

CASE NO. 17-8428
IN THE UNITED STATES SUPREME COURT

October 2017, Term

WILLIAM REAVES,

Petitioner,

vs.

JULIE L. JONES,
Secretary, Florida Department of Corrections,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

LESLIE T. CAMPBELL*
Sr. Assistant Attorney General
Florida Bar No. 0066631
Office of the Attorney General
1515 N. Flagler Dr. - Suite 900
West Palm Beach, FL 33401
Telephone (561) 837-5016
Facsimile (561) 837-5108

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1 Whether certiorari review of the habeas corpus claim of ineffective assistance of penalty phase counsel challenging counsel's investigation, preparation, and presentation of a mitigation case should be denied where the circuit court determined that the state court's resolution of postconviction relief was not contrary to or an unreasonable application of *Strickland* and its progeny?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i	
TABLE OF CONTENTS.....	ii	
TABLE OF CITATIONS	iii	
CITATION TO OPINIONS BELOW.....	1	
JURISDICTION.....	3	
CONSTITUTIONAL PROVISIONS INVOLVED.....	3	
STATEMENT OF CASE AND FACTS	3	
REASONS FOR DENYING THE WRIT.....	18	
ISSUE I - CERTIORARI REVIEW OF THE DENIAL OF HABEAS CORPUS RELIEF ON A CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY COUNSEL SHOULD BE DENIED AS TRIAL COUNSEL DID PRESENT PETITIONER'S BACKGROUND AND PRESENTED EXTENSIVELY PETITIONER'S VIETNAM WAR SERVICE IN MITIGATION AND THE FACT DEPENDENT FLORIDA SUPREME COURT'S RESOLUTON OF THE STRICKLAND CLAIM WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF FEDERAL LAW. THE ELEVENTH CIRCUIT DECISION UNDER REVIEW HERE APPLIED THIS COURT'S WELL SETTLED STRICKLAND PRECEDENT AND DOES NOT CONFLICT WITH THAT OF ANOTHER COURT OF APPEALS OR PRESENT AN IMPORTANT OR UNSETTLED MATTER OF CONSTITUTIONAL LAW (restated)		18
CONCLUSION.....	35	
CERTIFICATE OF SERVICE	36	

TABLE OF CITATIONS

Cases

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	31
<i>Bell v. Cone</i> , 535 U.S. 685 (2002)	27
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	34
<i>Brown v. Payton</i> , 544 U.S. 133 (2005)	26
<i>Cave v. State</i> , 899 So. 2d 1042 (Fla. 2005)	33
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	14, 21, 27
<i>Doorbal v. State</i> , 983 So. 2d 464 (Fla. 2008)	33
<i>Early v. Packer</i> , 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002)	26
<i>Felkner v. Jackson</i> , 131 S.Ct. 1305 (2011)	27
<i>Fils v. City of Aventura</i> , 647 F.3d 1272 (11th Cir. 2011)	23
<i>Gordon v. State</i> , 863 So.2d 1215 (Fla.2003)	33
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	15, 27
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016)	2
<i>In re Antrobus</i> , 563 F.3d 1092 (10th Cir. 2009)	23
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	34
<i>Maradiaga v. United States</i> , 679 F.3d 1286 (11th Cir. 2012)	23
<i>Porter v. McCollum</i> , 130 S. Ct. 447 (2009)	19
<i>Powell v Alabama</i> , 287 U.S. 45 (1932)	34
<i>Reaves v. Crosby</i> , 837 So.2d 396 (Fla. 2003)	2
<i>Reaves v. Florida</i> , 513 U.S. 990 (1994)	1
<i>Reaves v. Sec’y, Dep’t of Corrs</i> , 872 F.3d 1137 (11th Cir. 2017)	passim

Reaves v. Sec’y, Florida Department of Corrections, 717 F.3d 886 (11th Cir. 2013). 2, 8, 9

Reaves v. State, 27 So.3d 661 (Fla. 2009) 2, 8

Reaves v. State, 574 So.2d 105 (Fla. 1991) 1, 4

Reaves v. State, 639 So.2d 1 (Fla. 1994) passim

Reaves v. State, 826 So.2d 932 (Fla. 2002) passim

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

Ring v. Arizona, 536 U.S. 584 (2002) 7

Rockford Life Ins. Co. v. Illinois Dep’t of Revenue, 482 U.S. 182 (1987)..... 19

Strickland v. Washington, 466 U.S. 668 (1984)..... 6, 15, 17

Vining v. State, 827 So.2d 201 (Fla. 2002)..... 33

Way v. State, 760 So.2d 903 (Fla. 2000) 33

Wiggins v. Smith, 539 U.S. 510 (2003) 23

Williams v. Taylor, 529 U.S. 362 (2000) 15, 23, 26

Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) 26

Yeomalakis v. FDIC, 562 F.3d 56 (1st Cir. 2009) 23

Statutes

28 U.S.C. § 2254..... 3, 8, 26, 27

§ 90.804(1)(b), Fla. Stat. (1991)..... 4

§ 921.141(5)(b), (e), (h), Fla.Stat. (1985) 5

Rules

Fla. R. Crim. P. 3.203 32

CITATION TO OPINIONS BELOW

The decision of which Petitioner, William Reaves (“Reaves”) seeks discretionary review is reported as *Reaves v. Sec’y, Dep’t of Corrs*, 872 F.3d 1137 (11th Cir. 2017) which was issued on September 28, 2017. That decision reversed the district court’s granting of federal habeas relief and found that the district court erred by granting relief on a claim not raised in the federal habeas petition and by finding that the Florida Supreme Court’s determination was unreasonable for not revisiting, on its own motion, a claim that it already had rejected in an earlier appeal and reconsidering it based on a record created later following a limited remand for another purpose, even though Reaves did not ask the Florida Supreme Court to do so.

