and cocaine; major recurring depression; strong elements of PTSD; and a head injury, which was either caused by prolonged substance abuse or sustained shortly after Reaves' arrest as a result of an alleged police beating. He did not, however, give a specific opinion about Reaves' mental state at the time of the shooting. He simply suggested that, if Reaves' head injury had preceded the shooting, it would have left Reaves disinhibited, impulsive, and prone to rash behaviors in combination with acute intoxication. Dr. Hyde acknowledged that Reaves' confession to the police was "pretty exquisite" in terms of detail and was of the opinion that, if those details were accurate, it was unlikely that Reaves was confabulating.

In response to Reaves' expert witnesses, the State called psychiatrist Dr. McKinley Cheshire, who had testified during the penalty phase of Reaves' 1992 retrial. Dr. Cheshire concluded that Reaves "knew what he was doing" at the time of the shooting and made a conscious decision to kill the deputy. In particular, he testified that Reaves' statements to the police that he shot the deputy because he was facing a mandatory prison term for unlawfully possessing a firearm showed that Reaves was "thinking, calculating, considering the facts of the matter ... and the outcome of his behavior." Dr. Cheshire diagnosed Reaves with antisocial personality disorder, which was consistent with his calculated decision to murder the deputy in order avoid jail time.

During the course of the remand proceedings, Reaves moved for forensic testing of the clothing and hairs recovered by the police to determine the presence and concentration of drugs. The State responded that forensic testing was unnecessary because Weitz's unrebutted testimony from the time of trial was that Reaves had ingested 1.75 grams of cocaine before the shooting and "no one [was] contesting that [Reaves] was a chronic drug user." In denying Reaves' request, the state trial court noted that "[t]he State has all but stipulated that [Reaves] ingested cocaine on the date of the incident" and that it was "uncontroverted that [Reaves] was a drug addict and ingested cocaine" before the shooting.

Based on the evidence presented at the hearing, the state trial court rejected Reaves' ineffective assistance claim, finding that counsel did not render constitutionally deficient performance in failing to actively pursue a voluntary intoxication defense and retain experts who could testify about the combined effects of Reaves' substance abuse and mental conditions.

2. The Florida Supreme Court's Decision

The Florida Supreme Court affirmed the trial court's ruling, concluding that counsel rendered reasonably effective representation in light of "the record at retrial, ***898** the facts of the case, the law in Florida at the time, and counsel's experience and knowledge of the case." *Reaves v. State,* 942 So.2d 874, 878 (Fla.2006). The court noted that, in order to assert a viable voluntary intoxication defense, Reaves had to "present evidence of intoxication at the time of the offense that would show his inability to form the requisite specific intent," not merely evidence of a history of drug abuse. *Id.* at 879. The court then emphasized that: (1) other than his own assertions of being "high," Reaves did not present any "direct evidence" to show his level or state of intoxication at the time of the murder; (2) Reaves' expert witnesses had no objective evidence to support their opinions that he was intoxicated at the time of the shooting; (3) Reaves' other statements to the police, including his detailed account of the circumstances of the crime, indicated that "he knew exactly what he was doing at the time of the shooting," which essentially "negated any voluntary intoxication defense that trial counsel could have presented on [his] behalf"; and (4) Hinton's trial testimony, insofar as it quoted Reaves as telling the officer, "One of us got to go," and indicated that Reaves appeared to be in full control of his faculties after the shooting, "further negated the use of a voluntary intoxication defense." [8] *Id.* at 879–80.

8 As we explain later, the Florida Supreme Court properly discounted the relevance of Hinton's 1999 affidavit on the issue of counsel's ineffectiveness because Hinton refused to testify at the 1992 retrial, which means that the information contained in the later affidavit was not available at the time of the retrial. *See Reaves,* 942 So.2d at 881–82.

The Florida Supreme Court also underscored the point that under its *Chestnut* decision, which was the law in effect at the time of the 1992 retrial, Reaves could not have offered evidence of the combined effect of intoxication and a mental defect to support a voluntary intoxication defense. *Id.* at 880. Offering combined effect evidence was not permitted, the court explained, until *State v. Bias,* 653 So.2d 380 (Fla.1995), which was decided three years after Reaves' retrial. *Id.* Based on these considerations, coupled with trial counsel's testimony at the evidentiary hearing, the Florida Supreme Court found that counsel made a "strategic choice of excusable homicide as a defense over involuntary intoxication" which was "reasonable under the facts of the case and the law at the time," and as a result, counsel's performance was not deficient under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Id.* at 880–81. Given the lack of deficient performance, the court did not address *Strickland*'s prejudice prong. *Id.* at 881.

C. REAVES' FEDERAL HABEAS PROCEEDINGS

After his state post-conviction proceedings, Reaves filed a 28 U.S.C. § 2254 federal habeas petition claiming, among other things, that trial counsel had rendered ineffective assistance at the guilt phase of his retrial by failing to investigate, prepare, and present a voluntary intoxication defense. He contended that if counsel had introduced expert or lay testimony in support of a voluntary intoxication defense, it would have shown that he was incapable of forming the intent required for first-degree murder and resulted in a conviction for second-degree murder instead. Reaves also contended that counsel had rendered ineffective assistance during the penalty phase of the retrial by failing to investigate and present evidence of his impoverished childhood, military experience and combat-related PTSD, and substance abuse.

***899** The district court granted relief on Reaves' guilt phase claim of ineffective assistance of counsel involving a voluntary intoxication defense and ordered a new trial. The Florida Supreme Court's rejection of that claim, according to the district court, was based on an unreasonable determination of the facts. *See generally* 28 U.S.C. § 2254(d)(2). Chief among those unreasonable findings, the district court believed, was the finding that there was no direct evidence that Reaves was intoxicated at the time he shot the deputy. The district court acknowledged that Reaves' own statements to the officers that he had ingested cocaine on the day of the killing may have been the only evidence that he had been intoxicated. But the court pointed out that, according to the state trial court, the State had not disputed those statements. The district court also rejected the Florida Supreme Court's finding that trial counsel had made a strategic decision not to pursue a voluntary intoxication defense. It did so based on counsel's failure to offer a specific strategic reason for not pursuing that defense and his failure to recall whether he had discussed it with Reaves. Reaves had, the district court concluded, established the deficiency prong of his guilt stage ineffective assistance of counsel claim.

The district court also concluded that Reaves had satisfied the prejudice prong of *Strickland* because there was a reasonable probability that a voluntary intoxication defense would have prevented a first-degree murder conviction. In reaching that conclusion, the district court emphasized both the "tragic and bizarre" circumstances of the case and the expert testimony that the combination of Reaves' cocaine use and underlying mental problems rendered him unable to form the premeditated design required for first-degree murder. Based on its own review and interpretation of Florida law, which contradicted the view of the Florida Supreme Court, the district court concluded that evidence about the combined effect of Reaves' mental defects and cocaine use would have been admissible to support a voluntary intoxication defense. The district court also pointed to the length of the jury deliberations and the jury's questions about a hung jury and the element of premeditation, which the court surmised reflected "indecision and concerns about whether the requisite intent for first degree murder had been established."

In addition to granting relief on the guilt phase claim, the district court ordered an evidentiary hearing on Reaves' penalty phase claim in order to determine the extent of additional mitigating evidence that could have been presented to the jury and to assess whether the Florida Supreme Court reasonably found that such evidence would have been irrelevant or cumulative. The court, however, stayed the evidentiary hearing pending the result of any appeal of its decision of Reaves' guilt phase claim.

The State filed timely motions for reconsideration under Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60, both of which the district court denied. The State then filed this appeal.

III. LEGAL ANALYSIS

[1] **[2]** When reviewing a district court's grant or denial of habeas relief, "we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir.2000). To prevail on a claim of ineffective assistance of counsel, a petitioner must show both that: (1) counsel's performance was deficient, meaning that it "fell below an objective standard of reasonableness"; and (2) the deficient performance prejudiced the defense. ***900** *Strickland*, 466 U.S. at 687–88, 104 S.Ct. at 2064. Ordinarily, federal habeas review of claims adjudicated on the merits in state court is greatly circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996, which precludes relief unless the state court's decision involved an unreasonable application of clearly established federal law or was based on a unreasonable determination of the facts. 28 U.S.C. § 2254(d). However, because the Florida Supreme Court did not reach the issue of prejudice there is no decision on that issue to which we could defer. *See Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 930 (11th Cir.2011).

A. GUILT PHASE INEFFECTIVENESS

The State contends that, in granting habeas relief on Reaves' guilt phase claim of ineffective assistance, the district court failed to afford proper AEDPA deference to the Florida Supreme Court's factual findings, particularly its determination that Reaves did not present any direct evidence of his level of intoxication at the time of the murder. Under Florida law, the State insists, Reaves' "self-serving" statements to the police and to his experts about his cocaine use on the night of the murder were not "substantive evidence" of intoxication that could support a voluntary intoxication defense. *See Henry v. State*, 862 So.2d 679, 682–83 (Fla.2003); *Holsworth v. State*, 522 So.2d 348, 352 (Fla.1988). The State also maintains that, despite Reaves' assertions that he was "high" at the time of the murder, there was ample evidence he knew what he was doing when he shot the deputy, fled the scene, and evaded law enforcement, and that expert testimony about the combined effect of intoxicants and a mental condition could not support a voluntary intoxication defense under Florida law at the time of Reaves' retrial. For those reasons, the State contends, Reaves has not only failed to show that trial counsel rendered deficient performance in not actively pursuing a voluntary intoxication defense, but has also failed to show that he was prejudiced by counsel's actions.

Because we are convinced that Reaves has not carried his burden of demonstrating prejudice, we need not decide whether the district court failed to afford the required deference to the Florida Supreme Court's decision that there was no deficient performance.[9] *See Windom v. Sec'y,* ***901** *Dep't of Corr.*, 578 F.3d 1227, 1248 (11th Cir.2009) ("Because the failure to demonstrate either deficient performance or prejudice is dispositive ..., there is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one.") (quotation marks and alteration omitted).

9 We note, however, that the district court's decision that there was deficient performance was based on two fundamental flaws. For one thing, the district court mistook counsel's understandable lack of memory about what he may have been thinking at the time of the retrial, which occurred more than a decade before he testified at the post-conviction hearing, for the absence of a reasoned basis for electing not to actively pursue a voluntary intoxication defense. *See Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1245 (11th Cir.2011) (explaining that our binding precedent does not give the petitioner "the benefit of trial counsel's short memory"; instead, we presume that trial counsel exercised reasonable professional judgment); *Williams v. Head*, 185 F.3d 1223, 1227–28 (11th Cir.1999) (recounting that the trial had been ten years ago, counsel had lost his case file, and he

could not remember what had happened in the case, and concluding that "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment").

For another thing, the district court's emphasis on counsel's failure to articulate a specific strategic reason for not focusing on voluntary intoxication as a defense placed undue weight on counsel's subjective reasons for acting as he did. As we have explained, *Strickland* calls for an objective inquiry into the reasonableness of counsel's performance and, for that reason, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States,* 218 F.3d 1305, 1315 (11th Cir.2000) (en banc). The relevant question is whether "*some* reasonable lawyer" could have pursued the challenged course of action, regardless of whether the petitioner's trial counsel actually made a deliberate, informed, and strategic decision to do so. *See id.* at 1315 n. 16 (emphasis added); *see also Harrington v. Richter,* —— U.S. ——, 131 S.Ct. 770, 790, 178 L.Ed.2d 624 (2011) ("The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking .... *Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, *not counsel's subjective state of mind.*") (emphasis added).

[3] **[4]** To prove prejudice a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.,* and the "likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter,* —— U.S. ——, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). The inquiry into prejudice requires us to evaluate "the totality of the evidence—both that adduced at trial, and the evidence adduced in the habeas proceedings." *Wiggins v. Smith,* 539 U.S. 510, 536, 123 S.Ct. 2527, 2543, 156 L.Ed.2d 471 (2003) (quotation marks, brackets, and emphasis omitted).

[5] At the time of Reaves' 1992 retrial, voluntary intoxication could be asserted as a defense in Florida to specific intent crimes such as first-degree murder, but not to crimes like second-degree murder that can be established with either general or specific intent. [10] *See* ***902** *Gardner v. State,* 480 So.2d 91, 92 (Fla.1985); *Gentry v. State,* 437 So.2d 1097, 1099 (Fla.1983). Mere use of intoxicants, however, even to the extent that they "arouse[d] passions, diminishe[d] perceptions, release[d] inhibitions or cloud [ed] reason and judgment," was not enough to support a voluntary intoxication defense. *See* Fla. Std. Jury Instr. (Cr.) 3.04(g) (1987). Instead, a defendant was required to "come forward with evidence of intoxication at the time of the offense sufficient to establish that he was *unable to form the intent necessary to commit the crime charged.*" *Linehan v. State,* 476 So.2d 1262, 1264 (Fla.1985) (emphasis added); *see also* Fla. Std. Jury Instr. (Cr.) 3.04(g) (1987) (providing that a defendant must be so intoxicated that he or she was "incapable of forming" the required mental state for a crime). The required mental state for first-degree murder is a "premeditated design" to kill, which requires a specific intent to kill coupled with premeditation. [11] *See* Fla. Ann. Stat. § 782.04(1)(a); *Anderson,* 276 So.2d at 18 (explaining that second-degree murder requires either a general or specific intent to kill, while first-degree murder requires both a specific intent to kill and premeditation, which is "the one essential element which distinguishes first-degree murder from second-degree murder"); *Davis v. State,* 928 So.2d 1089, 1118 (Fla.2005) (evaluating whether a voluntary intoxication defense to a charge of first-degree murder "could have rebutted the necessary elements of specific intent and premeditation"). Premeditation is defined as not "a mere intent to kill," *Bradley v. State,* 787 So.2d 732, 738 (Fla.2001), but as a "fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act," *Asay v. State,* 580 So.2d 610, 612 (Fla.1991).

10 Effective October 1, 1999, Florida statutorily abolished the defense of voluntary intoxication, though that defense apparently remains available to defendants whose crimes predate that legislation's effective date. *See* Fla. Stat. Ann. § 775.051 (1999); *Travaglia v. State,* 864 So.2d 1221, 1223 (Fla. 5th DCA 2004). Florida is one of a number of states that have abolished the defense of voluntary intoxication in the past several decades, responding to statistics linking violent crime with self-induced intoxication, and to criticisms that the defense perversely rewards intoxicated behavior by reducing criminal punishment and contradicts widespread moral notions that a person who voluntarily impairs

his own faculties should be held fully accountable for the consequences. *See Montana v. Egelhoff,* 518 U.S. 37, 48–50, 116 S.Ct. 2013, 2018–20, 135 L.Ed.2d 361 (1996) (discussing the trend towards abolition of the defense and the justifications for doing so); Meghan Paulk Ingle, Note, *Law on the Rocks: The Intoxication Defenses Are Being Eighty–Sixed,* 55 Vand. L.Rev. 607, 614–16, 622–26 (2002) (same); *Bias,* 653 So.2d at 384 (Grimes, C.J., concurring) (urging the Florida legislature to abolish the voluntary intoxication defense and stating, "I cannot understand why a person should be exonerated of a specific intent crime simply because he drank too much").

This historical trend marks a return to the common law view, prevalent on both sides of the Atlantic until the late nineteenth century, that intoxication neither justifies nor mitigates criminal conduct. *See Egelhoff,* 518 U.S. at 44–47, 116 S.Ct. at 2018–20. As Justice Story remarked nearly two centuries ago:

> If the prisoner was at the time of committing the offence, intoxicated, as his counsel have earnestly contended, I cannot perceive how it can, in point of law, help his case. This is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another. Drunkenness is a gross vice, and in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity.

United States v. Cornell, 25 F. Cas. 650, 657–58 (C.C.D.R.I.1820) (Story, J.).

11 Florida courts sometimes phrase the voluntary intoxication inquiry in terms of whether the defendant was so intoxicated that he lacked the specific intent to kill, which could be interpreted to mean that the mental state required for first-degree murder is a specific intent to kill and nothing more. *See Henry v. State,* 948 So.2d 609, 626–27 (Fla.2006); *Patton v. State,* 878 So.2d 368, 373 (Fla.2004); *Jones v. State,* 855 So.2d 611, 616 (Fla.2003). When it has specifically focused on the matter, however, the Florida Supreme Court has clarified that the mental state required for first-degree murder is not merely a specific intent to kill but also premeditation, making premeditation the feature that distinguishes first- from second-degree murder. *See Anderson,* 276 So.2d at 18 (explaining that the "specific intent to kill" may be present in either first- or second-degree murder, and that "the one essential element which distinguishes [the two] is premeditation"); *Bradley v. State,* 787 So.2d 732, 738 (Fla.2001) (describing premeditation as "more than a mere intent to kill; it is a fully formed conscious purpose to kill").

For purposes of the voluntary intoxication defense, the question is whether the defendant was "unable to form the intent necessary to commit the crime charged." *Linehan,* 476 So.2d at 1264. Combining these threads of law with the prejudice requirement, the question before us is whether there is a reasonable probability that the jury, if presented with a voluntary intoxication defense, would have found that when he killed the deputy Reaves was incapable of forming the requisite mental state for first-degree murder—the premeditated design to kill.

[6] [7] There are two reasons we are convinced that Reaves has failed to carry his burden of demonstrating a substantial likelihood of a different result had trial counsel actively pursued a voluntary intoxication defense with all of the evidence, including the expert testimony, that was presented at the state court evidentiary hearing. The first is that most, if not all, of the expert testimony supporting the defense would have been inadmissible at Reaves' retrial. While the Florida Supreme ***903** Court, in affirming the denial of state collateral relief, based its decision on the absence of deficient performance, one of the primary reasons it articulated in support of that determination was "the law in Florida at the time" of Reaves' 1992 retrial. *Reaves,* 942 So.2d at 878. The state high court made clear that state law, as it existed at the time of the retrial, precluded a voluntary intoxication defense based on the combined effect of intoxication and an underlying mental condition that did not rise to the level of legal insanity. *Id.* at 880. The Florida Supreme Court's interpretation of state law is binding on federal courts. The district court should not have substituted its own interpretation of state law for that of Florida's highest court. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). The United States Supreme Court has instructed us that "state courts are the ultimate expositors of state law" and federal courts "are bound by their constructions" except in rare and extreme circumstances. *Mullaney v. Wilbur,* 421 U.S. 684, 691 & n. 11, 95 S.Ct. 1881, 1886 & n. 11, 44 L.Ed.2d 508 (1975). And we have held, in another capital murder case, that we were bound by the Florida Supreme Court's determination that a particular type of voluntary intoxication defense was not cognizable at the time of the petitioner's trial. *Pietri v. Fla. Dep't of Corr.,* 641 F.3d

1276, 1284 (11th Cir.2011) (emphasizing that "[a] state supreme court's interpretation of its law is binding on federal courts"). That decision applies here.

