

No. 17- 8428

OCTOBER TERM 2017

**In The
Supreme Court of the United States**

WILLIAM REAVES,

Petitioner

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

CAPITAL CASE

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's arguments rest on an artificial division of capital ineffective assistance counsel claims into "guilt phase" ineffective counsel claims and "penalty phase" ineffective counsel claims. *See* BIO at 14, 22 (suggesting that the Florida Supreme Court would have been required to *sua sponte* "resurrect" the "penalty phase" ineffective claim because only the "guilt phase" ineffective claim was before the court after the trial court's evidentiary hearing); *Id.* at 21 (asserting that the district court "invented" the "combined" guilty and penalty phase deficiency theories"). Respondent also asserts that Petitioner was required to "raise a distinct claim of cumulative error based on the combined ineffective assistance of guilty and penalty phase counsel" thereby promoting the view that courts must assess the prejudice from "guilt-phase" instances of deficient performance separately from prejudice arising from "penalty-phase" instances of deficient performance. *Id.* at 22.

This view that courts may conduct prejudice analyses separately, of course, is not the law. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court instructed lower courts to consider all errors in the prejudice analysis. And this Court employed a cumulative analysis in its prejudice analyses in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003). Moreover, in *Kyles v. Whitley*, 514 U.S. 419 (1995), this Court rejected a materiality analysis, upon which the prejudice analysis is based, that involved "a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*," *id.* at 441. Nowhere has this Court indicated that courts should consider "guilt phase" and "penalty phase" errors separately.

The claims below relating to mental health and substance abuse and intoxication were inextricably interrelated in this case. It is noteworthy that in 2002 the Florida Supreme Court’s remand for an evidentiary hearing on guilt phase ineffectiveness, including trial counsel’s failure to raise the defense of voluntary intoxication, also included the phrase “**and related subclaims,**” allowing for the presentation of additional evidence. *See Reaves v. State*, 826 So. 2d 932, 944 (2002) (emphasis added). Those “related subclaims” included the claim that trial counsel “was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects” *Id.* at 939. This claim is self-evidently broader in scope than voluntary intoxication, and resulted in evidence being presented at the 2003 evidentiary hearing on remand as to Petitioner’s combat PTSD and substance abuse disorder.¹

As the petition noted, counsel argued the relevance of the “related subclaims” concerning the ineffective assistance of trial counsel at the penalty phase at the beginning of the state court evidentiary hearing on March 3, 2003. *Tp.* at 6-10. Counsel told the trial court that the scope of the hearing was not limited to voluntary

¹ Not only is Respondent’s view of a separate prejudice analysis contrary to this Court’s ineffective-counsel law, but the insistence on viewing “guilt phase” and “penalty phase” instances of deficient performance separately is especially troubling in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000), this Court held that any fact that “exposes the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” of the offense that must be decided by the jury. In *Hurst*, this Court applied *Apprendi*’s holding to Florida’s death-sentencing scheme. The “penalty” phase, therefore, is a continuation of the “guilt” phase because the determination of whether a capital defendant is eligible for death is an element of the offense of capital murder—it is not merely a potential penalty.

intoxication and “the Supreme Court opinion also pointed out that the related [*Ake*] claim was also part of it.” Tp. at 6. The *Ake* claim was claim 5 in the 1999 Rule 3.851 motion, found at PCR 496-501.²

The claim incorporated “[a]ll other allegations and factual matters contained elsewhere in this motion” and then alleged that “Mr. Reaves was denied his rights under the federal Constitution to a professional, competent, and appropriate mental health evaluation for use in the aid of his defense. Counsel failed to obtain a professional, competent and appropriate mental health evaluation.” PCR. 496.

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

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

² *Ake v. Oklahoma*, 470 U.S. 68 (1985).