The opinion of the Florida Supreme Court on direct appeal is reported as *Reaves v. State*, 639 So.2d 1 (Fla. 1994),¹ *cert. denied*, *Reaves v. Florida*, 513 U.S. 990 (1994) and affirmed the first-degree murder conviction and death sentence at issue here. Subsequently, Reaves challenged his conviction and sentence collaterally and relief was denied summarily. *Reaves v. State*, 826 So.2d 932, 941–44 (Fla. 2002). On appeal, with the exception of remanding for an evidentiary hearing on “the claims relating to whether counsel was ineffective for failing to raise as voluntary intoxication defense and the related sub-claims” the Florida Supreme

¹ Originally, Reaves was by jury in 1987, convicted of premeditated first-degree murder, and sentenced to death. However, the Florida Supreme Court reversed because the State prosecutor had represented Reaves as a public defender in an earlier case. *See Reaves v. State*, 574 So.2d 105, 106–08 (Fla. 1991)

Court affirmed the summary denial of all of the claims including ineffective assistance at the penalty phase, and found the cumulative error claim moot in light of the remand. *Id.* at 944. *See also, Reaves v. Crosby*, 837 So.2d 396 (Fla. 2003) (denying state habeas corpus petition). Following a state evidentiary hearing, relief was denied and affirmed on appeal. *Reaves v. State*, 942 So.2d 874, 876-78 (Fla. 2006). The denial of Reaves' successive state collateral motion was affirmed on appeal. *See Reaves v. State*, 27 So.3d 661 (Fla. 2009)

Next, Reaves petitioned for federal habeas relief. Initially, the district court granted habeas relief on the claim of ineffective assistance of counsel and reserved ruling on the challenge to penalty phase counsel's effectiveness. On appeal, the circuit court reversed finding that the "district court should not have substituted its own interpretation of state law for that of Florida's highest court" and that the Florida Supreme Court's decision was not contrary to or an unreasonable application of federal law. *See Reaves v. Sec'y, Florida Department of Corrections*, 717 F.3d 886 (11th Cir. 2013). The case was then returned to the district court for resolution of the remaining ineffective assistance of penalty phase counsel claim.

Following an evidentiary hearing in federal court, the district court granted relief. However, again on appeal,² the circuit court reversed finding relief was granted on an issue not raised in the federal habeas petition and on facts not

² While his federal habeas appeal was pending, Reaves filed a successive postconviction motion in the trial court claiming his sentence was unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2016). That motion was denied and on May 2, 2018, Florida Supreme Court affirmed the denial of postconviction relief. *Reaves v. State*, -- So.2d --, case no. SC18-57 (Fla. May 2, 2018).

presented to the Florida Supreme Court at the time it decided the ineffective assistance of penalty phase counsel claim. *Reaves v. Sec'y, Dep't of Corrs*, 872 F.3d 1137 (11th Cir. 2017).

JURISDICTION

Petitioner, William Reaves (“Reaves”), is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, Julie L. Jones, Secretary, Florida Department of Corrections (hereinafter “State”), accepts as accurate Petitioner’s recitation of the Sixth, Eighth, and Fourteen Amendments of the United States Constitution as well as the 28 U.S.C. §2254(d)(1)-(2) of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

STATEMENT OF THE CASE AND FACTS

Currently, Reaves is under a sentence of death. On October 8, 1986, he was indicted for the first-degree murder of Sheriff’s Deputy Richard Raczkoski, possession of a firearm by a convicted felon, and trafficking in cocaine. Reaves was re-tried on the murder charge and is currently in the lawful custody of Florida pursuant to a valid judgment of guilt entered on February 25, 1992, and death sentence on March 31, 1992. *See Reaves v. State*, 639 So.2d 1 (Fla. 1994) (DE#17 Ex.A-R16 2329, 2332).

On direct appeal, the Florida Supreme Court (“FSC”) found:

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 FN1 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.

FN1. 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 circumstancesFN2 and no statutory mitigating circumstances. The judge found three nonstatutory mitigating circumstances. FN3

FN2. 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).

FN3. 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, 639 So.2d at 3.

Relevant to the issue before this Court, during the penalty phase, the State presented Bruce Haver, Merv Waldron, and Jim Attkison to establish Reaves' prior convictions for robbing two Holiday Inns. (DE#17 Ex.A-R12 1840, 1843-1845, 1854-63, 1870-71). Deputy Carl Lewis testified that in 1991, while Reaves awaited retrial, he punched Lewis in the face and busted his lip resulting in a battery on a law enforcement officer conviction. (DE#17 Ex.A-R12 1875-77, 1879). Reaves presented five lay witnesses, who knew him as a child adult, two veterans who served with him during the Vietnam War, and Dr. Weitz, a psychologist specializing

in Vietnam combat related mental issues. In rebuttal, the State offered Colonel Robert Ressler, Lt. Colonel Joseph Cinquino, Lt. Colonel Henry Norring, and Dr. McKinley Cheshire to rebut Reaves' claims of war time heroism, and Dr. Weitz's opinion that Reaves killed Deputy Raczkoski due to the combined effects of drugs and war time trauma. (DE#17 Ex.A-R14 2144-2243).

Upon a ten to two death recommendation, the trial court found the prior violent felony, avoid arrest, and heinous, atrocious, or cruel aggravators. Although Dr. Weitz opined both statutory mental mitigators applied, the trial court found neither, but found three nonstatutory mitigators - honorable military discharge, good reputation in the community up to the age of sixteen, and good family member. *Reaves*, 639 So.2d at 3, fn. 2-3. The conviction and death sentence were affirmed. *Reaves*, 639 So.2d at 4-6. On November 7, 1994, this Court denied certiorari. *Reaves v. Florida*, 513 U.S. 990 (1994).