Given the state of the law at the time of Reaves' retrial, as conclusively construed by the Florida Supreme Court, the expert opinions of Dr. Dudley, Dr. Crown, Dr. Parsons, and Dr. Hyde would have been inadmissible because those opinions were premised not on cocaine use alone, but on the combined effect of cocaine use and an underlying mental condition, whether PTSD, brain damage, or poly-substance abuse, that did not rise to the level of legal insanity. Likewise, Dr. Mash's conclusion that Reaves would not have been able to form the mental state required for first-degree murder was not based as much on the amount of cocaine Reaves allegedly ingested on the day of the shooting, as it was on the effect that years of chronic substance abuse had on his neurological functioning. The Florida Supreme Court has consistently held that evidence of a mental defect caused by chronic drug abuse, including so-called "cocaine psychosis," is inadmissible under state law for the purpose of establishing a voluntary intoxication defense. *See Pietri v. State,* 885 So.2d 245, 252 (Fla.2004) (noting that the Florida Supreme Court has consistently held that evidence of "metabolic intoxication" due to persistent drug use is inadmissible at trial to prove a lack of specific intent); *Spencer v. State,* 842 So.2d 52, 62–63 (Fla.2003) (concluding that evidence of a defendant's "dissociative state" resulting, in part, from a long history of alcohol abuse and "the residual effects of a two-week alcoholic binge" would not have been admissible during the guilt phase of the defendant's trial); *Street v. State,* 636 So.2d 1297, 1301 (Fla.1994) (holding that, because the defendant was not raising an insanity defense, the trial court properly refused to permit a defense expert to testify that the defendant was suffering from "the mental infirmity of cocaine psychosis" at the time of his offense).

Even Dr. Weitz, who claimed that he could describe the independent effects of the 1.75 grams of cocaine and alcohol Reaves allegedly consumed before the shooting, largely premised his opinion on ***904** the interplay between cocaine and Vietnam Syndrome, which he characterized as a "critical factor" in accounting for Reaves' actions. Thus, with the possible exception of some limited parts of Dr. Weitz's testimony, the opinions of Reaves' experts would, as a matter of Florida law, have been inadmissible to demonstrate that he was incapable of forming the premeditated design to kill that is required for first-degree murder.

The second reason we are convinced that Reaves has failed to carry his burden of proving a reasonable probability of a different result if a voluntary intoxication defense had been pursued is all of the evidence showing that he not only was capable of formulating a premeditated design to kill the deputy, but also actually did so. His undisputed actions and statements before and after the murder prove that he possessed the presence of mind to make a conscious and purposeful decision to kill the deputy, which negates a voluntary intoxication defense. Reaves told the officers who questioned him that he had shot the deputy because he believed that, as a convicted felon, he was facing a mandatory sentence for unlawfully possessing a firearm, and he did not want to go back to prison. Those facts, which are not contradicted by any evidence, prove that Reaves' actions were deliberate and motivated by a desire to avoid going back to prison. There is also the fact that he fired his weapon at the deputy seven times and hit him four times. *See Woods v. State,* 733 So.2d 980, 985 (Fla.1999) (explaining that, under Florida law, premeditation may be inferred from "the nature of the weapon used, ... the manner in which the homicide was committed, and the *nature and manner of the wounds inflicted*") (quotation marks omitted) (emphasis added).

Reaves had the presence of mind and mental capacity to immediately flee the area of the shooting, hide in the woods, and take other evasive action in order to avoid a sizeable police manhunt as he traveled seven miles on foot. And as soon as he arrived at Hinton's home he showered and changed his clothes. Reaves' ability to later recall the incident in considerable and vivid detail is more evidence weighing against a voluntary intoxication defense. *See Davis v. State,* 875 So.2d 359, 367 (Fla.2003) (concluding that a defendant's detailed confession about the circumstances of his crime "substantially undermined the viability of a voluntary intoxication defense").

The single most damaging piece of evidence presented at the retrial was Hinton's testimony (read into evidence) about Reaves' explanation for why he had killed the deputy. He recounted to Hinton how, as the deputy was pleading for his life, Reaves had told him, "One of us got to go, me or you." That is an articulation of a premeditated design to kill, pure and simple. Hinton also testified that Reaves appeared to be in full control of faculties as he described the incident. Hinton's uncontradicted testimony, particularly about what Reaves told him, proves that Reaves was "conscious of the nature of the act he [was] about to commit and the probable result of that act," which rules out a finding that he was too intoxicated to form the intent required for first-degree murder. *See Asay,* 580 So.2d at 612. [12] Even assuming ***905** that Reaves' experts would not have been precluded from testifying at the retrial, none of them was able to adequately explain how Reaves could have been unable to form a premeditated design to kill in light of his statement to the deputy that he was going to shoot him because one of them had to go.

12 Although Hinton's 1999 affidavit, in contradiction to his 1987 trial testimony, described Reaves as "all strung out" and "out of his head" after the shooting, that affidavit has no bearing on the question of prejudice. It did not even exist until seven years after the retrial. Despite the prosecutor's and the trial court's best efforts, Hinton refused to testify at the 1992 retrial, which led to the introduction of his trial testimony. *Cf. Williamson v. Moore,* 221 F.3d 1177, 1181 (11th Cir.2000) ("Counsel cannot be said to be ineffective for failing to call an unavailable witness.").

Having heard the evidence presented at the retrial, including Reaves' repeated references to being "high" on cocaine at the time of the shooting, and having received an instruction on the defense of voluntary intoxication, the jury concluded that Reaves was guilty of first-degree (premeditated) murder. We are not persuaded that there is a reasonable probability that the jury would have reached a different result had counsel actively pursued a voluntary intoxication defense. As the Florida Supreme Court aptly pointed out, Reaves' actions indicate that he "knew what he was doing." *See Reaves,* 942 So.2d at 880.

Unlike the district court, we are not convinced that Reaves' actions were bizarre, at least not bizarre enough to support a finding that he lacked the ability to form a premeditated design to take the deputy's life. The decision by Reaves, who was out of coins, to dial 911 for help in securing a cab was ill advised in light of the fact that he was a felon in possession of a firearm. His decision to immediately hang up may indicate that he realized that was not a wise course of action. But people sometimes make bad decisions and do stupid things. While a defendant's decision to kill a police officer to avoid arrest and a jail sentence is a bad decision, a stupid decision, an immoral decision, and a criminal decision, it is not bizarre enough to establish that Reaves lacked the ability to form a premeditated design to kill. Because Reaves has failed to carry his burden of proving that he was prejudiced by trial counsel's failure to pursue a voluntary intoxication defense, the district court erred in granting federal habeas relief on his guilt phase claim of ineffective assistance of counsel. It should have denied relief on that claim.

B. PENALTY PHASE INEFFECTIVENESS

[8] The State also challenges the district court's decision to grant an evidentiary hearing on Reaves' penalty phase claim of ineffective assistance of counsel. Although neither party contests our jurisdiction to review that aspect of the district court's judgment, "we are obligated to address jurisdictional questions *sua sponte* " whenever jurisdiction may be lacking. *Thomas v. Blue Cross and Blue Shield Ass'n,* 594 F.3d 814, 818 (11th Cir.2010) (quotation marks omitted).

[9] **[10]** As a general principle, our jurisdiction is limited to reviewing "final decisions" of district courts, 28 U.S.C. § 1291, meaning those that "end[ ] the litigation on the merits and leave[ ] nothing for the court to do but execute the judgment," *Pitney Bowes, Inc. v. Mestre,* 701 F.2d 1365, 1368 (11th Cir.1983) (quotation marks omitted). In the context of habeas proceedings, however, we have held that a judgment granting a writ of habeas corpus on less than all grounds asserted in a petition is a final, appealable decision within the meaning of § 1291. *Wilson v. Kemp,* 777 F.2d 621, 622 (11th Cir.1985). Nonetheless, that does not mean that every action taken by a district court in conjunction with granting a habeas petition ***906** constitutes an appealable final decision. *Cf. Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 38, 115 S.Ct. 1203, 1206, 131 L.Ed.2d 60 (1995) (holding that there was interlocutory appellate jurisdiction to review the district court's denial of summary judgment based on qualified immunity to individual officers, but not the district court's denial of the county commission's motion for summary judgment).

[11] In and of itself, the district court's grant of an evidentiary hearing on Reaves' penalty phase ineffective assistance claim does not constitute a final decision on the merits. *See Broussard v. Lippman,* 643 F.2d 1131, 1133 (5th Cir. Unit A 1981) ("When ... a district court anticipates that further proceedings on substantive matters may be required, any order it makes to facilitate those further proceedings is necessarily not final."). [13] Had the district court rejected Reaves' guilt phase claim on the merits but granted an evidentiary hearing on the penalty phase claim, we would not hesitate to classify the resulting decision as interlocutory. We see no reason to treat the district court's decision to conduct an evidentiary hearing on the sentence stage claim as final and immediately appealable simply because the court granted Reaves' habeas petition on a guilt stage claim.

13 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981.

[12] **[13]** Apart from final decisions, we may exercise appellate jurisdiction over certain interlocutory rulings that fall within 28 U.S.C. § 1292 or the collateral order doctrine. The district court's grant of an evidentiary hearing, however, does not fit under § 1292, *see* 28 U.S.C. § 1292(a)-(b), nor does it satisfy the requirements of the collateral order doctrine, which applies only to non-final decisions that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment," *Wajnstat v. Oceania Cruises, Inc.,* 684 F.3d 1153, 1156 (11th Cir.2012) (quotation marks omitted). The court's grant of an evidentiary hearing is not completely separate from the merits of Reaves' penalty phase claim and, should the district court ultimately grant relief on that claim, the State will have an opportunity to challenge the propriety of the district court's action in conducting an evidentiary hearing on the claim. If such a challenge occurs and is successful, any evidence admitted at the evidentiary hearing will have to be disregarded; were it otherwise, there would be no way to enforce the restrictions imposed by 28 U.S.C. § 2254(e)(2).

[14] **[15]** Under the doctrine of pendent appellate jurisdiction, we may also review an otherwise non-appealable decision that is "inextricably intertwined" with an appealable decision or when "review of the former decision is necessary to ensure meaningful review of the latter." *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1291 (11th Cir.2010) (quotation marks and alteration omitted). The issue of whether the district court properly granted an evidentiary hearing on Reaves' penalty phase claim is not "inextricably intertwined" with the merits of its decision on his distinct guilt phase claim, and we have had no difficulty resolving the latter issue without addressing the former. Because the district court's grant of an evidentiary hearing on the penalty phase claim is interlocutory in nature and no exception to the final judgment rule applies, we lack jurisdiction to review that decision.

*907 IV. CONCLUSION

For the foregoing reasons, we vacate the district court's grant of habeas relief on Reaves' claim that trial counsel was ineffective in failing to pursue a voluntary intoxication defense, and remand for further proceedings on Reaves' outstanding claim of ineffective assistance of counsel during the penalty phase of his retrial. We do not reach, and do not express any view on, whether the petitioner is entitled to an evidentiary hearing on that claim.

VACATED AND REMANDED.

All Citations

717 F.3d 886, 24 Fla. L. Weekly Fed. C 321

End of Document

APPENDIX F

2015 WL 13657202
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

William REAVES, Petitioner,
v.
Julie L. JONES, Secretary, Florida
Department of Corrections, [1] Respondent.

1 Julie L. Jones is now the Secretary of the Florida Department of Corrections and is automatically substituted as Respondent under Federal Rule of Civil Procedure 25(d)(1).

CASE NO. 10-14046-CIV-MIDDLEBROOKS
|
Signed 03/03/2015

Attorneys and Law Firms

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

Leslie T. Campbell, Attorney General Office, West Palm Beach, FL, for Respondent.

Opinion

ORDER GRANTING § 2254 PETITION AS TO PENALTY PHASE

DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE

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

2 Tim O'Brien, *The Things They Carried* 72 (First Mariner Books 2009) (1990).

The jury never learned of Mr. Reaves' mental disorder because his counsel's conduct undermined the adversarial process. Counsel did not investigate and present compelling mitigating evidence consistent with a coherent defense, and failed to object to inadmissible and inflammatory opinion and unreliable, speculative, and untrue testimony.

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

I. BACKGROUND

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

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

3 Writing for the Eleventh Circuit, Chief Judge Carnes took issue with my description of these circumstances as "bizarre," but noted that "events sometimes tumble towards tragedy as if the devil himself had shaved the dice." *Reaves v. Secretary*, 717 F.3d 886, 889 (11th Cir. 2013) (quoting Rick Bragg, *The Prince of Frogtown* 177-181 (Alfred A. Knopf 2008)). In the passage quoted by Judge Carnes, Rick Bragg is describing the shooting of a police chief by a drunken storekeeper and fishing buddy the chief was trying to disarm. According to Bragg, "there are things impossible to reconcile, and the killing of Chief D. E. Whiteside haunts the place and people even now."

> Bragg, *id.* at 177. The chiefs killing "makes no more sense now to Whiteside's son Bill than when he was a seven-year-old boy...." *Id.* at 178. " 'They gave Dentmon life in the penitentiary. But I didn't know life meant seven years.' " *Id.* at 181.

Confession

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

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

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

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

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

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

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

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

The 1987 Trial

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

The 1992 Trial

Pretrial. Shortly after being appointed to represent Mr. Reaves, Jonathan Kirschner filed a Motion on Legal Necessity for co-counsel. He did so because he was "overwhelmed by the Reaves case." (DE 80 at 11, Kirschner testimony). Mr. Kirschner testified that to proceed to trial without assistance in a case of this nature would be "prima facie ineffective." (A-R1 at 127).[4] Mr. Kirschner argued: "No mitigating evidence other than the defendant's testimony was presented at the first trial. In order to adequately prepare for a penalty phase, undersigned counsel must indulge in substantial additional investigative efforts, with dozens of witnesses, in order to prepare for same." (A-R16 at 2381) (Motion to Appoint Counsel). Mr. Kirschner had never tried a capital case: Mr. Reaves' defense was his first and last.[5]

4 The state court record was filed conventionally, as reflected in (DE 17). I cite to the state court record by

exhibit name (such as A-R1) and page number within the exhibit.

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

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

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

In his opening statement, Mr. Kirschner told the jury that "[w]hat happened on that night was a tragic accident and it was a horrible accident and it was certainly an unnecessary accident, but it was accidental." (*Id.* at 742, 104 S.Ct. 2052). Mr. Kirschner apprised the jury of the definition of "excusable homicide" in Florida and argued that "[i]f there is one thing that is patently clear, that is there was an accident that occurred that night. The gun dropped out of his pants, undeniable. The gun fell down. There was undeniably heat of passion. Gunshots were exchanged." (*Id.* at 743, 104 S.Ct. 2052). Mr. Kirschner then described the "provocation," which was not the fact that the Deputy drew his gun but was "the perception of William Reaves as to that provocation." (*Id.* at 745, 104 S.Ct. 2052). Mr. Reaves, it was argued, "indulged in something called survivor behavior." (*Id.*). Mr. Reaves learned this behavior "where a lot of other people learned it," in the Republic of Vietnam. (*Id.* at 752, 104 S.Ct. 2052). Also, "the evidence will be clear that the survivor behavior in conjunction with his use of narcotics contributed to this accidental killing." (*Id.* at 753, 104 S.Ct. 2052). Mr. Kirschner concluded that "[t]he evidence is going to show that this killing was the result of accident and misfortune in the heat of passion upon sudden and sufficient provocation" and that the jury must follow the law and find Mr. Reaves not guilty, which was, admittedly, going to be difficult "given the emotions in this case." (*Id.* at 754, 104 S.Ct. 2052).

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

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

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

*4 This should not have come as a surprise to Mr. Kirschner. On January 16, 1992, approximately a month before trial started, the State filed a motion to prohibit testimony of abnormal mental condition not constituting legal insanity. (A-R2 at 208). During argument, the State clarified to the court that "[w]hat we are trying to avoid is some post-traumatic stress syndrome, having the doctor get on the stand and say, that, well, you know, he served in Vietnam, and—." (*Id.* at 212). The court agreed, "[t]hey can't—I'm not going to allow them to do that." (*Id.*).

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

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

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

The State began its closing argument with the prosecutor explaining, in a meticulous fashion, the definition of first-degree premeditated murder. (A-R11 at 1649). He methodically walked through the elements and the evidence and how the State proved each of the statutory requirements for first-degree murder in Florida. The State then used Mr. Kirschner's ill-conceived defense against Mr. Reaves:

> Think back to the opening statements in this case. The defense counsel told you the defense was this was a mistake, accident, misfortune.
>
> Don't allow them to shift now and tell you that the defense is really voluntary intoxication because there was no evidence that the Defendant was ever intoxicated in any point of this, certainly not to any degree that he didn't know what he was doing.

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

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

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

> all I'm asking you to find. Thank you.

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

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

> Please give a clear explanation of second degree murder, specifically page nine, lines four and five. The Defendant carried or possessed a firearm during the commission of the "offense" in quotes. What offense is being referred to? Is the "offense" in quotes, "referring to secondary offense as in a robbery or is the reference to the crime before us?"
>
> * * *
>
> If a hung jury, will there be a retrial?
>
> * * *
>
> Could he be found guilty of first-degree murder or explain first-degree premeditated murder.

(*Id.* at 1791-99).