During the 2003 hearing the trial court acknowledged that “the only problem is the Supreme Court doesn’t say anything about that issue. I’ve looked through the cases and it’s like they’ve raised that issue and they didn’t decide on it.” PCR. at. 8. The trial court then opined that “[i]t’s like it was left out dangling and no mention until the very end, and then they talk about related to subclaims and they refer to this as a related sub issue. So, if you’re willing to go along with that, then that’s what we’ll do.” PCR. at. 9.

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

Petitioner’s counsel filed a motion for rehearing on March 26, 2004. It noted that “the recent case of *Wiggins v. Smith*, 123 S. Ct. at 2536-37,” had addressed a similar failure by trial counsel to investigate a capital defendant’s social history for the purpose of developing potential mitigation but that the relevant applicable ABA professional standards referenced therein were equally applicable to investigation at both the guilt phase and sentencing phase. Motion for Rehearing at 10-11.

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

Based on its artificial view of separate “guilt phase” and “penalty phase” ineffective claims, Respondent argues in support of the Eleventh Circuit’s finding that *Cullen v. Pinholster*, 563 U.S. 170 (2011), precluded the district court from considering the evidence from the 2003 evidentiary hearing when deciding the “ineffective penalty phase claim.” Under *Pinholster*, the habeas court can consider only “the record that was before the state court that adjudicated the claim on the merits.” *Id.* at 181. Respondent reasons that because the state court did not have the evidence from the 2003 state-court evidentiary hearing before it in 2002 when it denied Petitioner’s ineffective “penalty phase claim,” the district court was therefore precluded from considering that information. BIO at 24-25. Of course, this rests on

the faulty reasoning that courts need not view ineffective-counsel claims cumulatively and that courts may view counsel's errors in the "penalty phase" and "guilt phase" separately in the prejudice analysis.

Respondent chastises the district court for relying on the state court record that was created as a result of the remand for the hearing in 2003 on voluntary intoxication and related subclaims. However, Respondent has overlooked the fact that *Pinholster* presented a procedural position similar to the instant cause. *Pinholster* had filed two separate state habeas petitions. Regarding the issue of which of the state court records should be considered the *Pinholster* court stated that:

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

Id. at 1388 n.12 (citation omitted) (emphasis added). Interestingly, this Court asked whether consideration of the second state court proceeding would be exclusive, not whether it would be considered at all. This is because Pinholster's freestanding penalty phase claim was addressed twice by the California Supreme Court, while Reaves' freestanding penalty phase claim was addressed only in the initial round of

litigation. But no matter. *Pinholster* is not a rule dependent on the preservation of claims; it concerns the presentation of a record.

After the 2003 hearing the Florida Supreme Court had the entire state-court evidentiary record before it when in 2006 it denied Petitioner's appeal and ineffective-counsel claim in its entirety. And, even under the State's artificial view of "penalty phase" and "guilt phase" ineffective claims, *Pinholster* did not preclude the district court from considering the state trial-court evidentiary hearing. *Pinsholster* is grounded in concerns of comity. *Id.* at 185. Because the Florida Supreme Court possessed the entire record before it dismissed Petitioner's appeal in its entirety there are no comity concerns. Indeed, upon receipt of the evidence, the Florida Supreme Court was free to reconsider its "penalty phase" ineffective-counsel ruling or even reframe the ineffective-counsel inquiry as one dealing with mental-health experts. Comity concerns, therefore, are not implicated.

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

In denying Mr. Reaves' post-conviction relief, the state court found, and the Florida Supreme Court agreed, that "[a]ny of the proposed additional evidence [as to the penalty phase] would have been either irrelevant or cumulative." *Reaves*, 826 So. 2d at 941. . . . [T]hat was an unreasonable determination of the facts.

(Doc. 88 at 61). Nothing from the 2003 state court record was necessary to the district court's ruling. Considering the ways in which that record reaffirms the correctness of the ruling does not change the fact that the ruling stands on its own.