On February 17, 1999, Reaves filed his amended postconviction relief motion, and on February 9, 2000, it was denied summarily. (DE#17 Ex.C-PCR1-4 453; Ex.C-PCR1-7 1086-1104, Ex.C-PCR1-11 1807). In addressing the instant penalty phase claims ("IACPP"), the trial court found Reaves' claim that counsel failed to seek appointment of additional mental health/medical experts insufficiently pled; he failed to explain what these experts would have said and failed to explain *Strickland v. Washington*, 466 U.S. 668 (1984) prejudice. In the alternative, the court found the claim refuted by the record. (DE#17 Ex.C-PCR1-7 1099). It also rejected the claim that counsel was ineffective for not presenting

background/history mitigation as insufficiently pled and, alternatively, refuted by the record. (DE#17 Ex.C-PCR1-7 1099-1101). Regarding the claim that counsel deficiently failed to present evidence of Reaves' Vietnam experience, the court determined that ample evidence of his military experience had been presented. (DE#17 Ex.C-PCR1-7 1100).

The Florida Supreme Court affirmed, agreeing Reaves' claim that counsel was ineffective for failing to present various mitigating evidence about family background, military service, and drug use was cumulative to the evidence presented, or was irrelevant. *Reaves*, 826 So.2d at 941-942. It found that many of Reaves' claims were insufficiently pled because they were contained in a "one-sentence laundry list of other acts which he asserts constitute ineffective assistance of counsel." *Id.* at 942. The Florida Supreme Court denied *sub silentio* the denial of the IAC-PP claim regarding mental health/medical experts. The issue of ineffectiveness for not raising a voluntary intoxication defense and related sub-claims was remanded for an evidentiary hearing, but all other claims were denied. *Reaves*, 826 So.2d at 944.

In March 2003, the evidentiary hearing was held,³ and upon denial of relief, Reaves appealed. *Reaves v. State*, 942 So.2d 874, 876-78 (Fla. 2006). The Florida Supreme Court affirmed, finding counsel reasonably chose an excusable homicide

³ The Florida Supreme Court noted that following the evidentiary hearing, Reaves attempted to amend his postconviction motion with documentation from the VA that he was 100% disabled due to Post Traumatic Stress Disorder ("PTSD"). The trial court denied the amendment and a successive claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). *Reaves v. State*, 942 So.2d 874, 876-78 (Fla. 2006).

defense over voluntary intoxication. *Id.* at 880-81. Also, there was no error in precluding Hinton from testifying because he was unavailable for the 1992 retrial⁴ and Reaves did not show that additional testing of evidence could provide proof of Reaves' level of intoxication at the time of the crime. *Reaves*, 942 So.2d at 881-82.⁵

On February 16, 2010, Reaves filed his §28 U.S.C. §2254 petition. Subsequently, the district court granted the petition in part: (A) finding guilt phase counsel ineffective for not presenting a voluntary intoxication defense and ordering a new trial (Ground XXII); and (B) granting an evidentiary hearing on the IAC-PP claim (Ground IX).⁶ The district court stayed the evidentiary hearing pending the State's appeal of the granting of a new trial. (DE#20, 30). This circuit court reversed, determining Reaves had failed to carry his burden of demonstrating prejudice. *Reaves*, 717 F.3d at 900. Although the circuit court did not decide whether the district court failed to afford the proper deference to the state court's

⁴ Referencing *Reaves*, 639 So.2d at 3, the Florida Supreme Court affirmed Hinton's testimony as that Reaves arrived at his home and related the incident and Hinton "had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties." *Reaves*, 942 So.2d at 881-82.

⁵ Not at issue here, Reaves filed a successive postconviction motion seeking public records and challenging Florida's lethal injection statute as unconstitutional. The trial court denied the claim and Reaves appealed. The state court affirmed in an unpublished opinion. *Reaves v. State*, 27 So.3d 661 (Fla. 2009). (DE#17 Ex.F).

⁶ The claim alleged Reaves' counsel was ineffective for never: (1) seeking assistance of experts in addictionology, psychopharmacology, neuropsychology, psychiatry, and the unique experience of the African-American Vietnam veteran (DE#1 15, DE#6-1 93); (2) presenting information about Reaves' family's daily struggle for survival (DE#1 15, DE#6-1 99-100); (3) presenting information about the complex readjustment problems of the black Vietnam veteran (DE#1 15); and (4) providing evidence of Reaves' turbulent family history, child abuse, difficult personal history and life experience, and death of a loved one (DE#1 15, DE#6-1 99-100).

findings, it pointed out that the district court's analysis was flawed:

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.

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.” *** 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.

Id. at 900, fn. 9 (citations omitted).

Following remand to address the IAC-PP issue, the district court issued a *sua sponte* order granting an evidentiary hearing on that claim upon finding the state court unreasonably determined the facts in its affirmance of the summary denial of IAC-PP. (DE#40 3). An evidentiary hearing was set on three of Reaves' sub-claims – mental health experts, substance abuse issues, and family background.⁷ (DE#40 11). During the federal evidentiary hearing, Reaves presented Drs. Thomas Hyde,

⁷ Prior to the federal evidentiary hearing, the State sought permission for its mental health experts to evaluate Reaves. (DE#44). The district court denied the motion, reasoning Florida law had not given the State the right to examine a capital defendant in 1992, thus, it would not permit the State to do so in 2013. (DE#46 7-8).