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

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

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

The defense also called two witnesses who had served with Mr. Reaves in Vietnam. Hector Caban served in Vietnam in the Fourth Infantry Division and was in the "Charlie Platoon" with Mr. Reaves. (*Id.* at 1949). Mr. Reaves was with Mr. Caban's squad from November 1969 to September 1970. (*Id.* at 1979). During direct examination, Mr. Caban was able to identify Mr. Reaves in photographs that he identified as being taken in Vietnam. (*Id.* at 1950). In one photograph, Mr. Caban pointed out that Mr. Reaves was wearing a hat that belonged to a ranger patrol team because Mr. Reaves' squad helped save that particular team and afterwards Mr. Reaves asked one of the rangers for his hat. (*Id.* at 1960). Mr. Caban explained that his squad's missions were typically to "search and destroy." (*Id.* at 1967). Mr. Reaves' squad would typically encounter snipers shooting at them; they would not know that snipers were in the area until the "person in front of them got shot." (*Id.* at 1969). Mr. Caban recounted a specific experience where his squad encountered a U-Shape ambush, meaning that his squad was ambushed from three directions while the squad was entering an open field. (*Id.* at 1969-71). As a result of this incident, half of the members of their squad were shot. (*Id.* at 1973). Mr. Caban testified that when Mr. Reaves first arrived, he was quiet, nice, and got along with everyone. (*Id.* at 1980). However, towards the end of his time with the squad, Mr. Reaves began using heroin. (*Id.* at 1981). Along with serving in Vietnam, their squad also served time in Cambodia and experienced combat action there. (*Id.* at 1986-87). During their time together, Mr. Reaves and Mr. Caban experienced around 6-8 firefights (combat situations). (*Id.* at 1988).

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

William D. Wade also served in Vietnam with Mr. Reaves in the same platoon. Mr. Wade was the squad leader. (*Id.* at 2005). Mr. Wade testified about a specific six-week period when he and Mr. Reaves were involved in a U-shaped ambush. (*Id.* at 2007). According to Mr. Wade, their point man was killed by a shot to the head, another suffered a relatively minor wound but died of shock, and their sergeant was hit in the hip and pelvis and, although he survived, was permanently out of action. (*Id.* at 2008-09). Mr. Wade also testified to the close combat in very tough conditions that the platoon experienced during the war. (*Id.* at 2009). During his six weeks with Mr. Reaves' platoon, Mr. Wade estimated they had eight or nine combat situations. (*Id.* at 2014).

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

The defense rested.

The State's first rebuttal witness was Robert Ressler, a retired FBI Agent, who had previously served in the military but never in Vietnam or Cambodia. (A-R14 at 2145-47). Without objection from Mr. Kirschner, Mr. Ressler was qualified as an expert in military records. (*Id.* at 2154-55). This so-called "expert" opined that Mr. Reaves' Combat Infantryman Badge, the National Defense Service Medal, the Vietnam Service Medal with two bronze stars, and Air Medal were "automatically" given to everyone who was in Vietnam and "had no significance to valor or exemplary service." (*Id.* at 2167). Then, again without objection, Mr. Ressler opined that Mr. Reaves, who was honorably discharged from the Army but had received a disciplinary report in connection with a stolen radio, would not have received an honorable discharge except for the winding down of the Vietnam war. [6] (*Id.* at 2168-69).

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

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

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

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

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

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

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

The prosecutor then anticipated the arguments of Mr. Kirschner:

> ***8** [Mr. Kirschner] will tell you that you have heard a lot of testimony about cocaine and that the defendant is a drug user and is on cocaine.
>
> * * *
>
> I submit to you the logic of that should not be accepted by you. Why give a benefit to an individual that has elected to violate the laws of society by taking illegal drugs, then committing the crime of first-degree murder, and saying: Well, you know, I was on drugs, which I voluntarily took, but give me the benefit because if I was on drugs I should not be punished as badly.
>
> * * *
>
> ... Mr. Kirschner is going to get up here and he is going to take all these photographs of the defendant in Vietnam. And you are going to hear a lot about Vietnam. About the defendant's conduct in Vietnam. Defendant's service in Vietnam should all be used as a mitigating aspect.
>
> * * *
>
> The defendant served one year in Vietnam. He did not have a distinguished record to any degree. He received the medals that anyone else would have received for simply going there.
>
> * * *
>
> What the defendant did have in Vietnam was not a distinguished record, but the opposite. Violations of orders. Article 15, where he was reprimanded and punished and court martialed in Vietnam for stealing and other offenses.

> * * *
>
> Mr. Kirschner may argue that he has developed a personality disorder as a result of combat experience in Southeast Asia. Well, if you believe Dr. Weitz's testimony about Vietnam Syndrome, that may be an acceptable mitigating circumstance.
>
> * * *
>
> Remember, I spent a lot of time on him and I was showing him the book, "DSM-III-R" the Diagnostic Manual. I said: "Where does it say that post-traumatic stress people come back and commit crimes as criminals?" That's not in there.
>
> * * *
>
> Where is Vietnam Syndrome? Well, it's not in there either. They ain't in there for a reason, because they aren't recognized by the best psychologists and psychiatrists across the country. That's why it's not in there.

(*Id.* at 2287-96).

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

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

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

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

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

> If you find as a result of his combat experiences that he was unable to overcome ordinary judgment and that his inability to overcome ordinary judgment resulted in the killing, you could consider that a mitigating factor.
>
> If you find that as a result of his combat experiences in Southeast Asia that he had an inability to reflect upon what he was doing, you could find that as a mitigating factor.
>
> If you find that he is a Vietnam veteran and that as a result of his service in this country he was less able to control himself on that night than he would have been, you could use that as a mitigating factor.
>
> The fact that he was a positive influence on other people in his neighborhood, that can be a mitigating factor.

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

> Let's look for a minute at what the evidence of the last two days showed us. What the prosecutor showed us was that William Reaves, in 1973 and up to the present period or about twenty years, was a violent criminal.
>
> But there was—that's one 20-year period. But there was another 20-year period in William Reaves' life—and you saw that through some of the people who live in Gifford, who came in here and talked to you about what kind of a guy he was growing up.
>
> What we basically learned was that there was nothing terribly extraordinary about him. He was a nice enough guy. He stayed out of trouble. He was good to his parents and to his brothers. He went to church a lot. He played sports. He got along with the kids. He didn't get into a lot of fights.
>
> * * *
>
> We know from '48, when he was born, until 1968, when he went away to war, he was a nice kid. And we know from '71, when he got back, until now, he has been an antisocial violent guy.

> I submit to you there must be some explanation for that. And the only explanation that I can think of for that change is that something happened while he was in Southeast Asia.

(*Id.* at 2307-08).

Mr. Kirschner concluded:

> What I am suggesting to you is there are two different William Reaves. There was the William Reaves that went over there, and there was the Williams Reaves that came home.... I submit to you William Reaves never came home ... something was taken from him, or something was lost by him. Some essence, some part of his soul. Whatever it is that makes people good people.
>
> * * *
>
> Well, what he lost in Vietnam we can't give back to him. And whatever essence disappeared while he was in Vietnam—that changed him from that boy to the nasty guy who did robberies. We can't replace that, either. You can't give anything back.
>
> What I'm asking that you do is—that you give him a cell, let him live out his life in a cell at the Florida State Prison. I think we owe him.
>
> That's all, Your Honor.

(*Id.* at 2309, 2311-12).

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

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

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

Direct Appeal

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

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

State Collateral Proceedings

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

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

• Despite his request for co-counsel, defense counsel was placed in the untenable position of litigating Mr. Reaves' case alone, without support staff, and after a change of venue, hours away from his office. "He was overwhelmed and exhausted by the state prosecution that had the unlimited funds and benefit of two attorneys on the case." According to the ABA Guidelines for Selection and Performance of Appointed Counsel in Death Cases, capital defendants should be represented by two attorneys. (C-PCR1-4 at 453) (Amended Petition, Claim III ¶¶ 5, 6).

• "The record of Mr. Reaves' trial confirms the lack of preparation and investigation conducted by his attorney." Without a reasonable tactic or strategy, defense counsel failed to object to the introduction of inflammatory and improper evidence and failed to present adequate arguments to the jury. (*Id.* at Claim III ¶ 7).

• Defense counsel failed to adequately investigate Mr. Reaves' mental health problems and failed to present evidence of his intoxication at the time of the offense and its effect in conjunction with post-traumatic stress disorder. (*Id.* at Claim III ¶ 15).

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

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

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

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

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

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

• Defense counsel failed to adequately challenge the prosecution by failing to object to the testimony of Robert Ressler as an expert in military records, or the lack of qualification of Joseph Cinquino, a platoon leader of Mr. Reaves' unit for only a month, who testified he had never seen anyone suffering from PTSD, a claim almost certainly untrue in light of the incidence of PTSD in the Vietnam Era. (*Id.* at Claim XXII ¶¶ 21, 44).

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

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

3.850 Petition—Summary Denial Without Evidentiary Hearing. Despite stating he was "aware that a determination of reasonable trial strategy is best made after an evidentiary hearing," the judge decided "in this case, counsel's trial strategy is apparent from the face of the record." [12] (C-PCR1-7 at 1099). "The Defendant's claims either are procedurally barred, or the motion and the record conclusively demonstrate no entitlement to relief. Therefore, no evidentiary hearing is required." (*Id.* at 1103).

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

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

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

***12** (*Id.* at 1093).

With respect to the claim that "counsel should have obtained an expert to do a neuropsychological examination" and that petitioner "has hired a neuro-psychologist to present additional mitigating circumstances," the court stated: "The defendant does not identify either expert, or what conclusions and opinions the experts could relate, other than the psychologist will testify that Reaves suffers from post-traumatic stress disorder. This claim is also conclusory and legally insufficient." (*Id.* at 1093-94).

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

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

> [The failure to seek other experts] is conclusory. The Defendant fails to identify to what [*sic*] other experts would have testified, and how his attorney's alleged failure resulted in prejudice.
>
> This claim also is refuted by the record. Dr. Weitz, the defense expert, testified that Reaves suffered from poly-substance abuse, and an anti-social personality disorder. [13] Weitz also testified that he believed Reaves suffered from "Vietnam Syndrome," at the time of the murder. His ultimate conclusion was that the Defendant committed the murder while he was under

the influence of an extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of the law was impaired. Kirschner was successful in obtaining instructions on both these mitigation factors.

* * *

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

***13**

* * *

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

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

(*Id.* at 1099-1100) (citations omitted).

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

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

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

Reaves v. State, 826 So.2d 932, 936-37 (Fla. 2002) (citations omitted, emphasis added). The Supreme Court divided its opinion into several sections, including "A. Guilt Phase Ineffective Assistance of Counsel" and "B. Penalty Phase Ineffectiveness."

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

> Reaves also asserts that his trial counsel was ineffective in the penalty phase. To establish prejudice during the penalty phase, Reaves must show that "there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Cherry v. State,* 781 So.2d 1040, 1048 (Fla. 2000) (quoting *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052).
>
> Reaves first contends that counsel unreasonably failed to introduce various mitigating circumstances, like Reaves's [*sic*] impoverished childhood, his military background, his drug addiction, his sister's death which occurred shortly after he returned from Vietnam, and his giving assistance to a jail guard in 1973. The trial court denied this claim, finding that "[a]ny of the proposed additional evidence would have been either irrelevant or cumulative." We agree. Defense counsel presented numerous witnesses who discussed Reaves' childhood in detail and further testified as to his drug addiction when he returned home from Vietnam. Two men who served with Reaves also testified as to the conditions of fighting the war in Vietnam, including drug usage. A review of the record supports the

> trial court's finding that the evidence which he now seeks to introduce is cumulative. The only evidence identified in Reaves' postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a venereal disease, that one of his sisters died shortly after he returned from Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances. The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer.
>
> ***14**
>
> * * *
>
> Reaves also includes a one-sentence laundry list of other acts which he asserts constitute ineffective assistance of counsel, including counsel's "failure to provide Dr. Weitz with records from Washington, D.C.; failure to object to qualification of retired FBI agent Robert K. Ressler as an expert in military records; failure to object to the court rushing proceedings and denial of due process; [and] failure to object to the introduction of prejudicial and inflammatory testimony." These allegations are legally insufficient as Reaves has failed to describe these claims with any particularity and has failed to assert how these actions prejudiced his defense. Conclusory allegations are insufficient to meet a defendant's burden of establishing a prima facie case that he is entitled to postconviction relief. *Freeman,* 761 So.2d at 1061. Accordingly, we affirm the trial court's ruling on this issue.

Id. at 941-42 (footnotes omitted).

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

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

Id. at 937. The Supreme Court remanded the case to the trial judge for an evidentiary hearing on the claims related to whether counsel was ineffective for failing to raise a voluntary intoxication defense. The Court held that his argument that he was entitled to relief based on cumulative error was moot in light of its decision to remand the case for an evidentiary hearing. *Id.* at 941, 944.

<u>The State Evidentiary Hearing On Voluntary Intoxication.</u> On March 4-6, 2003, the trial court held an evidentiary hearing on Mr. Reaves' claim of ineffective assistance of counsel during the guilt phase for failing to put on a voluntary intoxication defense. During that hearing, Mr.

Reaves offered the testimony of several expert witnesses regarding his alleged intoxication and his mental status.

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

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

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

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

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

***16** Dr. Thomas Hyde, a behavioral neurologist, testified that he interviewed Mr. Reaves extensively and performed a full neurological evaluation. (*Id.* at 459). Dr. Hyde concluded that Mr. Reaves "had major recurring depression, poly substance abuse, probably met the criteria for cocaine dependence and alcohol dependence under the general term for poly substance abuse. He certainly had strong elements for post traumatic stress disorder, and he had a post concussive brain injury." (*Id.* at 465).

Also during the hearing, Mr. Reaves proffered evidence from Eugene Hinton. Mr. Hinton provided the defense with an affidavit that stated, among other things, that "Fat [Mr. Reaves] came to my house after the police got shot. He was scared and thought people wanted to kill him. Fat was all strung out. He had been smoking crack and pretty much out of his head...." (*Id.* at 426). This affidavit contradicted his 1987 trial testimony, which was read into the record at the 1992 re-trial. In advance of the state evidentiary hearing, Mr. Reaves filed a motion for a writ of habeas corpus ad testificandum seeking to have Mr. Hinton appear and testify. "The motion was denied, but the trial court allowed Hinton's affidavit to be used and argued." *Reaves v. State*, 942 So.2d 874, 881 (Fla. 2006).

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

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

***17 Supplement to 3.850 Petition—Department of Veterans Affairs 100% PTSD Disability Determination.** On December 10, 2003, Mr. Reaves' post-conviction counsel filed with the state court the determination by the Department of Veterans Affairs indicating Mr. Reaves had been approved for monetary benefits based upon a finding that he was 100% disabled due to PTSD related to his military service. (E-PCR2-2 at 281-82).

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

The Reasons for Decision are stated as follows:

> Service records show receipt of the Combat Infantryman Badge which is accepted as conclusive evidence of in service stressors.
>
> Most recent medical evidence identifies symptoms of high levels of autonomic arousal and depression; deficits in concentration, attending, and memory problems; presence of bizarre sensory experience (associated with intrusive PTSD symptomatology); hypervigilance; social avoidance and social isolation; fear of intimacy and social relations in general and intense fear of crowds; feelings of hostility, anxiety, and tension; intrusion and arousal symptoms; shame and guilt; mental confusion; persistent nightmares; hyperarousal, irritability, sleep disturbance, and rage reactions. There was no evidence that you are

> incompetent to handle financial affairs. GAF was reported at 45. Global Assessment of Functioning (GAF) score is used to report overall functioning and is to be estimated with respect only to psychological, social, and occupational functioning. This scale while not binding, is taken into consideration in determining the severity of disability for evaluation purposes.
>
> An evaluation of 100 percent is assigned from September 17, 2002, the date of your claim. An evaluation of 100 percent is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

(*Id.* at 289).

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

***18 The Florida Supreme Court.** The Florida Supreme Court affirmed the trial court's order denying Mr. Reaves' motion for post-conviction relief, "agree[ing] that counsel rendered reasonably effective representation." *Reaves v. State,* 942 So.2d 874, 878 (Fla. 2006). The Supreme Court stated, "Other than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense." *Id.* at 879. "Importantly, although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions." *Id.*

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

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

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

Id. at 881 (footnote omitted). [14]

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

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

> [D]efense counsel testified that he believed there was a basis for the voluntary intoxication defense but he viewed it as a secondary or fall-back defense that he would leave completely to the jury to figure out without his assistance. This was essentially his only explanation for not investigating or presenting the defense, and this explanation is patently unreasonable and inadequate in light of the facts and circumstances we outlined in our remand opinion and the additional facts and circumstances developed at the postconviction hearing.
>
> * * *
>
> As this Court explicitly detailed in our prior opinion, on this record, with its bizarre facts, voluntary intoxication jumps out as an explanation for the defendant's bizarre and deadly actions. And, while even that defense could not have exonerated the defendant from responsibility for the death of the officer, it could have resulted in a jury finding of guilt of a lesser degree of homicide. In a very real sense, the advancement of this defense represented a chance to save the appellant's life. It is simply not enough for counsel, as he admitted below, to leave it to the jury to figure out such an important defense on its own.

942 So.2d at 884.

II. STANDARD

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

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

15 In full, § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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

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

Id.