Pinholster ensures that a federal habeas court will only consider the record

“that was before the state court that adjudicated the claim on the merits” (Doc. 88 at 34). The Florida Supreme Court was the state court that adjudicated Mr. Reaves claims relating to penalty phase ineffectiveness. The Florida Supreme Court also reviewed the record from the 2003 state court evidentiary hearing. The Florida Supreme Court could have ruled on the penalty phase in its 2006 opinion, because it did not deny all ineffectiveness challenges to the penalty phase in 2002. As noted *supra*, when the Florida Supreme Court in 2002 remanded for an evidentiary hearing on guilt phase ineffectiveness, including failure to raise a defense of involuntary intoxication, it also allowed hearing on “related subclaims.” *Reaves v. State*, 826 So. 2d 932, 944 (2002).

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

In his dissent to the denial of relief, Justice Anstead pointed to the Florida Supreme Court’s 2002 prior opinion that remanded for the 2003 evidentiary hearing. The section he referenced specifically noted the interconnection between the penalty phase presentation and the guilt phase evidence:

During the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional testimony that **Reaves** was on drugs at the time of the crime.

Moreover, numerous witnesses testified that **Reaves** had a history of serious drug abuse dating back to the Vietnam War, that he became involved in “heavy drugs” towards the end of his service in Vietnam, and that his prior convictions were drug-related.

Reaves v. State, 942 So.2d 874, 883 (Fla. 2006). Petitioner’s Motion for Rehearing to the Florida Supreme Court also specifically noted the Court’s earlier opinion of June 20, 2002 and the reference therein to the related sub-issue “that his attorney was ineffective in not retaining experts who could testify properly as to the effects of substance abuse combined with his mental defects.” Motion at 2. The motion for rehearing also noted that “this Court’s majority has nothing to say about the extensive expert testimony that was presented below except that “although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions.” Motion at 2.

Had the Eleventh Circuit relied on the entire state court record, as would have been proper, it would have found, as the district court did, that Petitioner received constitutionally ineffective assistance of counsel at his penalty phase. The Eleventh Circuit’s refusal to consider the 2003 record is error, for the reasons explained in the petition and herein.

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

counsel's preparation for and presentation of guilt phase evidence are always pertinent to the penalty phase, especially in cases like this one in which facts that are pertinent to a guilt phase defense are also supportive of mitigation.

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

In the instant case, the issues surrounding Petitioner's mental health including PTSD, and his history of substance abuse and intoxication at the time of the offense were and should be, relevant to preparation for both the guilt/innocence and penalty phases. In a case such as this it is impossible to separate the claims surgically, rather as a surgeon would separate conjoined twins. Indeed trial counsel has a duty to operate under a unified theory of the case from pretrial to penalty phase. The district court correctly assessed the penalty phase ineffectiveness claim in light of the guilt phase claims and correctly determined that a new penalty phase was justified.

Respondent's Brief in Opposition demonstrates Petitioner's point that a non-cumulative ineffective-counsel review produces arbitrary results in violation of the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 274 (1972). If a non-cumulative analysis is the law, each court can determine how it groups attorney

errors. Here, the Florida Supreme Court could have grouped all errors that involved a mental health expert across both the “guilt phase” and “penalty phase”. Such a division would have made more sense because, as the Eleventh Circuit acknowledged, the “guilt phase” claim evidence “was also relevant to the penalty stage ineffective assistance claim about mitigating circumstances.” *Reaves v. Sec’y, Dep’t of Corrs.*, 872 F.3d 1137 (11th Cir. 2017). The Florida Supreme Court, however, chose to group all “penalty phase” errors together and remand the narrow issue of trial counsel’s failure to pursue a voluntary intoxication defense along with undefined “related subclaims” for an evidentiary hearing. Another court choosing to group all mental-health expert claims together would have evaluated prejudice differently and found ineffective assistance of counsel.

For the above stated reasons, Petitioner requests that certiorari be granted.

Respectfully Submitted,

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