Richard Dudley, David Price, William Weitz, and Barry Crown. He also presented his sister, several persons who knew him while he was growing up, a fellow Vietnam veteran, and 1992 counsel. (DE#77-80). The State called Drs. Bruce Zaret, Michael Brannon, and Enrique Suarez, the private investigator who worked on Reaves' case, and the prosecutor who conducted Reaves' first trial. (DE#79-80). Based on this evidence, the district court issued an order granting Reaves habeas relief and ordering a new penalty phase. (DE#88). The court engaged in a three-step analysis finding: (1) the combined effect of counsel's performance in the guilt and penalty phases of trial rendered penalty phase counsel deficient; (2) the Florida Supreme Court's determination of IAC-PP claims unreasonable under §2254(d) and (3) prejudice. (DE#88 38).

On appeal to the circuit court, the State asserted the district court erred in granting a new penalty phase: (1) where it considered a record not before the Florida Supreme Court; (2) failed to give proper deference to the state court findings, and (3) erroneously imposed a "duty" upon the Florida Supreme Court to *sua sponte* revisit a previously decided claim. Further, the State asserted the district court's review was erroneous having granted relief on claims not raised in the federal habeas petition, using flawed logic, and that under a proper *de novo* review relief should have been denied.

As part of the procedural history review, the circuit court recognized:

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 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.

Reaves, 872 F.3d at 1146–47. It also noted:

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.

Reaves, 872 F.3d at 1147 (footnote omitted)

The circuit court found Reaves had raised 25 claims in his habeas petition:

*** 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, 872 F.3d at 1148. The circuit court found:

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 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.

Reaves, 872 F.3d at 1148–49. The circuit court determined “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.” *Id.*

Continuing, the circuit court found:

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.

Neither Reaves' § 2254 petition nor his memorandum of law in support of his petition 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.

Reaves, 872 F.3d at 1149–50. Additionally, the circuit court concluded that the district court failed to follow *Cullen v. Pinholster*, 563 U.S. 170 (2011) and assessed the IAC-PP claim using evidence not before the Florida Supreme Court at the time that court decided the IAC-PP claim and required the Florida Supreme Court to resurrect a claim *sua sponte*.⁸ Given the dictates of *Pinholster* and AEDPA as

⁸ The circuit court found:

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 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]

interpreted by *Williams v. Taylor*, 529 U.S. 362 (2000) and *Harrington v. Richter*, 562 U.S. 86 (2011), the circuit court addressed the Florida Supreme Court's resolution of the IAC-PP under the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

There it found:

At the penalty phase, counsel called five witnesses who

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 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.

Reaves, 872 F.3d at 1152–53. The circuit court stated:

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.

Reaves, 872 F.3d at 1154.

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 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.

FN5 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.

Reaves, 872 F.3d at 1157–58.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW OF THE DENIAL OF HABEAS CORPUS RELIEF ON A CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY COUNSEL SHOULD BE DENIED AS TRIAL COUNSEL DID PRESENT PETITIONER'S BACKGROUND AND PRESENTED EXTENSIVELY PETITIONER'S VIETNAM WAR SERVICE IN MITIGATION AND THE FACT DEPENDENT FLORIDA SUPREME COURT'S RESOLUTION OF THE STRICKLAND CLAIM WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF FEDERAL LAW. THE ELEVENTH CIRCUIT DECISION UNDER REVIEW HERE APPLIED THIS COURT'S WELL SETTLED STRICKLAND PRECEDENT AND DOES NOT CONFLICT WITH THAT OF ANOTHER COURT OF APPEALS OR PRESENT AN IMPORTANT OR UNSETTLED MATTER OF CONSTITUTIONAL LAW (restated).

Certiorari review should be denied where the Eleventh Circuit Court of Appeals' decision reviewing a state court's denial of an ineffective assistance of counsel claim does not conflict with a decision of any other state court of last resort or any decision of any federal court of appeals. Here, Reaves cannot show that the Eleventh Circuit's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. *See* Sup. Ct. R. 10. Determination of whether the Eleventh Circuit's rejection of Petitioner's ineffective assistance of penalty phase counsel's claim under *Strickland*, is dependent wholly on the facts of the case and of significance to no one other than the parties to this litigation. Although the failure to meet any of the Rule 10 considerations is not controlling,

this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). Also, certiorari review is inappropriate as the claim Reaves presents to this Court was not presented properly in either state or federal court below. As no compelling reason for review has been offered, certiorari should be denied.

As an initial matter, this is not a case like *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) as Reaves suggests here. (Pet. at 1). In *Porter*, the question before the Court was whether Porter was prejudiced when penalty phase counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested a mental health evaluation for mitigation. *Porter*, 558 U.S. at 40. As a result of counsel's inadequate investigation, defense counsel failed to present Porter's extensive combat experience in the Korean war and its lasting impact upon the defendant. *Porter* applied well established law [*Strickland*] to a much different factual situation from that presented here.

In stark contrast to trial counsel's minimal efforts in *Porter*, here Reaves' Vietnam War service was presented extensively as mitigation during his penalty phase. Trial counsel presented a mental health expert and several lay witnesses who discussed Reaves wartime service and its continuing impact upon him when he returned home. As noted by the Eleventh Circuit in its habeas review:

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 and heightening his fear and anxiety leading to “a fear response” and “the ‘survivor’ reaction” of perceiving that his own life was in danger.

Reaves, 872 F.3d at 1157-58. *See also Reaves*, 826 So. 2d at 941–42.

The Florida Supreme Court’s resolution of this issue on the record before it was neither an unreasonable application of the facts nor contrary to, or an unreasonable application of any of this Court’s precedent. The court recognized that Reaves’ claim of ineffective assistance of penalty phase counsel did not survive an examination of the record in this case where counsel offered lay witness, family and Vietnam War veterans, and an expert in mitigation to discuss the most powerful mitigation available to counsel: Reaves’ wartime service and its impact upon him. That with hindsight, postconviction counsel would offer additional or somewhat different evidence relating to Reaves’ wartime service did not warrant additional intrusive postconviction inquiry. Upon review of the record, the Florida

Supreme Court reasonably concluded that the evidence was largely cumulative to the evidence actually presented during the penalty phase. This decision does not conflict with any of this Court's precedent. *See Pinholster*, 131 S. Ct. at 1410 (finding neither deficient performance or resulting prejudice where the "new" postconviction evidence "largely duplicated the mitigation evidence at trial.").