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

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

III. ANALYSIS

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

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

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

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

17 Alternatively, even if § 2254(d) were to be applied to the performance prong at the penalty phase, it is beyond dispute that in order to provide representation to a defendant in a capital trial, counsel must perform a thorough investigation where

it appears necessary to do so. *Frazier v. Bouchard,* 661 F.3d 519, 531 (11th Cir. 2011). The 3.850 petition alleged a failure to investigate available mitigation, including the impact of PTSD and cocaine, failure to consult necessary experts, failure to prepare Dr. Weitz, and, because of lack of investigation, a failure to challenge the qualifications and testimony of state witnesses. "If [petitioner's] allegations concerning counsel's performance are true—an assumption we must indulge because the state trial judge conducted *no evidentiary hearing* to evaluate the strength of [petitioner's] claims—there is support for [petitioner's] argument that his attorney failed to satisfy *Strickland*'s performance prong." *Id.* (emphasis added). The failure to evaluate Mr. Reaves' claims of deficient performance at the penalty phase, if taken as true based on the trial transcript alone, is an unreasonable application of *Strickland.*

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

***21** The Florida Supreme Court reversed the trial court's summary denial on the guilt phase involuntary intoxication issues.[18] 826 So.2d at 944. Following the evidentiary hearing, the state trial court found that Mr. Kirschner's decision to use the defense of voluntary intoxication as only a fail-back position and not to directly suggest voluntary intoxication to the jury, but to allow the jury to draw its own conclusion based upon the evidence presented was a reasonable trial strategy. (E-PCR 2-2 at 307). The state trial judge did not discuss *Strickland*'s prejudice prong at the guilt phase. The Florida Supreme Court found that "there is competent, substantial evidence in the record supporting the trial court's conclusion that trial counsel provided reasonably effective assistance of counsel." 942 So.2d at 880. The Florida Supreme Court concluded: "Because counsel's performance was not deficient, we need not address the prejudice prong." *Id.*

18 The Florida Supreme Court also denied Mr. Reaves' cumulative error claim (that "he is entitled to a new trial based on the impact of cumulative errors") as moot in light of the decision to remand the case for an evidentiary hearing. 826 So.2d at 944. It is not entirely clear whether this claim relates to the impact of cumulative errors throughout the trial and sentencing, or whether it is specific to counsel's cumulative errors at trial and sentencing. After the evidentiary hearing, neither the trial court nor the Florida Supreme Court ever addressed any cumulative error claim.

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

19 I previously denied Mr. Reaves' claim that his "trial was so infected with error that the cumulative nature of those errors rendered the trial unfair and its verdict and sentence unreliable." (DE 20 at 55) (finding that Mr. Reaves had not exhausted this claim). The previously rejected cumulative error claim (DE 1, Claim XVIII) is different than the one I address in this Order, which is the cumulative effect, or combined impact, of defense counsel's errors at the penalty phase and sentencing phase. (DE 1, Claim XXII); (Amended Petition, Claim XXII ¶ 48).

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

A. Performance

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

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

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

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

> *You know, the fact that it's in a book listed as a discrete diagnosis in the DSM, there's nothing magical about that —PTSD didn't exist before 1986. Does that mean that we didn't have battle fatigue after World War II? The books change. They have a big meeting of psychiatrists and psychologists and they vote and compromises are made. And so whether or not it's in the book or not doesn't mean that much to me.*
>
> -Jonathan Kirschner (DE 80 at 76).

Ignorance is not a strategy nor is it a foundation for competent representation. For a lawyer not to care whether a mental disorder is recognized by experts in the field is like a doctor expressing a lack of concern about whether stomach pain is caused by indigestion or cancer. As the prosecution hammered home, over and over again, PTSD is a recognized mental disorder —"Vietnam Syndrome" is not.

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

At the time of Mr. Kirschner's appointment as Mr. Reaves' counsel, the impact of trauma on Vietnam veterans and its consequences were well documented.[20] In the 1970s, President Carter and his Veterans Affairs ("VA") Administrator Max Cleland established the Readjustment Counseling Service within the Veterans

Administration to meet the needs of Vietnam veterans. The Service was renewed by Congress in 1981 and 1983, and Congress subsequently directed the creation of the National Center for PTSD under the Department of Veterans Affairs.

20 *See, e.g.*, Walker, *The Psychological Problems of Vietnam Veterans*, 246 J.A.M.A. 781 (1981); Wilson & Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 Behav. Sci. & L. 70 (1983); Smith, *Post Traumatic Stress Disorder—An Often Overlooked Element of Trauma*, Trial Mag. 92 (Feb. 1984); Walker & Cavenar, *Vietnam Veterans: Their Problems Continue*, 170 J. Nervous & Mental Disease 174 (1982); Michael J. Donaldson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415 (1988).

***23** Post-Traumatic Stress Disorder is an anxiety disorder induced by exposure to a traumatic event.[21] Although the psychological effects of combat had long been recognized in previous wars, the symptoms now associated with PTSD were known as "shell shock" or "battle fatigue." The American Psychiatric Association codified PTSD as a separate mental disorder in 1980.[22]

21 Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders—Text Revision* 463 (4th rev. ed. 2000) ("DSM-IV-TR").

22 Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 236-37 (3d ed. 1980) [hereinafter DSM-III].

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

23 Kulka, *supra* note 7, at xxvi (foreward by Alan Cranston).

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

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

24 Analysis suggested that some of this difference likely could be attributed to differing levels of combat exposure. *Id.* at 85, 267, 130 S.Ct. 447.

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

— twice as likely to have committed 13 or more violent crimes in the past years (14.4% v. 7.6%).

— one and a half times more likely to have been arrested or jailed (39.1% v. 27.7%); and

— three times more likely to have been convicted of a felony (8.8% v. 2.8%)

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

*24 **Alcohol and Drug Abuse.** The use of alcohol and drugs in individuals with PTSD often reflects attempts at self-medication in an effort to increase denial and numbing, damp down nightmares and flashbacks, and diminish symptoms of chronic hyperarousal, including irritability, hypervigilance, and startle reactions. *Id.* at 46, 130 S.Ct. 447. Male Vietnam theatre veterans with PTSD are two to six times more likely to abuse alcohol or drugs than those without the disorder. *Id.* at 274.

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

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

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

25 The American Bar Association provides that "[i]n cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("ABA Guidelines") at 2.1 (Number of Attorneys Per Case). The Commentary states: "[T]he defendant is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate defense at trial and an adequate appeal. In the context of capital litigation, this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney." *Id.* at Commentary to 2.1. Guideline 5.1 (Attorney Eligibility) provides that "[l]ead trial counsel assignments should be distributed to attorneys who: (iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder and an additional five were felony jury trials...." *Id.* at 5.1.

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

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

*25 However, in the files obtained by Mr. Kirschner from previous counsel were witness statements from Mr. Reaves' mother, brother, and sister, as well as statements by Mr. Reaves himself, that would have, according to Mr. Weitz, satisfied that missing criteria and allowed him to diagnose PTSD. (*Id.* at 119, 135). For example, one of the investigative summaries found in Mr. Kirschner's files from the investigator that had been hired by Mr. Reaves' former counsel was from an interview with Mr. Reaves' brother, Byron Reaves. Byron shared a bedroom with Mr. Reaves and told the investigator that his brother had dreams of combat situations that would wake him during the night and did most of his sleeping during the day because he could not sleep at night. Mr. Kirschner testified: "Again, I don't remember ever talking to Byron Reaves. And, you know, that's part of the mystery to me as to why I didn't follow through on some of these things.

And I can't—I don't have a good answer for that." (*Id.* at 72, 130 S.Ct. 447).

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

26 Mr. Kirschner and Dr. Weitz's case files supported their testimony. For example, Mr. Kirschner's case file included this information (Kirschner testimony at 28), while Dr. Weitz's file did not (Weitz testimony at 81-84).

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

Dr. Weitz also testified that, in his 15 years working with the Veterans Administration, he found that 80-85% of combat veterans had concurrent drug and alcohol abuse. "They used it in country. They used it coming back." (Weitz testimony at 110). Mr. Kirschner, at least at one point, recognized the importance of the issue and considered retaining an expert in addiction. (Kirschner testimony at 32-33). His notes reflect that he even spoke by phone with the head of the Center for Addiction studies at Harvard, yet he never followed through. (*Id.* at 78, 130 S.Ct. 447). His excuse? He was expensive. "I didn't think the judge would approve it." (*Id.* at 78-79, 130 S.Ct. 447). He continued: "What I don't understand is why I didn't say, okay, let's get closer to home. Check Jupiter. Check Hope Sound. Check—you know, see if there's anybody closer to home that charges a lot less that I can run a motion and maybe get someone appointed. And that never happened." (*Id.* at 79, 130 S.Ct. 447). Mr. Kirschner was directly asked: "there was one inquiry with one expert who you thought was too expensive, was that any reason not to look further?" (*Id.* at 88, 131 S.Ct. 770). Mr. Kirschner's response was telling:

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

(*Id.* at 88-89).[27]

27 Subsection D.7 (Expert Assistance) of ABA Guideline 11.4.1 (Investigation) provides that "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for (A) preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; (D) presentation of mitigation." ABA Guideline 11.4.1, *supra* note 25. The Commentary states: "The need for a standard mandatory investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation. Inexperienced counsel—and even counsel experienced in non-capital cases—'may underestimate the importance of developing meaningful sources of mitigating evidence....' *See* Guideline 11.8 and Commentary." *Id.* at Commentary to 11.4.1. "Resources that counsel needs to pursue a proper investigation should be sought early in the case. The type or amount of assistance than can or will be made available varies from jurisdiction to jurisdiction; counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial." *Id.*

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

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

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

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

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

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

28 His defense of excusable homicide never had any chance for success.

(2) Just Showing Up Isn't Enough

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

-Jonathan Kirschner (DE 80 at 35).

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

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

29 "Counsel should seek to ensure that the client is not harmed by improper, inaccurate, or misleading

> information being considered by the sentencing entity or entities in determining the sentence to be imposed." ABA Guidelines 11.8.2 (Duties of Counsel Regarding Sentencing Options, Consequences and Procedures), *supra* note 25.

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

> Q. Turning to the area of your experience in dealing with military records: Tell the jury your experience dealing with military records.
>
> A. The two years of my enlisted time, when I performed as an army personnel specialist. I had two years of actual "hands on" work with military records. My primary duty was to maintain the officer's qualification from and the enlisted D.A. Form 20, which is the enlisted qualification form.
>
> And to maintain them within the unit that I was in and doing other specialty work in Personnel as well. Beyond that, as an officer for the other eight years I routinely handled records of people in my unit.
>
> * * *
>
> Q. Has your knowledge of military records assisted psychiatrists and psychologists in referencing—and juries—and understanding the area of post-traumatic stress disorder?
>
> A. Yes, it has.
>
> * * *
>
> Q. Could you explain to the jury how your knowledge of military records affects a jury's ability to understand whether post-traumatic stress disorder exists or not?
>
> A. Well, military records are rather complicated and they are somewhat cryptic, I guess you may say. To a non-military reader, it would be very difficult to just pick up a record and read through it to understand what really is going on in the person's life that is the subject of those records.
>
> The basic words of interest are the D.A. Form 20, which is the enlisted qualification record, and the D.D. Form 214, which is a separation record. Then beyond that you have a number of orders, special orders and documents in the record that then can be matched to the 214 and the Form 20.
>
> ***28** Q. What is your total years of experience with the Military, sir?
>
> A. Actually, including my Reserve time, thirty-five years. I will have thirty-five years next month.
>
> Prosecutor: Your Honor, at this point the State would tender the Colonel as an expert in military records.
>
> The Court: Do you wish to Voir Dire?
>
> Mr. Kirschner: As long as it is limited to military records, no sir. We take no position.
>
> The Court: He is being qualified as an expert in military records?
>
> Prosecutor: Yes, sir.
>
> The Court: All right. Then he will testify as an expert ...

(*Id.* at 2153-55). Without objection, the "records expert" testified that Mr. Reaves' combat-related awards and decorations "were rather unremarkable and very routine for a person performing in Vietnam." (*Id.* at 2163).

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

But the U.S. Army Human Resources Command, Awards, and Decorations Branch indicates that the CIB, established in 1943, is only granted to infantrymen "engaged in active ground combat."[30] The operative word "in active" connotes actual combat. "U.S. Army Vietnam regulations went so far as to require documentation of the type and intensity of enemy fire encountered by the Soldier." *Id.* As the U.S. Army's website explains:

30 Awards and Decorations Branch—Combat Infantry Badge CIB, U.S. Army Human Resources Command Website, https://www.hrc.army.mil/TAGD/Awards % 20and% 20Decorations% 20Branch% 20-% 20Combat% 20Infantry% 20Badge% 20CIB (last visited Feb. 23, 2015).

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

(1) Be an Infantryman satisfactorily performing infantry duties.

(2) Assigned to an infantry unit during such time as the unit is engaged in active ground combat.

(3) Actively participate in such ground combat. Campaign or battle credit alone is not sufficient for award of the CIB."

Id.

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

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

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

Id.

31 U.S. Army Service, Campaign Medals and Foreign Awards Information, Air Medal, http://veteranmedals.army.mil/awardg&d.nsf/374fbd6468877ab385256b6600590a90/f899b90af9284b6785256b660063cfbd!OpenDocument (last visited Feb. 23, 2015).

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

32 "And his father would have nodded, knowing full well that many brave men do not win medals for their bravery, and that others win medals for doing nothing.... He would've explained to his father that none of these decorations was for uncommon valor. They were for common valor. The routine, daily stuff —just humping, just enduring ... and if his father were to ask, he would've explained what each signified and how proud he was of all of them, especially the Combat Infantryman's Badge, because it meant he had been there as a real soldier and had done all the things soldiers do, and therefore it wasn't such a big deal that he could not bring himself to be uncommonly brave." O'Brien, *supra* note 2, at 135.

Then, the following exchange occurred:

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

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

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

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

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

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

> Q. Now, Dr. Weitz has talked about Vietnam Syndrome. Is there such a thing recognized within this book?
>
> A: No, sir.

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

> Q. Do you have any opinions as to the defendant's mental status at the time of the offense on September 23, 1986, when the defendant shot Deputy Sheriff Rackoski four times in the back?
>
> * * *
>
> A. From the documents—I have never examined this person, but from the documents and the sworn statements it's my opinion that he was experiencing anxiety at the time. It's my opinion that he was not incompetent. It's my opinion that he understood right from wrong and understood the nature and consequences of his behavior.
>
> And he, in my opinion, was really not suffering from a psychiatric illness.
>
> Q. Why then, did the defendant from a psychological viewpoint, shoot Deputy Sheriff Raczkowski?
>
> A. I should tell you that we have a diagnosis in psychiatry that is called Adult Antisocial Behavior. Which is different from anti-social behavior disorder.
>
> You asked the question: Why did he shoot this man. This man was executed by a drug dealer to cover up the possibility of his going back to jail, and he was motivated to be selfish, to protect himself, and do away with the witnesses. It was a judgment call and he judged and then carried out the execution based on his judgment.

(*Id.* at 2231).

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

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

> A. My opinion is that this man was executed while begging for his life and making an attempt to stay alive.
>
> I do not believe the discussion that has been held on the fear—that he saw fear in this man's eyes and therefore he had to do something to protect himself. I think he

saw a man acting normally in a state of emergency and to defend himself.

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

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

(*Id.* at 2243).

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

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

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

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

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

The Eleventh Circuit has said that in reviewing a habeas petition, "[a] piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983).

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

33 *See also Libberton v. Ryan*, 583 F.3d 1147, 1166 (9th Cir. 2009) ("But ineffectiveness is often manifested earlier. For example, defense counsel may have failed to discover impeaching evidence that could have been used against an unfavorable witness who testified during the guilt phase, and which would have portrayed the defendant in a light that would have assisted him at the penalty phase."); *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005) ("The combination of counsel's guilt and penalty phase deficiencies, including their failure to investigate their client's mental health and failure to overcome a complete communication failure, combined to deny Daniels effective representation and prejudiced the outcome of his penalty phase trial.").

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

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

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

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

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

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

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

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

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

34 During the Iran-Contra hearings, Brendan Sullivan was Col. Oliver North's attorney. The Committee Chairman, Sen. Inouye (D. Ha.), suggested after a Sullivan objection that North could take care of himself. "Let the witness object if he wishes to," the Senator told Sullivan. "Well, sir," Sullivan replied, "I'm not a potted plant. I'm here as the lawyer. That's my job." *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. Times, July 10, 1987.

Voluntary intoxication was raised for the first time during the charge conference and by the trial judge, not Mr. Kirschner. It was only at that point that he asked for the instruction. Characterizing Mr. Kirschner's "decision" as a "back up" strategy is an after-the-fact rationalization of counsel's failure to investigate a viable defense and an unreasonable application of *Strickland. See Wiggins*, 539 U.S. at 526-27, 123 S.Ct. 2527 ("[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.").

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

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

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

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

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

B. Prejudice

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

***34** Because the state courts adjudicated the prejudice claim on the merits, albeit without an evidentiary hearing, AEDPA governs my review. "AEDPA 'imposes a highly deferential standard for evaluating state court rulings' and 'demands that state-court decisions be given the benefit of the doubt.' " *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1253 (11th Cir. 2013) (quoting *Renico v. Lett*, 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)), *cert. denied*, 135 S. Ct. 67 (2014). At the same time, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

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

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

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

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

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

35 I recognize that, when the Florida Supreme Court first determined in 2002 that Mr. Reaves' proposed evidence was cumulative, the Florida Supreme Court did not have the evidence from the hearing on voluntary intoxication or the PTSD disability determination. However, in 2006, the Florida Supreme Court had all of that evidence and unreasonably did not reconsider its finding of cumulativeness. Although Mr. Reaves' 3.850 petition was resolved piecemeal, with the Florida Supreme Court addressing certain claims in 2002 and other claims in 2006, the Florida Supreme Court had a duty to consider the entire state court record when it finally dismissed Mr. Reaves 3.850 petition.

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

> Q. And is post-traumatic stress syndrome recognized by both the psychiatric and psychological experts within the field and listed within the Diagnostic and Statistical Manual of Mental Disorders known as DSM-III-R that I am holding?
>
> A. Yes.
>
> Q. Now, Dr. Weitz has talked about Vietnam Syndrome. Is there such a thing recognized within this book?
>
> A. No Sir.

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

> Q. What did the deposition of Dr. Weitz go into?
>
> A. It went into a concept that I think he is developing concerning post-traumatic stress syndrome as it relates to Vietnam veterans. I think he is inventing some concept that he is trying to get other people to believe.

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

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

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

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

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

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

(A-R15 at 2295-96).

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

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

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

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

(2) An Unreasonable Application of *Strickland*.

In two cases particularly pertinent here, the Supreme Court has found state court prejudice decisions also to be an unreasonable application of *Strickland* under § 2254(d)

(1). *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Porter v. McCollum*, 558 U.S. 30, 130 (S.Ct. 447, 175 L.Ed.2d 398 2009). In *Williams*, the state supreme court had held that "the excluded mitigating evidence—which it characterized as merely indicating 'that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment,'—'barely would have altered the profile of this defendant that was presented to the jury.' " 558 U.S. at 372, 130 S.Ct. 876. The Supreme Court found that the state court had "ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity," and that it was "unreasonable to characterize the additional evidence as coming from 'mostly relatives.' " *Id.* at 373, 130 S.Ct. 876 n.5.