Certiorari review would be inappropriate as the "combined" guilt and penalty phase deficiency theories invented by the district court and pressed by Reaves here was not fairly or properly presented in state court. As set forth above, in 2002, the Florida Supreme Court affirmed the summary denial of the ineffective assistance of penalty phase counsel claim ("IAC-PP"),⁹ but remanded for an evidentiary hearing solely on a claim of ineffectiveness of guilt phase counsel for not raising a voluntary intoxication defense and related sub-claims to that guilt phase issue. *Reaves*, 826 So.2d at 941-942, 944. In the appeal following the denial of relief on the guilt phase claim, Reaves made no specific argument or request for reconsideration of his

⁹ As identified by the circuit court, Reaves argued in his original state postconviction relief motion:

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 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."

Reaves, 872 F.3d 1137 at 1144–45.

previously rejected IAC-PP claim nor did he assert that the evidence presented at the 2003 evidentiary hearing established IAC-PP. At no time in his initial postconviction motion or in his appeal from that did Reaves ever raise a distinct claim of cumulative error based on the combined ineffective assistance of guilt and penalty phase counsel; therefore, the cumulative effect of guilt/penalty phase counsel errors was not before the state courts. Reaves intimates that the Florida Supreme Court should have *sua sponte* created and addressed this issue.

Given that the issue was never before the state court, the district court could not create it or offer it as a basis for relief in federal court under AEDPA. In fact, Reaves made no claim in his federal habeas petition that the actions of his guilt phase counsel rendered his penalty phase counsel ineffective. Yet here, Reaves asserts that selected statements from his various written pleadings, the Florida Supreme Court's 2002 remand instructions, and the evidence developed in 2003 during the remand essentially raised such a cumulative error claim that the Florida Supreme Court "could have" revisited the previously denied IAC-PP claim when it reviewed in 2006 the denial of relief after the evidentiary hearing. (Pet. at 20). Reaves claims that the district court's analysis was correct and that *Strickland* and its progeny require a cumulative analysis of counsel's errors throughout the combined guilt and penalty phases irrespective of whether a specific claim was identified. He maintains that had the circuit court considered the entire record from 1999-2006, penalty phase counsel would have been deemed ineffective, despite the fact he never brought such a claim below or argued it to the state courts.

The pith of Reaves' argument is that a reviewing court should comb the records for evidence, even where evidence and/or claims not pointed out by the defendant or evidence developed after an issue was decided on appeal, to support a *Strickland* claim even when that claim had been rejected previously and the defendant did not make a specific request for review. Anything short of this court-driven expansive review, Reaves maintains is violative of *Strickland*; *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000). However, Reaves' suggestion for a *sua sponte* analysis flies in the face of well settled law that the burden is on the defendant to identify issues and prove his claims.¹⁰ Likewise,

¹⁰ As the circuit court found:

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

his analysis of *Strickland* and its progeny is incorrect, and expands this Court's case law beyond the bounds set by this Court. His argument also ignores the limitations set by AEDPA and *Pinholster* that exhausted claims must first be presented to the state court, must implicate federal law, and must be reviewed by the habeas court in light of the Supreme Court precedent in existence and the record before the state court at the time it rendered its decision. Reaves' position is untenable and does not set forth a basis for certiorari review. This Court has never required such an analysis.

The Florida Supreme Court identified Reaves IAC-PP claim¹¹ properly based

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., 872 F.3d at 1149.

¹¹ The Florida Supreme Court found Reaves contended: (1) counsel unreasonably failed to introduce various mitigating circumstances, i.e., Reaves's impoverished childhood, military background, drug addiction, his sister's death shortly after his return from Vietnam, and his giving assistance to a jail guard in 1973; and (2) that penalty phase counsel failed to object to references to Reaves' first trial and conceded "key issues." Agreeing with the trial court that Reaves' "proposed additional evidence would have been either irrelevant or cumulative" the Florida Supreme Court considered the 2002 record finding:

***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

on the pleadings and arguments he set forth. Likewise, it identified the controlling law and applied the law to those facts in a manner which was not contrary to or an unreasonable application of this Court's precedent. *See Reaves*, 826 So.2d at 941–44. Likewise, the circuit court identified correctly the claim Reaves raised in state court, identified the record properly before the Florida Supreme Court when it decided the IAC-PP claim as required by *Pinholster*, and followed the dictates of *Harrington* in finding Reaves did not meet the requirements for relief under the AEDPA. The circuit court's decision is in accordance with this Court's precedent and does not conflict with another circuit court or state supreme court decision. Certiorari should be denied.

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.

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.

Reaves, 826 So. 2d at 941–42 (footnotes omitted)

Review of the denial of habeas corpus relief by the Eleventh Circuit Court of Appeals is circumscribed by 28 U.S.C. Section 2254(d)(1)¹² which focuses solely on the propriety of the state court's decision on the merits of the claim of ineffective assistance of penalty phase counsel. Federal habeas corpus relief is not available unless the state decision is "contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or the state court's determination of facts was unreasonable in light of the evidence." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). *See, Woodford v. Visciotti*, 537 U.S. 19 (2002) (explaining when habeas applicant alleges Sixth Amendment violation, he must show that state court applied *Strickland* in an objectively unreasonable manner); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (noting that the focus is on the

¹² 28 U.S. 2254 was amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As this Court explained in *Brown v. Payton*, 544 U.S. 133, 141 (2005):

AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the 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). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor*, *supra*, at 405, 120 S.Ct. 1495; *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam). A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor*, *supra*, at 405, 120 S.Ct. 1495; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

state court's application of governing federal law). The AEDPA, 28 U.S.C. § 2254, “imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.” *Felkner v. Jackson*, 131 S.Ct. 1305, 1307 (2011) (*per curiam*).