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

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

***37** In Mr. Reaves' case, the Florida Supreme Court unreasonably ignored the significant expert testimony presented in the state habeas hearing on voluntary intoxication that PTSD and cocaine affected his actions. The VA's disability determination was either overlooked or intentionally ignored. In saying that ample evidence of Vietnam and Mr. Reaves' role in the war had been presented, the Court failed to recognize that the relevance was not only that he served his country, but also that he had been mentally injured in doing so. The Florida Supreme Court rendered a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *Strickland v. Washington.* [36]

36 Again, I recognize that the record was further developed after the Florida Supreme Court found in 2002 that Mr. Reaves' proposed evidence was cumulative. However, the evidence from the state evidentiary hearing only confirmed Mr. Reaves' allegations and highlighted counsel's failures, which affected the penalty phase. The Florida Supreme Court's failure to reconcile its 2006 opinion with its 2002 opinion, as well as explain the more fully developed state record's impact on its 2002 opinion, is unreasonable. As Justice Anstead explained, "[a]ll that has been added to the record is *more* evidence, expert and otherwise, of the defendant's cocaine addiction and intoxication at the time of the offense." 942 So.2d at 882.

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

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

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

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

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

First, the obvious difference, a double murder with days of preparation and premeditation, 558 U.S. at 31, 130 S.Ct. 447, compared to an unplanned encounter measured in moments. Porter was convicted of two counts of first-degree murder for killing his former girlfriend and her boyfriend. *Id.* at 31, 130 S.Ct. 447. As his relationship with his girlfriend was ending, Porter threatened to kill her but then left town. *Id.* Three months later he returned, tried to see her, but her mother told him she did not want to see him. *Id.* A few days later, Porter suggested to a friend that she would read about him in the papers. *Porter v. State*, 564 So.2d 1060, 1061 (Fla. 1990). He asked another friend for a pistol, and when the friend refused, the pistol disappeared from his house. *Id.* He drove by his former girlfriend's house each of the two days before the shooting, and the night before the murder, he tried to visit her but she called the police. *Id.* The next morning, after drinking heavily the night before, Porter shot her in her home, struggled with her boyfriend, forced him outside the house, and shot him. 558 U.S. at 31-32, 130 S.Ct. 447.

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

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

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

37 The United States Supreme Court found this explicit state court finding unreasonable:

> [N]either the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to [the expert's] testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that [the expert] used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.

Porter, 558 U.S. at 42-43, 130 S.Ct. 447.

Applying *Strickland*, in order to assess whether there was a reasonable probability that Porter would have received a different sentence, the Supreme Court said it would "consider 'the totality of the available mitigation evidence —both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.' " *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (quoting *Williams*, 529 U.S. at 397-98, 120 S.Ct.

1495). The Supreme Court found that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41, 130 S.Ct. 447. On the mitigating side, the Supreme Court pointed to Porter's military service in Korea and struggles to regain normalcy upon return from the war, a childhood history of physical abuse, his brain abnormality, difficulty in reading and writing, and limited education. *Id.*

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

> ***39** [T]he relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.

558 U.S. at 43-44, 130 S.Ct. 447. The Court reversed the Court of Appeals' judgment affirming Porter's sentence of death. *Id.*

38 Both Minnesota and California have enacted statutes explicitly listing mental illness and military service as mitigating sentencing factors. *See* Cal. Penal Code § 1170.9(a) (West 2011); Minn. Stat. Ann. § 609.115(10)(a) (West 2011). Federal Sentencing Guidelines have also been amended to recognize military service as an appropriate mitigating factor: "Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." U.S. Sentencing Guidelines Manual § 5H1.11 (2011). *See also* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 Cardozo L. Rev. 53 (Oct. 2012).

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

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

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

During the federal evidentiary hearing, Mr. Reaves called five experts, four of whom had testified in the state evidentiary hearing on voluntary intoxication.[39] Dr. Thomas Hyde, a behavior neurologist, affiliated with John Hopkins University School of Medicine, diagnosed Mr. Reaves with Post-Traumatic Stress

Disorder, major recurrent depression and cocaine dependency, with neurological findings associated with frontal lobe dysfunction. Dr. Richard Dudley, a physician with a specialty in psychiatry, diagnosed Mr. Reaves with Post-Traumatic Stress Disorder, which through interaction with cocaine, caused him to be clinically paranoid. According to Dr. Dudley, PTSD and cocaine interacted with each other, making each worse. Dr. David Price, a forensic psychologist specializing in patients with PTSD, after examining Mr. Reaves, administering the Minnesota Multiphasic Personality Inventory II and Millon Clinical Multiaxial Inventory-III, and interviewing family members and persons serving with Mr. Reaves in Vietnam, also diagnosed Mr. Reaves with PTSD. Dr. Barry Crown, a psychologist specializing in neuropsychology and addictionology and former clinical director of the National Institute of Mental Health Drug Abuse Training Center, testified about Mr. Reaves' extensive drug use and it was also his opinion that in conjunction with PTSD, it had impaired Mr. Reaves' reasoning and judgment and caused paranoia.

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

***40** Dr. Hyde, Dr. Dudley, and Dr. Price each testified that Mr. Reaves met two of the Florida statutory mental health mitigating circumstances.[40] It was their opinion that at the time of the crime, Mr. Reaves was under extreme mental or emotional disturbance and his capacity to conform his conduct to the law was substantially impaired. (DE 77 at 23, Hyde testimony); (*Id.* at 106, Dudley testimony); (*Id.* at 189-90, Price testimony). I found their testimony credible and convincing.

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

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> * * *
>
> (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
>
> * * *
>
> (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

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

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

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

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

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

***41** Just as the Supreme Court said in *Porter*, there exists too much mitigating evidence that was not presented to be ignored. The medical testimony is compelling and should be considered by the sentencer.[42] Conversely, the aggravating side of the ledger is less substantial.

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

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

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

Finally, the prejudice in this case is not only the mitigation Mr. Reaves' counsel failed to introduce, but also the false and inflammatory evidence the prosecution was allowed to present while Mr. Kirschner silently watched. In Porter's case, the Supreme Court acknowledged that PTSD is not uncommon among veterans returning from combat. *Porter*, 558 U.S. at 35 n.4, 130 S.Ct. 447.[43] Yet, the state presented a lay rebuttal witness (a former military officer, who according to a member of Mr. Reaves' squad, never left the base camp) who testified he never saw anyone with PTSD. The Supreme Court pointed to Porter's receipt of the Combat Infantryman Badge as a testament to his participation in combat, 558 U.S. at 35, 130 S.Ct. 447, yet according to the demonstrably false testimony of the State's "records expert," everyone in Vietnam received one.

43 The Supreme Court cited the testimony of Eric Shinseki, Secretary of Veterans Affairs, reporting that approximately 23% of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility have been preliminarily diagnosed with PTSD. 558 U.S. at 35 n.4, 130 S.Ct. 447. Further, in July 2009, the Army's Surgeon General released a lengthy report of an investigation conducted after eight homicides were perpetrated by six soldiers from units at Fort Carson, Colorado between November 2008 and May 2009. Among its conclusions: "Survey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes;" "Psychopathology (particularly alcohol/drug disorders, mood disorders, and anxiety disorders) are clear risk factors for aggression individually and particularly in conjunction with each other;" "Nearly 80 percent (11 of 14) of alleged homicide perpetrators in this analysis had documented alcohol or drug abuse problems." Epidemiological Consultation 14-HK-OB1U-09, Investigation of Homicides at Fort Carson, Colorado, U.S. Army Center for Health

Promotion and Preventative Medicine, July 2009. *See also* David Phillips, *Lethal Warriors: When the New Band of Brothers Came Home* 241 (Palgrave Macmillan 2010) ("It is not, in most cases, that war took guys who otherwise would have been Eagle Scouts and Nobel Prize winners and turned them into drug-addled homicidal maniacs. It is that war nudged everybody toward the edge. Guys who might have struggled with minor crime ended up committing something major, like murder.").

***42** In closing, a few words about the last testimony the sentencing jury heard before deciding Mr. Reaves' fate. As a trial judge, I find it reprehensible; in my view its prejudice is hard to overstate. Without any objection, the prosecutor elicited testimony in the guise of expert opinion from a medical doctor that the Deputy was "executed while begging for his life ... by a drug dealer to cover up the possibility of his going back to jail ... to do away with the witnesses." "It was a judgment call and he judged and then carried out the execution based on his judgment."

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

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

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

IV. CONCLUSION

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

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

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

ORDERED AND ADJUDGED that

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

shall issue upon William Reaves' claim of ineffective assistance of counsel at the penalty phase.

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

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

All Citations

Slip Copy, 2015 WL 13657202

End of Document

APPENDIX G

872 F.3d 1137
United States Court of Appeals,
Eleventh Circuit.

William REAVES, Petitioner–Appellee,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent–Appellant.

No. 15-11225
|
(September 28, 2017)

Synopsis

Background: State prisoner petitioned for federal habeas corpus relief, alleging ineffective assistance of trial counsel, after he was convicted of first degree murder and sentenced to death, 639 So.2d 1. The district court granted the petition as to prisoner's guilt-phase claims. State appealed. The Court of Appeals, 717 F.3d 886, vacated and remanded. On remand, the United States District Court for the Southern District of Florida, No. 2:10–cv–14046–DMM, Donald M. Middlebrooks, J., granted the petition. State appealed.

Holdings: The Court of Appeals, Ed Carnes, Chief Judge, held that:

[1] district court could not grant relief to state prisoner on his federal habeas petition on basis that errors of trial counsel at guilt and sentence phases of his capital murder trial rendered result of sentence phase unfair;

[2] state appellate court did not have duty when case returned from limited remand for evidentiary hearing on particular issue to sift through record looking for basis to upend its earlier decision on different issues without even being asked to do so, and federal court on habeas review could not consider part of state court record that was created in connection with another claim that did not exist when state court decided that claim; and

[3] conclusion by Florida Supreme Court on ineffective assistance of counsel claim that proposed additional evidence about petitioner's mental health and substance abuse at penalty stage of his capital murder trial was cumulative was not contrary to, and it did not involve unreasonable application of, clearly established federal law and it was not based on unreasonable determination of facts.

Reversed.

West Headnotes (21)

[1] **Habeas Corpus**
Review de novo
Habeas Corpus
Clear error

When reviewing a district court's grant or denial of habeas relief, the Court of Appeals reviews questions of law and mixed questions of law and fact de novo, and findings of fact for clear error. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[2] **Criminal Law**
Deficient representation and prejudice in general

A habeas petitioner alleging ineffective assistance of counsel must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

4 Cases that cite this headnote

[3] **Criminal Law**
Deficient representation in general

Counsel's performance was deficient only if counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. U.S. Const. Amend. 6.

3 Cases that cite this headnote

[4] **Criminal Law**
Prejudice in general

A defendant can establish prejudice on an ineffective assistance of counsel claim only by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S. Const. Amend. 6.

4 Cases that cite this headnote

[5] **Habeas Corpus**
Issues, proof, and variance

District court could not grant relief to state prisoner on his federal habeas petition on basis that errors of trial counsel at guilt and sentence phases of his capital murder trial rendered result of sentence phase unfair, since only claim that prisoner raised was that trial counsel was ineffective at penalty phase for failing to investigate and present mental health mitigating evidence relating to prisoner's post-traumatic stress disorder (PTSD) and polysubstance addiction. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Hearing, evidence, and presentation of arguments

To prevail on a particular theory of liability, a party must present that argument to the district court; a district court cannot concoct or resurrect arguments neither made nor advanced by the parties.

Cases that cite this headnote

[7] **Habeas Corpus**
Adequacy or effectiveness of state proceeding;full and fair litigation

If a state court has not adjudicated the merits of a claim that was properly presented, federal habeas review is not subject to the deferential standard that applies under Antiterrorism and Effective Death Penalty Act (AEDPA); instead, the claim is reviewed de novo. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[8] **Habeas Corpus**
Counsel

On federal habeas review, federal court had to afford deference to both performance and prejudice requirements on Florida prisoner's penalty stage ineffective assistance of counsel claim, since Florida Supreme Court rejected both of those parts in its decision on the merits. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

[9] **Criminal Law**
Deficient representation and prejudice in general

An ineffective assistance claim has two parts: (1) whether counsel performed deficiently and, if so (2) whether the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Determination

A court need not address the performance prong of an ineffective assistance of counsel claim if the defendant cannot meet the prejudice prong, or vice versa, because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[11] **Habeas Corpus**
Counsel

When a state court's decision on an ineffective assistance claim clearly rests on only one prong of the *Strickland* test, a federal habeas court conducts a plenary review of the other one, if necessary. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Habeas Corpus**
Counsel

A state court need not explain every step of its decision-making process to adjudicate every prong of an ineffective assistance claim; Antiterrorism and Effective Death Penalty Act (AEDPA) deference is afforded to a state court even where the state court's decision is a summary adjudication or engages in only some evaluation. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

[13] **Habeas Corpus**
Reception of evidence;affidavits; matters considered

Habeas Corpus
Criminal Cases

State appellate habeas court did not have duty when case returned from limited remand for evidentiary hearing on particular issue to sift through record looking for basis to upend its earlier decision on different issues without even being asked to do so, and federal court on habeas review could not consider part of state court record that was created in connection with another claim that did not exist when state court decided that claim. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[14] **Habeas Corpus**
Post-trial proceedings;sentencing, appeal, etc

Conclusion by Florida Supreme Court on ineffective assistance of counsel claim that proposed additional evidence about petitioner's mental health and substance abuse at penalty stage of his capital murder trial was cumulative was not contrary to, and it did not involve unreasonable application of, clearly established federal law and it was not based on unreasonable determination of facts, and therefore petitioner was not entitled to federal habeas relief; when mental health was at issue, counsel did not provide ineffective assistance on basis that expert may have existed who would have testified more favorably than expert who actually was called. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[15] **Courts**
Dicta

Habeas Corpus
Federal Review of State or Territorial Cases

Habeas Corpus
Federal or constitutional questions

The phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[16] **Habeas Corpus**
Federal or constitutional questions

On a federal habeas petition, to result in a decision that was "contrary to" clearly established federal law, the state court must have arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or decided a case differently than the Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[17] **Habeas Corpus**
Federal Review of State or Territorial Cases

On a federal habeas petition, to result in a decision that involved an "unreasonable application of" clearly established federal law, the state court must have identified the correct governing legal principle from the Supreme Court's decisions but unreasonably applied that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[18] **Habeas Corpus**

Federal Review of State or Territorial Cases

Federal habeas relief may not be justified on the basis that the federal court would have reached a different decision or is convinced that the state court decision is wrong. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[19] **Habeas Corpus**

Federal Review of State or Territorial Cases

A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance; if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination. 28 U.S.C.A. § 2254(d)(2).

Cases that cite this headnote

[20] **Criminal Law**

Adequacy of investigation of sentencing issues

While a complete failure to investigate mitigating evidence would be deficient performance, counsel's decision to not investigate for more mitigating evidence of the same kind counsel had already discovered is not ineffective if the additional evidence would be cumulative of the evidence already discovered. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[21] **Habeas Corpus**

Reception of evidence;affidavits; matters considered

Federal appellate court on habeas review of penalty phase ineffective assistance claim could not consider evidence presented at state court evidentiary hearing on guilt stage ineffectiveness claim or at subsequent federal evidentiary hearing, since that evidence was not before state appellate court when it denied relief on penalty phase ineffective assistance claim. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

***1140** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 2:10–cv–14046–DMM

Attorneys and Law Firms

Michael Chance Meyer, William McKinley Hennis, III, Neal A. Dupree, Rachel Lawrence Day, Capital Collateral Regional Counsel—South, Fort Lauderdale, FL, for Petitioner–Appellee.

Leslie Teresa Campbell, Attorney General's Office, West Palm Beach, FL, Ryan L. Butler, State Attorney's Office, 19th Circuit, Fort Pierce, FL, Respondent–Appellant.

Before ED CARNES, Chief Judge, TJOFLAT and MARCUS, Circuit Judges.

Opinion

ED CARNES, Chief Judge:

William Reaves, a Florida prisoner who has been sentenced to death for the murder of a police officer, sought in the Florida courts habeas relief from his conviction and sentence. When he appealed the summary denial of one of his state post-conviction motions, the Florida Supreme Court held that one claim was moot and remanded another claim for an evidentiary hearing. It affirmed on the merits the denial of all of the other claims that Reaves had appealed, including a claim that trial counsel had rendered ineffective assistance at the penalty stage by not developing and presenting certain mitigating circumstances evidence. Reaves v. State, 826 So.2d 932, 941–44 (Fla. 2002). It also affirmed the state trial court's rejection of the penalty stage ineffectiveness claim because "the proposed mitigation evidence was either irrelevant, cumulative of evidence already presented at sentencing, or would not have affected the balance of aggravating and mitigating circumstances." See Reaves v. Sec'y, Fla. Dep't of Corr., 717 F.3d 886, 893 (11th Cir. 2013) (explaining that was the basis of the Florida Supreme Court's rejection of the claim).

The one claim that was not finally disposed of by the Florida Supreme Court's 2002 decision was a guilt stage ineffective assistance claim involving the failure of trial counsel to pursue a voluntary intoxication defense. Reaves, 826 So.2d at 937–39, 944. The court remanded the case to the trial court for it to conduct an evidentiary hearing on that guilt stage claim. ***1141** Id. at 944; see Reaves, 717 F.3d at 893–94 (explaining that the Florida Supreme Court "conclude[d] that an evidentiary hearing was needed to resolve Reaves' claim that counsel was ineffective in failing to present a voluntary intoxication defense during the guilt phase of the trial, and it remanded the case for that purpose").