Further, as provided in *Pinholster*, 131 S.Ct. at 1398 AEDPA review under §2254(d)(1) is limited to the record before the state court that adjudicated the prisoner's claim on the merits and AEDPA’s “backward-looking language requires an examination of the state-court decision at the time it was made.” *Id.*, at 1398. A federal court may not issue a writ of habeas corpus unless “the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694 (2002). To determine whether a petitioner has satisfied §2254(d)(1), a federal court “must determine what arguments or theories supported or, as here, could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” *Harrington v. Richter*, 562 U.S. at 102. Having conducted this analysis, it may only grant relief if the state court’s rejection of the claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 103. “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”

Id. at 101 (*quoting Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Here, trial counsel's penalty phase presentation was objectively reasonable, and included both lay witness and mental health testimony. Reaves' combat service was described to the jury and its impact upon him was described both by the expert and lay witnesses. His family and friends informed the jury of Reaves' both before and after Vietnam,¹³ two soldiers from Reaves' platoon described war

¹³ Fran Ross, a local attorney, had known Reaves all of her life, having grown up together. She described their community, Gifford, as a small, predominately African-American, area where segregation was practiced. Ross identified photographs of Reaves' childhood home and church and noted that there was a strong sense of community where Gifford watched each other's children. (DE#17 Ex.A-R12 1896-99, 1905).

Reaves was a helpful child, always assisting others. He helped Ross's uncle build a house. Reaves was likeable and brought laughter to all. In high school, he was a good basketball player. Ross looked up to him and credited him with encouraging her to go to school and do well. However, she noticed a change in Reaves after he returned from Vietnam; he was using drugs (heroin) and was involved in crime. (DE#17 Ex.A-R12 1907-10).

Rev. Young was the pastor of the Baptist Church where the Reaves family worshiped. Reaves was a good student of the Bible and Young thought Reaves might become a preacher. As a child, Reaves was congenial with a good sense of humor. He was not rebellious/mischievous and had a good reputation in the community. Young lived two doors from Reaves and never had to scold him. (DE#17 Ex.A-R12 1921-22, 1924).

William Cobb knew Reaves since he was five or six, and had contact with him until Reaves entered the army. Cobb's wife taught Reaves' in fifth grade. In Gifford the children played in neighborhood yards. Reaves was an energetic, respectful young man, not a trouble-maker. (DE#17 Ex.A-R13 1931-32). Charlie Jones was a few years older than Reaves, and grew up with him. Reaves was a "fun-loving, happy go lucky type fella." However, Reaves was a different person after Vietnam and using heroin. (DE#17 Ex.A-R13 1937-39).

Ann Covington, described her brother as the most caring and gentle of her siblings. Reaves was an obedient child and devout Christian. Their family was close-knit, and religious. All the children attended and were involved actively in church. Their mother was the boss of the household. Although strict, Reaves was very close to and respectful of his mother. After Reaves returned from Vietnam, there was a marked change in his demeanor. He no longer ate meals with the

experiences,¹⁴ and an expert psychologist who had worked with veterans put Reaves' mental health history and post-Vietnam life in context for the jury.¹⁵ The

family, instead preferring to eat alone. He was anxious, and it was best not to surprise him from behind. Covington learned not to startle him while he was sleeping. In order to wake him, she had to call to him from outside his room before entering. (DE#17 Ex.A-R13 1941-42, 1945-46).

¹⁴ Hector Caban arrived in Vietnam in September of 1969 and served in the same platoon as Reaves. He authenticated a photograph of Reaves from Vietnam and explained what a typical day was like for Reaves. The soldiers had to trek through mountainous jungles and sleep under improvised lean-to's to stay dry. They had to dig holes in front of their sleeping area. If the enemy opened fire on them at night, they would jump into the holes and fire from a position of cover. They had to bury all of their trash except empty cans, as the enemy would use those to make grenades. (DE#17 Ex.A-R13 1956, 1960, 1965-67). Most of their missions were search-and-destroy. (DE#17 Ex.A-R13 1967). In his first month in Vietnam, their squad was ambushed, two comrades killed, and seven or eight shot. Caban received a Bronze Star for his actions during that engagement. (DE#17 Ex.A-R13 1970-75). Caban described Reaves as a quiet person who got along well with everyone. Drug use was common among the soldiers, and Reaves began using heroin. Many of his fellow soldiers coped with the war by using drugs or drinking. Due to his drug use, Reaves' performance suffered. (DE#17 Ex.A-R13 1980-82). During their time together, they were in six to eight enemy engagements. Reaves was very loyal; even getting reprimanded for refusing to leave the side of a wounded soldier being evacuated. (DE#17 Ex.A-R13 1988, 1991-1992).

Vietnam veteran, William Wade, served with Reaves for six weeks beginning in November 1969. Wade had a vivid memory of one enemy engagement where their unit was ambushed and two of their comrades killed. He related a November 20, 1969, fire fight while they were retaking a hill from the enemy. They came under heavy fire from machine guns and rocket propelled grenades, resulting in casualties. In Vietnam they had to watch constantly for trip-wires attached to explosive devices. Given where they were stationed, their engagements were with trained North Vietnamese troops rather than Viet Cong. (DE#17 Ex.A-R13 2006, 2008, 2010-11, 2013-15).