At the evidentiary hearing in the state trial court on remand, Reaves presented evidence that was relevant to the guilt stage ineffectiveness claim involving the voluntary intoxication defense, which was the reason the case was there. He argued to the state trial court that in view of the evidence that he had presented on that claim at the evidentiary hearing he was entitled to relief from the murder conviction. Even though some of the evidence that he presented in support of that guilt stage claim was also relevant to the penalty stage ineffective assistance claim about mitigating circumstances, Reaves did not attempt to re-assert that penalty stage claim during the remand proceedings, nor did he argue that it or any other claim in his Rule 3.850 motion entitled him to relief from his sentence. (Of course, having his conviction set aside on the guilt stage claim he pursued would automatically overturn his death sentence.)

After the evidentiary hearing on remand, the state trial court again ruled that Reaves was not entitled to relief on his guilt stage ineffective assistance claim relating to the voluntary intoxication defense and reiterated its denial of his Rule 3.850 motion. [1] The trial court on remand did not revisit the penalty stage ineffective assistance of counsel claim involving mitigating circumstances nor mention that claim or any sentence stage claim. Reaves appealed again.

1 The remanded claim was based on counsel's failure to raise a voluntary intoxication defense and his failure to retain experts to testify in support of that guilt stage defense. After considering the evidence Reaves had presented at the hearing on remand, the trial court ruled: "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 Defendant's motion is denied."

In his second, or post-remand, appeal from the denial of state collateral relief, Reaves did not re-assert or re-argue the penalty stage ineffective assistance claim that the Florida Supreme Court had rejected on the merits in the first appeal. Instead, as he had in the remand proceeding in the trial court, the only claim he asserted and argued in the state supreme court was the guilt stage ineffective assistance claim involving the voluntary intoxication defense. That was the only claim that court had not rejected on the merits or as moot in his first appeal from the denial of state collateral relief. And in the second appeal that guilt stage ineffectiveness claim was the only one the Florida Supreme Court considered. See Reaves, 942 So.2d 874 (Fla. 2006). The court did not take it upon itself to resurrect and reconsider any claims that it had decided in the first appeal, including the penalty stage ineffectiveness claim.

After the Florida Supreme Court rejected Reaves' appeal from the denial of his guilt stage ineffective assistance claim on remand, he filed in federal district court a 28 U.S.C. § 2254 petition for writ of habeas corpus. He raised 25 claims in his petition, including the penalty stage ineffectiveness claim involving mitigating circumstances. The district court did not grant relief on that claim but instead granted relief on a claim that was not one of the 25 claims that Reaves had raised in his federal habeas petition or otherwise in the proceeding. Not only that, but in granting relief the district court relied on ***1142** evidence that had not even been before the Florida Supreme Court in the first appeal from the denial of state collateral relief. We reverse.

I. FACTS AND PROCEDURAL HISTORY

We have recounted the facts underlying Reaves' conviction in considerable detail before. See Reaves, 717

F.3d at 889–90. So we will assume familiarity with that recounting and not repeat it in all of its detail here. Early in the morning on September 23, 1986, Reaves tried to call a taxi to pick him up at a convenience store. Id. at 889. When the taxi did not show up quickly enough he dialed 911, but he hung up before speaking to the operator. Id. In response to the hang-up call Deputy Richard Raczkoski was dispatched to the convenience store, where he helped Reaves contact a taxi. Id. While they waited for the taxi to arrive, a .38 caliber pistol fell out of Reaves' pants, and a brief struggle ensued as Deputy Raczkoski tried to stop Reaves from grabbing the pistol. Id. Reaves got ahold of the pistol and, after Deputy Raczkoski turned to run, shot the deputy four times in the back. Id. He discharged the pistol a total of seven times, with each shot requiring a separate pull of the trigger. Id.

Reaves later told a friend that Deputy Raczkoski had attempted to draw his own weapon and that he had pointed his gun in the deputy's face and warned him: "I wouldn't do that if I were you." Id. at 889–90. Reaves also told his friend that when the deputy pleaded for his life, he responded: "One of us got to go, me or you." Id. at 890. In a voluntary confession to the police, Reaves said that he "couldn't let that officer get that gun" because he believed that he was facing "a mandatory three years" for being a felon in possession of a firearm. Id.

A. Reaves' State Court Proceedings

1. Criminal Trials and Appeals

In 1987 Reaves was tried, convicted, and sentenced to death for premeditated first degree murder. Id. The Florida Supreme Court reversed his conviction and remanded for a new trial on a ground not relevant to this appeal. Reaves v. State, 574 So.2d 105, 107–08 (Fla. 1991). Reaves was retried in 1992. Reaves v. State, 639 So.2d 1, 3 n.1 (Fla. 1994). At trial counsel's request the state trial court reappointed Dr. William Weitz, a clinical psychologist, as a mental health expert for the defense. Reaves, 717 F.3d at 891. Dr. Weitz had examined Reaves before his first trial in 1987. Id. He diagnosed Reaves, an African American veteran of the Vietnam War, with antisocial personality disorder, polysubstance abuse, and a disorder called Vietnam Syndrome, which Dr. Weitz defined as a "sub-clinical" variety of post-traumatic stress disorder (PTSD), id., involving a change in behavior occurring because of combat exposure. Trial counsel's strategy was to present a defense of excusable homicide using that mental health evidence, but the trial court found that Dr. Weitz's testimony was inadmissible and barred it from the guilt stage of the trial. Id. at 891–92. Nonetheless, trial counsel continued to focus largely on the defense of excusable homicide. See id. at 892. The jury, unconvinced, found Reaves guilty of premeditated first degree murder. See id.

At the penalty phase of the trial, Reaves presented eight witnesses who testified about his childhood and his military service in Vietnam. Fran Ross, an attorney who had grown up with Reaves, testified that as a child Reaves had been helpful and well-liked in the community. Reverend Leon Young, the pastor at Reaves' childhood church, testified that Reaves had been "a good Bible student," and Young had thought that Reaves might become a ***1143** minister. Similarly, Otis Cobbs, who lived in the same neighborhood as Reaves, testified that Reaves had been "very respectable and very mannerful and a very energetic young man" who had been a model student. Charlie Jones, who was a few years older than Reaves and grew up with him, testified that Reaves had been "a fun-loving happy-go-lucky type fella." And Ann Covington, Reaves' sister, testified that before joining the army Reaves had been very gentle, caring, and obedient, and a devout Christian.

Ross, Jones, and Covington all testified that Reaves was different after he returned from Vietnam. Ross and Jones testified that it was apparent that Reaves had started to use drugs. Covington testified that after his experiences in the war Reaves had become unable to participate in family dinners, was anxious and tense, and could not be approached without giving him warning.

Hector Caban and William Wade, soldiers who served with Reaves in Vietnam, also testified. Reaves had arrived in Vietnam in November 1969. They told the jury how, shortly after his arrival, their squad was involved in a "U-shaped ambush," in which the enemy attacked them from three sides. Two of the men in Reaves' squad were killed in that ambush, and another was seriously injured. Caban, who served in the same squad as Reaves, described for the jury other actions that the squad was involved in during the ten months that he and Reaves were together in Vietnam. He estimated that he was involved in six to eight fire fights, and said that Reaves was involved "[m]ost of the time."

Although his testimony had been barred from the guilt phase of the trial, the state trial court permitted mental health expert Dr. Weitz to testify for Reaves at the penalty stage. The court qualified him as an expert in general psychology, clinical psychology, military psychology, Vietnam Syndrome, and "post-traumatic stress disorders." Dr. Weitz testified that he had diagnosed Reaves with antisocial personality disorder, polysubstance abuse, and Vietnam Syndrome, a term he defined to mean "a series of psychological and behavioral reactions of veterans as they were returning from the combat service in Vietnam." He explained that Vietnam Syndrome was characterized by alienation, depression, rage, and increased use of alcohol and drugs. And he gave his opinion that Reaves' Vietnam Syndrome "impacted on the events of that evening" in the following ways, as he listed them:

> One: Because of use of cocaine and other substances on the night and the morning of that event, [Reaves'] judgment and perception were already impaired.
>
> Secondly: Because of perception at the time of the event of a situation out of control, intense stress and pressure—"panic" as he describes—panic on both parties, heightened fear and anxiety, the fear response is prevalent.
>
> The reaction to—the "survivor" reaction of perceiving his own life would be paramount. I believe, then, that the reaction of Mr. Reaves, the quickness of response, the sensation of fear, the recognition that things were panicked, uncontrolled and becoming unpredictable, that he sensed the danger to his own life, and his behavior was influenced by that perception.

Dr. Weitz also explained that he diagnosed Reaves with Vietnam Syndrome instead of PTSD because Reaves did not present all of the criteria required for a PTSD diagnosis. According to Dr. Weitz, Reaves had not, for example, reported flashbacks or bad dreams, which are criteria for a formal diagnosis of PTSD.

In rebuttal the State called Robert Ressler, a retired FBI criminologist and veteran ***1144** (although not of the Vietnam War) to testify as an expert in military records. Ressler testified that Reaves had been honorably discharged and had received a number of medals and awards, including the Combat Infantryman's Badge, which is awarded for infantrymen assigned to a combat unit. But he also said that those medals and awards "were rather unremarkable and very routine for a person performing in Vietnam for a period of ... one year." Ressler characterized Reaves' honorable discharge as a product of the wartime environment. He was of the view that because Reaves had been court-martialed for theft, "[c]hances are" that in peacetime he would not have been honorably discharged.

The State also called Lieutenant Colonel Joseph Cinquino, who had been a platoon leader in Vietnam, and who testified that he had never seen any soldiers suffering from PTSD. Finally, the State called Dr. McKinley Cheshire, an expert in psychiatry, who testified that Vietnam Syndrome was not included in the then-current Third Edition–Revised of the Diagnostic and Statistical Manual of Mental Disorders. Based on his review of the documents relating to Reaves, Dr. Cheshire was of the opinion that he "was really not suffering from a psychiatric illness," but instead Deputy Raczkoski "was executed by a drug dealer to cover up the possibility of [Reaves'] going back to jail," and in doing that Reaves "was motivated to be selfish, to protect himself, and to do away with the witnesses."

By a vote of ten to two, the jury recommended a death sentence. Reaves, 717 F.3d at 892. The trial judge found three aggravating circumstances, no statutory mitigating circumstances, and three nonstatutory mitigating circumstances. Reaves, 639 So.2d at 3. He concluded that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Reaves to death. See id. The Florida Supreme Court rejected the trial court's finding with respect to one of the three aggravating circumstances—that the murder was especially heinous, atrocious or cruel—but it affirmed Reaves' conviction and also his sentence. [2] Id. at 6.

2 The aggravating circumstances that withstood scrutiny on appeal were that Reaves had been convicted of a felony involving the use or threat of violence to the person and that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Reaves, 639 So.2d at 3 n.2, 6 n.11. The nonstatutory mitigating circumstances that the trial court listed

were that Reaves had been honorably discharged from the military, had a good reputation in his community up to the age of 16, and was considerate to his mother and good to his siblings. Id. at 3 n.3.

2. Initial State Post-Conviction Proceedings

Reaves then began pursuing collateral attacks on his conviction and sentence. In his first Florida Rule of Criminal Procedure 3.850 motion he raised 27 claims, including ineffective assistance of counsel at the guilt and penalty phases of his trial. Reaves contended that his counsel was ineffective at the guilt stage for, among other things, failing to investigate and present a voluntary intoxication defense based on the combination of his mental health and substance abuse problems. He also claimed that in violation of Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), Dr. Weitz had not provided adequate mental health assistance to aid his defense.

In addition, Reaves claimed that trial counsel had rendered ineffective assistance at the penalty stage. He asserted that counsel had been ineffective because he failed to: seek the assistance of experts in addictionology, psychopharmacology, neuropsychology, and psychiatry; explain to ***1145** the jury how his substance abuse in conjunction with his mental health problems related to the murder; investigate his military service in Vietnam; provide Dr. Weitz with information relating to his military service and mental state; object to Ressler's qualification as an expert in military records; and "object to the introduction of prejudicial and inflammatory testimony." Finally, Reaves claimed that the cumulative effect of the "number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence."

The state trial court held a hearing, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), to determine whether any of the claims Reaves had raised in his Rule 3.850 motion required an evidentiary hearing. At the hearing Reaves argued that trial counsel should have hired a neuropsychologist, a psychologist, and an addictionologist. He stated that one of the experts he could proffer was "a black male" who would testify that Reaves had PTSD and did not have antisocial personality disorder. He indicated that an unnamed neuropsychologist would testify about unspecified non-statutory mitigators. He also said that an unnamed psychologist would testify that Reaves had PTSD, about "statutory mitigators as well as a host of non-statutory mitigators," and would "provide specific testing results with five different tests that have to do with indication of PTSD that were available."

The state trial court denied Reaves' Rule 3.850 motion without an evidentiary hearing. With respect to the penalty phase ineffective assistance claim, the trial court found that Reaves' claim that trial counsel should have hired additional mental health experts was conclusory and refuted by the record, and that the "additional evidence relating to Reaves' enlistment in the military, his service in Vietnam, ... and his addiction to heroin.... would have been either irrelevant or cumulative."

In 2002 the Florida Supreme Court affirmed in part and reversed in part the state trial court's judgment in the Rule 3.850 proceeding. Reaves, 826 So.2d at 944. The part of the judgment that it reversed was the trial court's summary denial of the Reaves' guilt stage ineffective assistance claim relating to counsel's failure to pursue a voluntary intoxication defense; it remanded that claim for an evidentiary hearing. Id. at 938–39, 944. It dismissed as moot the cumulative error claim in light of the remand, and it "affirm[ed] the trial court's denial of Reaves' postconviction motion in all other aspects." Id. The affirmance of the penalty stage ineffective assistance claim was on the merits, with the Florida Supreme Court specifically stating that it agreed with the state trial court that the additional mitigating evidence Reaves had alleged would have been irrelevant or cumulative to that which trial counsel had presented about Reaves' impoverished childhood, his drug addiction, and the conditions of his service in Vietnam. Id. at 941.

3. The Post-Remand State Proceedings

In March 2003 the state trial court held a three-day evidentiary hearing on Reaves' guilt phase ineffectiveness claim. Reaves called as witnesses his trial counsel and six expert witnesses: Dr. Weitz, Dr. Richard Dudley, Dr. Barry Crown, Dr. Deborah Mash, Dr. Erwin Parson, and Dr. Thomas Hyde. Because we described at length the testimony presented at the 2003 evidentiary hearing in our previous decision, Reaves, 717 F.3d at 894–97, we will not describe it in detail now. The takeaways are that Dr. Dudley testified that Reaves suffered from polysubstance abuse and PTSD. Id. at 895. Dr. Crown testified that Reaves suffered from brain damage in a ***1146** part of his brain associated with understanding the long-term consequences of his behavior and that the combination of Reaves' use of cocaine and brain damage "would have resulted in a phenomenon called 'cocaine kindling,' which causes a person to have disrupted 'reasoning, judgment, particularly short-term memory,' and to become impulsive and paranoid." Id. at 895–96. Dr. Mash testified that Reaves' extensive cocaine abuse rendered him paranoid and delusional at the time of the shooting and that cocaine use exacerbates the symptoms of PTSD. Id. at 896. Dr. Parson testified that at the time of the murder, Reaves was suffering from PTSD and "dissociation," with a history of chronic substance abuse, all of which combined to make him incapable of forming the specific intent to kill. Id. at 896–97. And Dr. Hyde testified that Reaves had a history of polysubstance abuse, depression, strong elements of PTSD, and a head injury which, if the injury occurred prior to the shooting, could have left him "disinhibited, impulsive, and prone to rash behaviors in combination with acute intoxication." Id. at 897.

In rebuttal the State called Dr. Cheshire, who reiterated his testimony from the penalty phase of the trial that Reaves "knew what he was doing" and had made a conscious decision to shoot the deputy in an attempt to avoid being sent back to prison. Id. Among the materials he had studied in reaching that opinion were ones showing that Reaves had told the police that he shot the deputy because he didn't want to go back to prison and told a friend that when the deputy pleaded for his life, Reaves replied: "One of us got to go, me or you." After the state court evidentiary hearing, Reaves supplemented the record with a 2003 finding by the Department of Veterans Affairs that he was one hundred percent disabled due to PTSD relating to his military service and entitled to benefits for that reason.

The state trial court again denied Reaves' Rule 3.850 motion, finding that counsel did not perform deficiently at the guilt stage. Reaves appealed that decision to the Florida Supreme Court, where he argued that trial counsel rendered ineffective assistance at the guilt stage by failing to pursue a voluntary intoxication defense. He did not, however, re-assert his penalty phase ineffectiveness claim or even mention it. In 2006, the Florida Supreme Court affirmed the state trial court's rejection of Reaves' guilt stage ineffective assistance claim and its resulting denial of post-conviction relief following the remand. Reaves v. State, 942 So.2d 874, 882 (Fla. 2006).

B. Reaves' Federal Habeas Proceedings

1. 28 U.S.C. § 2254 Petition

In his § 2254 petition, which Reaves filed in 2010, he claimed that trial counsel was ineffective at the guilt and penalty stages of his trial. He alleged that at the penalty stage counsel should have sought assistance from experts in addictionology, psychopharmacology, neuropsychology, psychiatry, and in the "unique experience of an African–American Vietnam Veteran." He argued that counsel's failure to do those things left counsel unable to explain to the jury the complexities of Reaves' psychological condition and the role it played in the crime.

Reaves also raised a cumulative error claim, alleging that the cumulative effect of the trial court's errors at the guilt and sentence stage resulted in an unreliable trial. In that claim Reaves identified five specific errors that he alleged had the cumulative effect of making his trial unfair:

> 1) the trial court's refusal to admit the prior inconsistent statements of a key witness; 2) the prosecutor[']s reference to Mr. Reaves as a "cocaine seller;" 3) the prosecutor's "golden rule" violation ***1147** in closing argument where he asked the jury to put themselves in the victim's position; 4) the trial court's admission of evidence that Mr. Reaves attempted to sell cocaine to a police office[r] in Georgia and 5) the court's erroneous finding that the murder was heinous[,] atrocious and cruel.

He did not include in this claim of cumulative error anything about his counsel's performance at either stage of the trial.