¹⁵ Dr. Weitz, a clinical psychologist who worked for the Department of Veterans Affairs ("VA") and maintained a private psychology practice, began his career as a clinical psychologist for the Army, where he worked at various hospitals including Walter Reed Army Medical Center in Washington, D.C. and was licensed in Florida, California, Maryland, and the District of Columbia. His 14 years of service as an active duty military psychologist, and raining, gave him experience treating soldiers with combat related mental health conditions. (DE#17 Ex.A-R13 2029-2033).

extensive presentation of penalty phase counsel is clear from the record and supports the state court's rejection of the IACC-PP claim.

With the penalty phase counsel's presentation outlined, the initial step in addressing Reaves' argument here is to determine the claim raised by him and

In 1987 and 1991, Dr. Weitz evaluated Reaves before both trials. He based his opinion on the clinical interviews and his administration of multiple tests. Reaves suffered from an Axis I disorder, poly-substance abuse, anti-social personality disorder (later rejected in postconviction), and was experiencing the psychological and emotional effects of his Vietnam combat service at the time of the murder. Those effects impacted his behavior and impacted on the events that led to the killing. Dr. Weitz described Reaves' behavior as "Vietnam Syndrome," a term widely used in the late 1960's and 1970's to describe a series of psychological and behavioral reactions by returning combat veterans. The characteristics of this condition included the inability to fit in with their family/friends/environments, depression, generalized feelings of rage, and excessive alcohol/drug use. (DE#17 Ex.A-R13 2039-41, 2043-45).

While in combat, Reaves developed heightened senses of sight and sound. His reaction times were quickened, his response times to stimuli were shortened, and his ability to sense/perceive fear was heightened. At the time of the murder, Reaves' judgment was impaired by drug usage, and the effects of his war-time trauma caused him to perceive the situation with the deputy as out of his control. When Reaves' gun fell from his pants, Reaves perceived an extreme danger to his own life, and his paramount concern was self-survival. Like a combat soldier, he viewed his weapon as his friend. Reaves "could not and would not" leave his weapon, and the issue of who was going to control the weapon, became the critical factor. Dr. Weitz opined that the survivor behavior Reaves learned in Vietnam led him to react quickly and without reflecting on what he was doing. Drug use combined with his combat related psychological condition substantially impaired Reaves' capacity to conform his conduct to the requirements of law and caused him to be under the influence of extreme mental or emotional disturbance at the time of the shooting. Contributing factors were Reaves' youth at the time of Vietnam service and lack of services available to African-American Veterans returning from war. (DE#17 Ex.A-R13 2048-50, 2052, 2057).

Dr. Weitz acknowledged Vietnam Syndrome was not a listed condition in the Diagnostic and Statistical Manual of Mental Disorders and that Reaves' psychological test results indicated he was capable of lying and manipulative behavior. Also, Reaves knew right from wrong at the time of the murder. Reaves never claimed he killed the deputy because of instinctual behavior learned in Vietnam, and Weitz found no support for such a finding. (DE#17 Ex.A-R13 2076, 2083, 2093, 2131).

adjudicated on the merits by the Florida Supreme Court and the record at the time the claim was decided. The record establishes that when Reaves first presented his postconviction claims to the state court, he argued in Claim V that he received an inadequate mental health examination in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985) because Dr. Weitz mistook PTSD for Anti-Social Personality Disorder. (DE#17 Ex.C-PCR1-4 47). Reaves faulted Dr. Weitz and counsel for failing to ensure that complete and accurate notes were taken during Weitz's interviews of Reaves, for neglecting to interview soldiers who served in the military with Reaves, and for failing to obtain "records from Washington, D.C., and the Veteran's Administration." (DE#17 Ex.C-PCR1-4 45). In Claim XXII his only mention of Dr. Weitz was contained in an insufficiently pled string cite of deficiency allegations:

presenting the testimony of Dr. William Allen Weitz (R. 2042); failure to provide Reaves' in depth taped interview to the police upon his arrest in Georgia on September 25, 1986, to Dr. Weitz (R. 2090-2091); failure to provide Dr. Weitz with statements from other soldiers that served with Reaves in the military (R. 2124, 2127); failure to provide Dr. Weitz with records from Washington, D.C. (R. 2127); failure to provide Dr. Weitz with Veteran's Administration records (R. 2132)

(DE#17 Ex.C-PCR1-4 126-127).

The sum and substance of the cumulative error claim in Reaves' original postconviction motion was:

This Court can also take into consideration that counsel's errors were cumulative. Mr. Reaves did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. (citations omitted). The sheer number and types of errors involved in his trial, when considered as a whole, resulted

in an unreliable conviction and sentence.

(DE#17 Ex.C-PCR1-4 128). The Florida Supreme Court found the cumulative error claim moot in light of its decision to remand Reaves' guilt phase involuntary intoxication claim for an evidentiary hearing. *Reaves*, 826 So.2d at 944. Reaves abandoned this claim by failing to raise it in his second appeal following the trial court's rejection of the guilt phase claim. *Reaves v. State*, 942 So.2d 874 (Fla. 2006) (DE#17 Ex.E-PCR2 Initial Brief).

In his §2254 petition, Reaves raised his IAC-PP in Claim IX (Claim XXII in the state postconviction motion) and alleged, without elaboration, that "trial counsel also failed to adequately to [*sic*] investigate the issue of Vietnam-era combat related post-traumatic stress disorder (PTSD) as mitigation." (DE#1 14). In his supporting memorandum of law, Reaves repeated the arguments he made in his state postconviction motion about Dr. Weitz's mistaken diagnosis of Antisocial Personality Disorder ("ASPD") and repeated that his new experts would make a diagnosis of PTSD. (DE#6-1 94-99).

Reaves points to *Williams* and *Wiggins* to suggest that there must be a cumulative review of counsel's errors when assessing *Strickland* prejudice. While a reviewing court must look at how counsel's errors impacted the result of the proceedings, it remains the defendant's burden to identify those errors in a clearly articulated claim. At no time in state or federal court did Reaves set forth the argument that guilt phase counsel's alleged errors combined with penalty phase counsel's errors resulted in ineffective assistance of counsel at the penalty phase.

Having failed to present that claim in state court, he cannot rely on a reviewing court to *sua sponte* create that issue, especially a federal district court. Likewise, Reaves' suggestion that the combined errors argument was raised in state court based on a motion for rehearing before the trial court hearing the remanded issue of ineffective assistance of guilt phase counsel is not well taken. First of all, the remand was for a guilt phase issue only and, although evidence may relate to both guilt and penalty phase matters, the claim was limited to the guilt phase claim and related guilt phase sub-claims on remand. Second, a party may not raise issues for the first time in a motion for rehearing.¹⁶ Third, Reaves abandoned a combined cumulative error claim because he did not raise it in the appeal from the evidentiary hearing remand. *See Reaves*, 942 So.2d at 876-78.

Reaves reads too much into the prejudice analysis conducted in *Strickland* and *Wiggins*. As noted above, Reaves did not alert the state court of this combined

¹⁶The Florida Supreme Court has held repeatedly:

***"[a] defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required." *Vining v. State*, 827 So.2d 201, 212 (Fla. 2002) (concluding that trial court did not err in denying rehearing of an order granting an evidentiary hearing on only one claim where defendant on rehearing "for the first time made factual allegations relating to his claim that counsel was ineffective in investigating and presenting mental health mitigating evidence").

Doorbal v. State, 983 So. 2d 464, 485 (Fla. 2008). *See also Cave v. State*, 899 So. 2d 1042, 1052 (Fla. 2005) (refusing to address merits of claim as it was raised for first time in motion for rehearing); *Gordon v. State*, 863 So.2d 1215, 1219 (Fla.2003) (same); *Way v. State*, 760 So.2d 903, 915 (Fla .2000) (same).

cumulative error claim. The “errors” that were considered in *Strickland* were errors identified by the defendant in that case. Likewise, the assessment of prejudice is *Wiggins* and *Williams v. Taylor*, 5529 U.S. 362, 395-98 (2000) again was based on the evidence and arguments brought forward during the litigation of the case.¹⁷ The reference to a cumulative review of counsel’s errors has not been interpreted to require a reviewing court to “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*, 872 F.3d at 1149 as was done by the federal district court here and as pressed for by Reaves on certiorari review. Reaves’ expansive reading of *Strickland* and its progeny has not been adopted by this Court, thus, he has not shown a basis for certiorari review. The Florida Supreme Court’s rejection of Reaves’ penalty phase ineffectiveness claim is not contrary to or an unreasonable application of any decision of this Court. This Court has never held that a habeas petitioner is not required to raise the claim in his petition for relief. Likewise, this Court has never held that a reviewing state court has a duty to *sua sponte* reconsider its final decision of an exhausted claim in light of the record developed in a subsequent appeal. This Court should deny certiorari.

In sum, a determination of whether the Eleventh Circuit’s rejection of

¹⁷ Reaves’ reliance on the prejudice/materiality analysis conducted under *Kyles v. Whitley*, 514 U.S. 419 (1995) and other cases assessing *Brady v. Maryland*, 373 U.S. 83 (1963) and denial of counsel claims under *Powell v Alabama*, 287 U.S. 45 (1932) do not stand for the proposition that a reviewing court, conducting an analysis, cumulative or otherwise, must *sua sponte* generate new arguments and claims for the defendant while ignoring the limitations of AEDPA and *Pinholster* in search for issues not raised by the defendant or abandoned previously.

Reaves' ineffective assistance claim under *Strickland* is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. Moreover, there is no conflict of law among the courts of appeal implicated by this case. The trial court and Florida Supreme Court applied the proper law and reached a conclusion supported by the facts developed below. With the proper record and exhausted claim identified, the appropriate level of deference due to counsel under *Strickland* as viewed through the optics of the AEDPA and its demand for respect for all reasonable state court judgments, it is clear that habeas relief was properly denied in this case. Accordingly, certiorari should be denied

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny the request for certiorari review.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



Leslie T. Campbell
Senior Assistant Attorney General
Florida Bar No. 0066631

OFFICE OF THE ATTORNEY GENERAL
1515 N. Flagler Dr.: 9th Floor
West Palm Beach, FL 33401
Office: (561) 837-5016
Facsimile: (561) 837-5108

COUNSEL FOR RESPONDENT

CASE NO. 17-8428

IN THE UNITED STATES SUPREME COURT

October 2017, Term

WILLIAM REAVES,
Petitioner,

vs.

JULIE L. JONES,
Secretary, Florida Department of Corrections,
Respondent.

CERTIFICATE OF SERVICE

I, Leslie T. Campbell, a member of the Bar of this Court, hereby certifies that on May 21, 2018, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to WILLIAM M. HENNIS, III, ESQ., and RACHAEL L. DAY, ESQ., Office of the Capital Collateral Regional Counsel - South, One East Broward Boulevard, Suite 444, Fort Lauderdale, FL 33301, counsel for Petitioner herein. I further certify that all parties required to be served have been served.



LESLIE T. CAMPBELL
Senior Assistant Attorney General
Florida Bar No. 0066631
OFFICE OF THE ATTORNEY GENERAL
1515 N. Flagler Dr.; 9th Floor
West Palm Beach, FL 33401
Office: (561) 837-5016
Facsimile: (561) 837-5108
Primary Email: CapApp@myfloridalegal.com
Email: Leslie.Campbell@myforidalegal.com
COUNSEL FOR RESPONDENT