The district court granted Reaves an evidentiary hearing on his penalty phase ineffective assistance claim, but in the same order it stayed that hearing because it decided to grant him relief on his guilt phase ineffectiveness claim. The State appealed the grant of relief on that claim, and we reversed. See Reaves, 717 F.3d at 905. We concluded that Reaves had not shown prejudice based on counsel's alleged errors at the guilt phase, and declined to address whether he had shown that trial counsel performed deficiently. Id. at 900, 905. We remanded the case for further proceedings on Reaves' unaddressed penalty phase ineffective assistance claim. Id. at 907.

2. The District Court's Post-Remand Proceedings

In March 2014, on remand from this Court, the district court held an evidentiary hearing on Reaves' penalty phase claim. After the hearing on that claim the district court entered an order granting Reaves' § 2254 petition based on the combined impact of counsel's errors at the guilt and penalty phases—not on the cumulative effect of the trial court's errors, which was the only cumulative or combined effect claim that Reaves had pleaded. In assessing the combined impact of what it viewed as counsel's errors at the guilt and sentence stages, the district court reviewed de novo trial counsel's performance at both stages. It found that counsel had performed deficiently at both stages by failing to investigate and present evidence about Reaves' PTSD and substance abuse. The court also found that counsel performed deficiently at the penalty stage by failing to object to Ressler as an expert in military records and failing to object to Dr. Cheshire's testimony that Reaves "executed" Deputy Raczkoski because he was a drug dealer attempting to escape a return to prison. The district court rejected as unreasonable the Florida Supreme Court's decision that Reaves had not shown prejudice based on any deficient performance by counsel.

In making those determinations the district court stated that, although it had considered the evidence presented at the federal evidentiary hearing in deciding the performance component of the sentence stage ineffectiveness claim, it would have reached the same result even if it had considered only "the state court record." But by "the state court record" the district court meant not only the state court record that existed at the time the Florida Supreme Court decided the penalty stage ineffectiveness claim on the merits but also the evidence that was introduced in the later state court hearing on a different claim. [3]

3 In part of one sentence in the next to last page of its 77-page order the district court indicated that even if not allowed to consider the combined impact of counsel's errors at both stages of the trial, it still would have granted habeas relief on the sentence because of errors counsel committed at the sentence stage. We interpret that to be a ruling that the penalty stage ineffective assistance claim has merit. And we disagree with that ruling. See infra, Part II(D).

II. DISCUSSION

[1] "When reviewing a district court's grant or denial of habeas relief, we review ***1148** questions of law and mixed questions of law and fact de novo, and findings of fact for clear error." Reaves, 717 F.3d at 899 (quotation marks omitted). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

[2] [3] [4] A habeas petitioner alleging ineffective assistance of counsel must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's performance was deficient only if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. A petitioner can establish prejudice only by showing that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

A. The District Court's Grant of Relief on a Claim that Reaves Did Not Make

[5] In his § 2254 petition Reaves made 25 claims, including claims of innocence, of errors by the state trial court and the state habeas court, of judicial bias, of prosecutorial misconduct, of the unconstitutionality of Florida's capital sentencing scheme, of incompetence to be executed, of ineffectiveness of counsel at the pretrial, guilt, and penalty phases and on appeal, and of "cumulative error" regarding the errors the Florida Supreme Court found on direct appeal but decided were harmless.

The district court, however, did not actually grant relief on any of those 25 claims. It granted relief on a claim that Reaves did not raise, a claim the district court called Reaves' "cumulative effect, or combined impact" claim. According to the district court, the claim was that "the cumulative effect, or combined impact, of defense counsel's errors at the penalty phase [sic] and sentencing phase" prejudiced Reaves in sentencing. We'll call that the "combined impact" claim for short.

Reaves did raise a cumulative error claim in his § 2254 petition but it was not the claim on which the district court granted him relief. Despite the confusing similarity in names, Reaves' cumulative error claim is different from the combined impact claim that the district court crafted for him and then granted relief on. What Reaves asserted and argued as his cumulative error claim is that five trial court errors that the Florida Supreme Court on direct appeal found to be harmless had a cumulative effect that rendered his trial unfair. See supra at —— (quoting that claim). The cumulative error claim Reaves pleaded and pursued said nothing about errors that counsel made at the sentence stage (or at the guilt stage for that ***1149** matter). By contrast, the district court's combined impact claim asserted that the errors of trial counsel at the guilt and sentence phases rendered the result of the sentence phase unfair. Whatever else may be said of the claim that the district court constructed for Reaves, it is not a claim that he made to the court. The first time that claim came into existence in this federal habeas case was when the district court issued an order that both created the claim and granted relief based on it.

[6] Habeas petitioners must specify the grounds on which they assert that they are entitled to relief. Rules Governing § 2254 Cases in the United States District Courts, Rule 2(c)(1) ("The [§ 2254] petition must: (1) specify all the grounds for relief available to the petitioner...."). "To prevail on a particular theory of liability, a party must present that argument to the district court. Our adversarial system requires it; district courts cannot concoct or resurrect arguments neither made nor advanced by the parties." Fils v. City of Aventura, 647 F.3d 1272, 1284 (11th Cir. 2011) (citation omitted); see also Maradiaga v. United States, 679 F.3d 1286, 1293–94 (11th Cir. 2012) ("[D]istrict courts cannot concoct or resurrect arguments neither made nor advanced by the parties. That federal courts can take notice of [the law] does not mean that a party ... need not cite it to the court or present argument based upon it, or that federal courts must scour the law ... for possible arguments a [party] might have made.") (citation and quotation marks omitted); cf. In re Antrobus, 563 F.3d 1092, 1099–1100 (10th Cir. 2009) ("Under our rules we are not permitted to invent arguments even for pro se litigants; certainly, we cannot revive ones foregone nearly a year ago by such well-counseled litigants."); Yeomalakis v. FDIC, 562 F.3d 56, 61 (1st Cir. 2009) ("It is not our job, especially in a counseled civil case, to create arguments for someone who has not made them or to assemble them from assorted hints and references scattered throughout the brief."). In this case, the district court not only concocted new arguments but also a new claim for Reaves and resurrected arguments that he had abandoned by the time he went into federal court.

Reaves' § 2254 petition alleged that he received ineffective assistance of trial counsel at the penalty stage because counsel failed to investigate and present evidence of Reaves' polysubstance addiction, his combat-related PTSD, and the effect those disorders had on his behavior.[4] The district court agreed for those reasons and also because counsel failed to object to Ressler as an expert in military records and to Dr. Cheshire's testimony about Reaves' motivation for killing Deputy Raczkoski. And it found that trial counsel performed deficiently at the guilt stage, which it considered not as a freestanding claim but in support of its combined impact theory for sentence stage relief.

4 Reaves' § 2254 petition also alleged ineffective assistance because trial counsel did not investigate and present evidence of Reaves' difficult childhood and his experience as an African American Vietnam veteran, but the district court did not rely on that allegation and Reaves does not argue that it is an alternative ground for affirming the district court. See Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1318 (11th Cir. 2012) ("[The appellee] abandoned that exception as a defense by failing to list or otherwise state it as an issue on appeal."); La Grasta v. First Union Sec., Inc., 358 F.3d 840, 847 n.4 (11th Cir. 2004) ("[The appellee] has waived the argument by failing to discuss it in its answer brief. [The appellee]'s reference to having made this argument before the district court in its statement of facts is not an adequate substitute for elaborating the merits of the argument on appeal.").

Neither Reaves' § 2254 petition nor his memorandum of law in support of his petition ***1150** mentioned anything about the effect of trial counsel's purported guilt-stage errors on the penalty stage, or about Ressler's testimony about his military records, or about Dr. Cheshire's testimony concerning Reaves' motivation for killing the deputy. Not only that, but Reaves did not mention any of those things in support of any of his other claims. They cannot be found anywhere in his federal habeas petition. Nor can they be found in the memorandum he filed with the district court after the evidentiary hearing in that court. Reaves' argument in the district court in support of his penalty phase ineffective assistance claim was that trial counsel should have investigated and presented evidence about how his combat-related PTSD and polysubstance addiction affected his behavior on the night of the murder. That is the only contention that the district court should have considered in ruling on the penalty phase ineffective assistance claim.

The district court justified its consideration of those unpleaded contentions and theories by citing "Claim XXII" from Reaves' § 2254 petition. But that claim asserted only that trial counsel had provided ineffective assistance at the guilt phase by failing to investigate and prepare a voluntary intoxication defense. It did not assert that trial counsel should have investigated and presented evidence of Reaves' mental illness or addiction at the penalty phase and it did not provide the district court with a basis for considering the court's own combined impact claim.

As support for the existence of its combined impact claim, the district court relied on a claim that Reaves had made in his state Rule 3.850 motion. But even if he raised and exhausted a combined impact claim in his state habeas proceedings, Reaves, who was represented by experienced counsel in his federal habeas proceeding, was required to raise that claim in his § 2254 petition if he wanted federal relief on it. Rules Governing § 2254 Cases, Rule 2(c)(1); Fils, 647 F.3d at 1284. A petitioner who has exhausted a claim in his state collateral proceedings is free to challenge the state courts' resolution of that claim by asserting it in his federal proceeding. If he chooses not to assert that claim, however, the district court should abide by his choice and not assert the claim for him. See Maradiaga, 679 F.3d at 1293 ("[I]t is well settled that issues not raised in the district court in the first instance are forfeited."); Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1152 (11th Cir. 2011) (same); Fils, 647 F.3d at 1284 ("To prevail on a particular theory of liability, a party must present that argument to the district court. Our adversarial system requires it; district courts cannot concoct or resurrect arguments neither made nor advanced by the parties.") (citation omitted); Resolution Tr. Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments...."). A federal habeas court may not take over a petitioner's case and impose its own view of the claims that should be raised. Allowing a court to do so would blur the line between judge and advocate.

Because Reaves did not present any claim to the district court about the combined impact that trial counsel's errors at the guilt phase may have had on the penalty phase, or any claim about the testimony of Ressler or Dr. Cheshire, the district court should not have presented the claim for him. Instead, in the proceeding on remand from this Court, the district court should have reviewed and decided only the one claim Reaves had pleaded and that remained after our earlier decision in this case: the claim that trial counsel was ineffective at the penalty phase for failing to investigate and present mental health mitigating evidence relating to Reaves' PTSD and polysubstance addiction.

***1151** We closed our previous opinion in this case with the instruction that we were "remand[ing] for further proceedings on Reaves' outstanding claim of ineffective assistance of counsel during the penalty phase of his retrial." See Reaves, 717 F.3d at 907. That was our mandate, which the district court should have followed. If it had followed our mandate, the district court would have limited itself to consideration of whether counsel rendered ineffective assistance "during the penalty phase." Id. (emphasis added). That it did not was error. We will honor and enforce our own mandate by considering only the claim that we instructed the district court to consider on remand, not the combined impact claim Reaves never pleaded.

B. State Court Adjudication on the Merits of the Penalty Stage Ineffectiveness Claim, a Claim that Reaves Did Make

[7] [8] If a state court has already adjudicated on the merits a prisoner's claim seeking habeas relief, the AEDPA standard guides review of the state court's decision, and a federal habeas court may grant relief only if the adjudication was contrary to, or an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). If, however, no state court has adjudicated the merits of a claim that was properly presented, "federal habeas review is not subject to the deferential standard that applies under AEDPA.... Instead, the claim is reviewed de novo." Cone v. Bell, 556 U.S. 449, 472, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).

[9] [10] [11] An ineffective assistance claim has two parts: (1) whether counsel performed deficiently and, if so (2) whether the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000) (citation omitted). As a result, when a state court's decision on an ineffective assistance claim clearly rests on only one prong of the Strickland test, we conduct a plenary review of the other one, if necessary. Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 930 (11th Cir. 2011); see also Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 2467, 162 L.Ed.2d 360 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice and so we examine this element of the Strickland claim de novo....") (citation omitted).

[12] But the fact that a state court did not explain every step of its decision-making process does not mean that it did not adjudicate every prong of an ineffective assistance claim. See Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172, 1211 (11th Cir. 2013) ("[W]e reject [the] claim that a state court's written opinion involves an unreasonable application of federal law and is not entitled to deference unless that opinion on its face 'shows its work....' "). "[W]e afford AEDPA deference even where the state court's decision is a summary adjudication or engages in only some evaluation...." Id. at 1213; cf. Johnson, 643 F.3d at 930 & n.9 (explaining that we were reviewing de novo an unaddressed component of the petitioner's ineffective assistance claim because the state court "did provide an explanation of its decision which makes clear that it ruled on the deficiency prong but did not rule on the prejudice prong") (emphases added).

In his Rule 3.850 motion Reaves claimed that counsel was ineffective at the penalty phase for failing to investigate and present mitigation evidence about his polysubstance *1152 addiction in conjunction with his combat-related PTSD, and how those disorders combined to "play[ ] a role in putting William 'Fat' Reaves on trial for his life." The state trial court found that the part of Reaves' penalty phase claim relating to mental health experts was conclusory and refuted by the record, and that the proposed additional evidence relating to his military service and substance abuse was irrelevant or cumulative. In 2002 the Florida Supreme Court remanded for an evidentiary hearing limited to one of Reaves' guilt phase claims, but it affirmed on the merits the part of the state trial court's order denying Reaves relief on his penalty phase ineffective assistance claim. Reaves, 826 So.2d at 944.

In analyzing Reaves' penalty phase ineffective assistance claim, the Florida Supreme Court addressed both the prejudice and the deficient performance prongs of the Strickland test. First, it explained what a petitioner needs to show to establish prejudice. Id. at 941. On the deficiency prong, the court stated that: "It is not negligent [for an attorney] to fail to call [as witnesses] everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position." Id. at 941 n.12 (quoting Jennings v. State, 583 So.2d 316, 321 (Fla. 1991)). As that quotation makes clear, the Florida Supreme Court rejected Reaves' penalty stage ineffective assistance of counsel claim on the performance prong as well as the prejudice prong. Relevant to both prongs, it concluded that "[a] review of the record supports the trial court's finding that the evidence which he now seeks to introduce is cumulative." Id. at 941.

Because the Florida Supreme Court in its 2002 decision did reject Reaves' penalty stage ineffective assistance of counsel claim on the merits as to both the performance and prejudice requirements, we afford both of those parts of its decision § 2254 deference.

C. The State Court Record

[13] The state court record in this case is lengthy and complex, involving multiple trials, hearings, and appeals. In his state habeas proceedings, Reaves filed a Rule 3.850 motion, which the state trial court denied without a hearing. The Florida Supreme Court reviewed that court's judgment and in 2002 it affirmed the denial of Reaves' penalty phase ineffective assistance claim but remanded for a hearing on "the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and the related subclaims" at the guilt stage. Reaves, 826 So.2d at 941–42, 944. Following that directive, in 2003 the state trial court held the evidentiary hearing on the guilt stage ineffectiveness claim and again denied Reaves' Rule 3.850 motion. In 2006 the Florida Supreme Court affirmed that denial. Reaves, 942 So.2d at 882.

Although the Florida Supreme Court's rejection of Reaves' penalty phase ineffective assistance claim occurred in its 2002 decision, the district court reviewed that rejection in light of the the entire state court record, including the 2003 evidentiary hearing, which was not even in existence when the Florida Supreme Court decided the claim. The district court justified considering that later evidence on the ground that "in 2006, the Florida Supreme Court had all of that evidence [from the 2003 evidentiary hearing] and unreasonably did not reconsider its finding of cumulativeness." When the state supreme court considered and rejected the penalty stage ineffectiveness claim on the merits, it did not have that evidence. It did not have that evidence until years later when it reviewed ***1153** the state trial court's post-remand decision on the guilt stage claim. The district court believed that the Florida Supreme Court had a duty to resurrect on its own motion a claim that it had already rejected and to reconsider it based on evidence submitted later, on another claim, following a limited remand for another purpose, even though the petitioner did not ask it to do so.

To justify its own consideration of later acquired evidence, the district court relied on Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). That decision, however, does not say or hold that a federal habeas court may consider a part of the state court record that was created in connection with another claim and that did not even exist when the state court decided the claim that is being reviewed by the federal court. The Pinholster case, which actually reversed a grant of habeas relief, was not about that.

Pinholster had asserted in a state habeas petition a claim that the state supreme court summarily denied. Pinholster, 563 U.S. at 177–78, 131 S.Ct. at 1396. He later filed a second state habeas petition reiterating the same claim and adding several new allegations and evidence relating to that claim. Id. at 178, 131 S.Ct. at 1396–97. The state supreme court summarily denied the claim again. Id. at 178, 131 S.Ct. at 1397. Pinholster then filed a federal habeas petition and was granted an evidentiary hearing. Id. at 179, 131 S.Ct. at 1397. Based on the evidence presented at that federal evidentiary hearing, the district court granted his § 2254 petition. Id. The Ninth Circuit affirmed, but the Supreme Court reversed. Id. at 174, 180, 131 S.Ct. at 1394, 1397.

The Supreme Court held that in deciding whether a state court's determination was unreasonable under § 2254(d)(1), "review ... is limited to the record that was before the state court that adjudicated the claim on the merits." Id. at 181, 131 S.Ct. at 1398. The Court explained:

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

> is limited to the record in existence at that same time i.e., the record before the state court.

Id. at 181–82, 131 S. Ct. at 1398 (emphases added).

In this case, the record that was in existence at the time the Florida Supreme Court decided Reaves' penalty phase ineffective assistance claim in 2002 did not include—and obviously could not have included—the 2003 state court evidentiary hearing. Nor did it include anything else that came after the 2002 decision, such as the Department of Veterans Affairs disability determination in 2003. In keeping with the Pinholster decision, the district court in reviewing the penalty stage ineffectiveness claim should have confined itself to the state court record that existed in 2002. It did not do that.

Instead, the district court also considered evidence from the 2003 evidentiary hearing on Reaves' guilt stage ineffectiveness claim. In considering evidence that was submitted in state court later and on a different claim, the district misread footnote 12 of the Pinholster opinion. In the Pinholster case, as we have mentioned, there were two state supreme court decisions on the same claim. Id. at 177–78, 131 S.Ct. at 1396–97. The evidentiary record was larger at the time of the second decision. Id. at 178, 131 S.Ct. at 1396. In footnote 12 the Supreme Court discussed, but did not decide, the question of whether in order to prevail Pinholster was required ***1154** to prove that both decisions of the state supreme court were unreasonable, or only that the later decision—the record of which "include[d] all of the evidence that Pinholster ever submitted in state habeas"—was unreasonable. Id. at 188 n.12, 131 S.Ct. at 1402 n.12. The Supreme Court declined to answer that question because it concluded that the state court's second decision was not unreasonable, even considering all of the evidence favorable to Pinholster that was in the record by then. Id. What the Supreme Court did in footnote 12 of its opinion was to take "the most favorable approach for Pinholster" because even doing that "Pinholster has failed to satisfy § 2254(d)(1)." Id. The Court essentially assumed away a non-dispositive issue that did not affect the result, something courts do quite often. That is not at all what the district court did in this case.

The actual holding of Pinholster, once again, is that "review ... is limited to the record that was before the state court that adjudicated the claim on the merits." Id. at 181, 131 S.Ct. at 1398. That includes the evidence in the record when the state court made the decision being examined, not any other evidence that was developed later on another claim. As the Supreme Court explained, that holding is in keeping with the deferential standard in § 2254(d), which confines a federal habeas court to examining "the state-court decision at the time it was made," and, it follows, "the record in existence at that same time" as that decision. Id. at 181–82, 131 S.Ct. at 1398.

The Florida Supreme Court made the decision to deny relief on Reaves' penalty phase ineffective assistance claim in 2002, not in 2006 after the case was appealed again following remand on another claim. Reaves, 826 So.2d at 932. When the case was before the state supreme court on that later appeal after remand, Reaves did not re-assert the penalty stage ineffectiveness claim or ask the court to reconsider its rejection of that claim four years earlier. The Florida Supreme Court was not obligated to revisit the claim on its own motion, even assuming that it could have under Florida law. The district court was barred, under Pinholster and § 2254(d), from considering the 2006 state court record in reviewing the Florida Supreme Court's 2002 decision on Reaves' penalty phase ineffective assistance claim.

In support of its decision to consider the entire state court record, the district court also cited our decision in Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011). In that case the petitioner asserted on direct appeal a claim of ineffective assistance of trial counsel, which the state supreme court rejected on the merits. Id. at 1212. Ferrell then asserted in a state post-conviction motion a claim that appellate counsel had been ineffective in investigating and presenting the claim that trial counsel was ineffective. Id. at 1220. The motion was granted by the state trial court, but the state supreme court reversed, concluding that appellate counsel had been effective in developing the record on trial counsel's effectiveness. Id. at 1220–21.

Ferrell then filed in federal court a § 2254 petition raising claims of ineffective assistance of both trial and appellate counsel. Id. at 1222. The district court denied his petition but we reversed. Id. at 1222, 1245–46. In doing so we concluded that the state supreme court had unreasonably applied Strickland in denying both Ferrell's claim (raised on direct appeal) that trial counsel had been ineffective, and his claim (raised in his state postconviction proceeding) that appellate counsel had been ineffective for failing to adequately investigate and present the claim that trial counsel was ineffective. Id. at 1233, 1236, 1239.

In reaching our decision in Ferrell, we considered both claims on "the full record ***1155** that was before the Georgia Supreme Court when it ruled on the appellate-counsel claim," even though that court had decided the trial counsel claim earlier based on a more limited direct appeal record. Id. at 1226 n.16. We did so for two reasons. First, although the state supreme court had rejected the trial counsel ineffectiveness claim on direct appeal before the state habeas record was developed, when that court later decided the appellate counsel ineffectiveness claim in the state habeas appeal it "repeatedly discussed trial counsel's performance." Id. In other words, the state supreme court had revisited the trial counsel ineffectiveness claim when it decided the appellate counsel ineffectiveness claim. And second, appellate counsel had performed ineffectively in developing the record on the trial counsel claim. Id.

The Ferrell decision is distinguishable from this case. In that case we could and did review the decision on the trial counsel claim using the state court record that was later developed on the appellate counsel claim because that is what the state supreme court did. In deciding the appellate counsel claim the state court had effectively revisited, reconsidered, and re-decided the trial counsel claim in light of the larger record. See id. So we could too. By contrast, in this case, the Florida Supreme Court rejected Reaves' claim once, and never revisited or addressed it again. And the Florida Supreme Court's later rejection of Reaves' guilt phase claim did not require that court to reconsider his penalty phase ineffective assistance claim. The Ferrell decision did not authorize the district court to consider the part of the state court record in Reaves' case that did not exist when the Florida Supreme Court issued the 2002 decision that the district court was reviewing.

The district court determined that "the Florida Supreme Court had a duty to consider the entire state court record when it finally dismissed" Reaves' Rule 3.850 motion in 2006. The district court did not point to any decision, nor have we found one, holding that a court has a duty to reconsider—without even being asked—a claim that was denied years before because evidence that was later submitted on some other claim may bear on the claim that the court rejected years before.

Reaves never argued—and still does not—that the Florida Supreme Court had any such duty. The closest he comes is in his statement that "[p]enalty phase considerations were ... still on the table during the remand" to the state trial court for an evidentiary hearing on the guilt stage ineffectiveness claim, so the Florida Supreme Court "had an opportunity to address [those considerations] in 2006." Appellee's Br. at 46, 52. We disagree. The only claim that was "on the table during the remand" was the claim that the Florida Supreme Court put on the table when it remanded the case, which was the guilt stage ineffective assistance claim. In any event, even if we assume that that court had an "opportunity to address" the penalty stage ineffectiveness claim again after the case returned from remand, an opportunity is not a duty.

We reject the proposition that when a case returns from a limited remand for an evidentiary hearing on a particular issue the appellate court, without even being asked to do so, is required to sift through the record looking for a basis to upend its earlier decision of different issues. The Florida Supreme Court had no duty to do that in Reaves' case, and the district court erred in considering parts of the state court record that were not before the Florida Supreme Court when it decided the merits of Reaves' penalty phase ineffective assistance claim in 2002.

***1156** D. Whether the Florida Supreme Court's Decision Was Unreasonable

[14] Reaves asserted in his Rule 3.850 motion that counsel was ineffective at the penalty phase for failing to investigate and present mitigation evidence about his polysubstance addiction in conjunction with his combat-related PTSD, and how those disorders "played a role in putting William 'Fat' Reaves on trial for his life." The Florida Supreme Court determined that counsel was not ineffective in that way because the proposed additional evidence was cumulative. Reaves, 826 So.2d at 941. The question before us is whether the Florida Supreme Court's decision on the penalty stage ineffective assistance claim was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d).

[15] **[16]** **[17]** "[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States'.... refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). Under § 2254(d)(1), to result in a decision that was "contrary to" clearly established federal law, the state court must have "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "decide[d] a case differently than [the] Court has on a set of materially indistinguishable facts." Id. at 412–13, 120 S.Ct. at 1523. To result in a decision that involved an "unreasonable application of" clearly established federal law, the state court must have "identifie[d] the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applie[d] that principle to the facts of the prisoner's case." Id. at 413, 120 S.Ct. at 1523.

[18] It is not enough to justify federal habeas relief that the federal court would have reached a different decision or is convinced that the state court decision is wrong. White v. Woodall, 572 U.S. ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) ("[A]n unreasonable application of [Supreme Court] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (quotation marks omitted); Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011) ("It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."); Woodford v. Visciotti, 537 U.S. 19, 25, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002) ("An unreasonable application of federal law is different from an incorrect application of federal law.") (quotation marks and emphasis omitted); Williams, 529 U.S. at 411, 120 S.Ct. at 1522 ("Under § 2254(d)(1)'s 'unreasonable application' clause ... a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

[19] As for § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010). "If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." Brumfield v. Cain, 576 U.S. ——, 135 S.Ct. 2269, 2277, 192 L.Ed.2d 356 (2015) (quotation marks and alterations omitted).

***1157** We have explained how difficult it is for a petitioner to establish that a state court's rejection of an ineffective assistance claim was unreasonable:

> Even without the deference due under § 2254, the Strickland standard for judging the performance of counsel "is a most deferential one." Harrington, 562 U.S. at 105, 131 S.Ct. at 788. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether "there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.

Johnson, 643 F.3d at 910–11 (citations altered).

[20] We have also held that counsel's failure to present cumulative evidence is not ineffective assistance. See Turner v. Crosby, 339 F.3d 1247, 1277 (11th Cir. 2003) (concluding trial counsel's performance was not deficient for failing to submit cumulative testimony to the jury during the penalty phase of trial); Glock v. Moore, 195 F.3d 625, 636 (11th Cir. 1999) (concluding that, "where much of the new evidence that [petitioner] presents is merely repetitive and cumulative to that which was presented at trial," the petitioner cannot show prejudice). And while a complete failure to investigate mitigating evidence would be deficient performance, see Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2066 ("[C]ounsel has a duty to make reasonable investigations...."), counsel's decision not to investigate for more mitigating evidence of the same kind counsel had already discovered is not ineffective if the additional evidence would be cumulative of the evidence already discovered, cf. Turner, 339 F.3d at 1277; Glock, 195 F.3d at 636. As we have said, "the fact that other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 647 (11th Cir. 2016) (quotation marks omitted); see Waters v. Thomas, 46 F.3d 1506, 1512, 1514 (11th Cir. 1995) (en banc). As a result, if the Florida Supreme Court's cumulativeness finding was not unreasonable, its rejection of Reaves' ineffective assistance claim was also not unreasonable in view of the deference we owe its decision.

At the penalty phase, counsel called five witnesses who testified about Reaves' excellent childhood reputation in the neighborhood he grew up in. Three of them testified about how different Reaves was when he returned from his service in Vietnam, from his drug use to his newfound inability to spend time with the family he had once been close to. Defense counsel also presented witnesses who testified about how Reaves was drafted into the military, sent to Vietnam where he served for a year, and returned a changed man who was addicted to drugs and suffering from Vietnam Syndrome. To back up that diagnosis counsel also called veterans who had been with Reaves in Vietnam to describe what he had been through there. They described, for example, how Reaves and his squad had been caught up in six or eight firefights. In one of them they were caught in a "U-shaped ambush" in which some men were killed or seriously injured. Dr. Weitz explained to the jury that the Vietnam Syndrome and substance abuse "impacted on the events of [the] evening" of the murder by impairing Reaves' judgment ***1158** and heightening his fear and anxiety leading to "a fear response" and "the 'survivor' reaction" of perceiving that his own life was in danger.

In spite of the presentation of that evidence to the jury, in his state Rule 3.850 motion Reaves claimed that counsel was ineffective for failing to hire experts in addictionology, psychopharmacology, neuropsychology, psychiatry, "and the unique experience of the African–American Vietnam Veteran." Those unnamed experts, Reaves said, would have been able to "explain the complexities of [his] psychological condition and how it played a role in putting William 'Fat' Reaves on trial for his life." The motion described how Reaves was drafted into military service, entered a combat zone in Vietnam in November 1969, and "soon became addicted to heroin," an addiction he was treated for when he returned to the United States in November 1970. The motion also described at length general combat conditions in Vietnam and Cambodia.

Later, at Reaves' Huff hearing, he expanded on those assertions, stating that one of his unnamed experts could have testified that Reaves had PTSD and did not have antisocial personality disorder, an unnamed neuropsychologist could have testified about unspecified non-statutory mitigators, and an unnamed psychologist could have testified that Reaves had PTSD and would "provide specific testing results with five different tests that have to do with indication of PTSD that were available." But Reaves never explained how a diagnosis of Vietnam Syndrome was different from a diagnosis of PTSD in some way that would have made a difference to the jury or judge.

Based on the record that the Florida Supreme Court had before it at the time of its 2002 decision on the penalty phase ineffective assistance claim, which is the only record that we may consider in reviewing that decision, the Florida Supreme Court did not unreasonably conclude that Reaves' proposed additional evidence about his mental health and substance abuse was cumulative. [5] Its rejection of his penalty phase ineffective assistance claim was not an unreasonable application of clearly established federal law.

5 Reaves also contended in his brief in support of his § 2254 petition that trial counsel was ineffective for failing to provide Dr. Weitz with sufficient information to properly evaluate his behavior. In his state Rule 3.850 motion, he had contended that "[c]ounsel was also ineffective regarding ... failure to provide Reaves' in-depth taped interview to the police upon his arrest in Georgia on September 25, 1986 to Dr. Weitz; failure to provide Dr. Weitz with statements from other soldiers that served with Reaves in the military; failure to provide Dr. Weitz with records from Washington; failure to provide Dr. Weitz with Veterans' Administration records." Exh. C–PCR1–4 at 577–79. But he did not explain what difference those records would have made to Dr. Weitz's report or findings. See id. The Florida Supreme Court rejected that claim as conclusory. Reaves, 826 So.2d at 942. That conclusion was not unreasonable.

In granting relief, the district court relied on the Supreme Court's decision in Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). The Porter case bears some similarities to this one, but there are material differences. In Porter the petitioner had murdered his former girlfriend and her new boyfriend. Id. at 31, 130 S.Ct. at 448. At the penalty phase "[t]he sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." Id. at 32, 130 S.Ct. at 449. That was all.

Porter was sentenced to death for the murder of his former girlfriend but not for the murder of her boyfriend. Id. During ***1159** his state habeas proceedings, he introduced evidence of "his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." Id. at 33, 130 S.Ct. at 449. The state court deciding Porter's claim did not address the deficient performance part of the Strickland test, instead concluding that Porter could not show prejudice based on the failure to introduce all that mitigating circumstances evidence. Id. at 36, 130 S.Ct. at 451. As a result, the Supreme Court considered the deficient performance component de novo and reviewed the prejudice component with § 2254(d) deference. Id. at 39, 41, 130 S.Ct. at 452, 453.

The Supreme Court concluded that Porter's attorney had performed deficiently because he had only one short meeting with Porter about the penalty phase, he "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family," and "he ignored pertinent avenues for investigation of which he should have been aware," such as court-ordered competency evaluations describing Porter's education, military service, and childhood abuse. Id. at 39–40, 130 S.Ct. at 453.

The Court also concluded that the state court unreasonably applied Strickland in finding that Porter had not established prejudice. Id. at 42, 130 S.Ct. at 454. The Court explained that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." Id. at 41, 130 S.Ct. at 454. And, the Court concluded, the aggravating circumstances were not so strong that additional mitigating evidence would not have mattered. Id. at 41–42, 130 S.Ct. at 454.

[21] There are several important differences between the Porter decision and this case. First, the Supreme Court was reviewing de novo the state court's determination on the deficiency component of ineffective assistance because the state court had not addressed it. Id. at 39, 130 S.Ct. at 452. In this case, by contrast, we must review with § 2254(d) deference both the deficiency and prejudice parts of the Florida Supreme Court's determination on the penalty stage ineffectiveness issue because that court decided both parts on the merits. Second, in Porter the Supreme Court was able to consider all of the evidence that had been presented in Porter's state habeas proceedings because that evidence was in the record and before the state court when it decided the claim. See id. at 33, 130 S.Ct. at 449. In contrast, we cannot consider the evidence presented at the 2003 state court evidentiary hearing on the guilt stage ineffectiveness claim or at the 2014 federal evidentiary hearing because none of that evidence was before the Florida Supreme Court in 2002 when it denied relief on Reaves' penalty phase ineffective assistance claim.

Finally, the Porter decision is also distinguishable because trial counsel in that case did no investigation into Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." Id. That was deficient performance because "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. In this case, by contrast, counsel did investigate, and in fact presented evidence about Reaves' substance abuse and mental illness, as well as about his childhood and sterling reputation in the community when he was child. See supra at ––––. And nothing that was specifically alleged in Reaves' Rule 3.850 motion was information that trial counsel did ***1160** not have and present during the penalty phase.

The fact that habeas counsel, years after the trial, direct appeal, retrial, and second direct appeal, found experts prepared to testify that Reaves had PTSD instead of Vietnam Syndrome does not establish that counsel's investigation and presentation of mitigating evidence was outside "the wide range of reasonable professional assistance." Id. at 689, 104 S.Ct. at 2065. And, more to the point, it does not show that, based on the record before it, the Florida Supreme Court's 2002 decision that counsel's performance was within the wide range of reasonable professional assistance was contrary to clearly established law.

Dr. Weitz, whom counsel presented at the penalty phase, was qualified as an expert in PTSD. He was of the opinion that Reaves did not meet the criteria for a PTSD diagnosis but that he did meet all of the requirements for a diagnosis of Vietnam Syndrome. He told the jury that and explained what he meant. We have held that "[w]hen mental health is at issue, counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed." Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1244 (11th Cir. 2015) (citing Ward v. Hall, 592 F.3d 1144, 1173 (11th Cir. 2010), and Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)); see also Elledge v. Dugger, 823 F.2d 1439, 1447 n.17 (11th Cir.), opinion withdrawn in part on denial of reh'g, 833 F.2d 250 (11th Cir. 1987) ("We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to 'shop' for a psychiatrist who will testify in a particular way."); cf. Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003) ("[A] failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance."); Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998) ("Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion.") (quotation marks omitted); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance."). It was not unreasonable for the Florida Supreme Court to reach the same conclusion that we have in the past.

The Florida Supreme Court did not unreasonably deny relief on Reaves' penalty phase ineffective assistance claim. Because the district court erred in granting habeas relief to Reaves on that ground, we reverse that part of its judgment and remand with instructions to deny the § 2254 petition.

REVERSED. [6]

6 While this case was on appeal, Reaves filed a motion to stay further proceedings in this Court pending a decision on his Hurst claim in the state courts. See Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Since then the state trial court has denied that claim and the Florida Supreme Court has dismissed Reaves' appeal of the denial. Accordingly, the motion to stay these proceedings is DENIED AS MOOT.

All Citations

872 F.3d 1137, 27 Fla. L. Weekly Fed. C 225

End of Document

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 06, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-11225-P
Case Style: William Reaves v. Secretary, FL DOC
District Court Docket No: 2:10-cv-14046-DMM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11225-P

WILLIAM REAVES,

Petitioner - Appellee,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellant.

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

BEFORE: ED CARNES, Chief Judge, TJOFLAT and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by William Reaves is DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-41