NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

DIETER RIECHMANN,

***Petitioner*,**

v.

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

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state court's conclusion that evidence not presented at trial was cumulative of other evidence before the jury a "determination of the facts" that is reviewed for reasonableness under 28 U.S.C. § 2254(d)(2), or an "application of clearly established Federal law" reviewed for reasonableness under § 2254(d)(1), an issue on which the circuit courts of appeal disagree?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States Supreme Court:

Dieter Riechmann v. Florida,
No. 07-11617 (Oct. 16, 2008)

Dieter Riechmann v. Florida,
No. 91-8075 (Nov. 2, 1992)

United States Court of Appeals for the Eleventh Circuit:

Dieter Riechmann v. Florida Department of Corrections, *Attorney General State of Florida*,
No 18-10145 (Oct. 7, 2019),
rehearing denied (May 11, 2020)

United States District Court for the Southern District of Florida:

Dieter Riechmann v. Florida Department of Corrections, et al.,
No. 1:13-cv-20863-JEM (December 13, 2017)

Florida Supreme Court:

Dieter Riechmann v. State of Florida,
No. SC03-760 (April 12, 2007),
revised on denial of rehearing (Sept. 20, 2007)
rehearing denied (Nov. 30, 2007)

Dieter Riechmann v. James R. McDonough,
No. SC06-117 (Sept. 21, 2006)

State of Florida v. Dieter Riechmann,
Nos. SC89564, S93236 (February 24, 2000),
rehearing denied (Jan. 31, 2001)

Dieter Riechmann v. State of Florida,
No. 73492 (May 30, 1991)

Florida Fourth District Court of Appeal:

Dieter Riechmann v. State of Florida,
No. 3D10-605 (Feb. 22, 2012)

Florida Eleventh Judicial Circuit Court:

State of Florida v. Dieter Riechmann,
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Dieter Riechmann respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10145 in that court.

OPINIONS BELOW

The Eleventh Circuit's order denying rehearing is unpublished and reproduced in Appendix A-1. The Eleventh Circuit's opinion affirming the district court's denial

of Petitioner's 28 U.S.C. § 2254 petition is published at 940 F.3d 559 and reproduced in Appendix A-2. The district court's final judgment and its order adopting the magistrate judge's report and recommendation, are both unreported and reproduced in Appendices A-3 and A-4, respectively. The magistrate judge's report is unreported and reproduced in Appendix A-5.

The decision of the Florida Supreme Court affirming Mr. Riechmann's conviction and death sentence on direct appeal is published at 581 So.2d 133, and reproduced in Appendix A-6.

The state trial court's order granting Mr. Riechmann's first postconviction motion in part and ordering a new sentencing hearing is unpublished and reproduced in Appendix A-7. The decision of the Florida Supreme Court affirming the trial court's order on Mr. Riechmann's first postconviction motion but denying his petition for writ of habeas corpus is published at 777 So.2d 342 (Fla. 2000), and reproduced at Appendix A-8.

The state trial court's order denying Mr. Riechmann's second postconviction motion is unpublished and reproduced at Appendix A-9. The decision of the Florida Supreme Court affirming that decision is published at 966 So.2d 298, and reproduced at Appendix A-10.

The decision of the Florida Supreme Court denying Mr. Riechmann's petition for writ of habeas corpus is published at 940 So.2d 1125, and reproduced at Appendix A-11.

The decision of the Florida Third District Court of Appeal affirming the trial court's order resentencing Mr. Riechmann to life imprisonment is published at 83 So.3d 734, and reproduced at Appendix A-12.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On October 7, 2019, the court of appeals affirmed the district court's denial of Mr. Riechmann's § 2254 habeas corpus petition. App. A-2. On May 11, 2020, the court of appeals denied Mr. Riechmann's timely petition for rehearing and rehearing en banc. App. A-1. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

1. Mr. Riechmann and his partner of thirteen years, Kersten Kischnick, were German citizens who travelled to Miami in 1987. App. A-2 at 2. Ms. Kischnick was shot and killed while she sat in the passenger seat of a rental car driven by Mr. Riechmann. *Id.* The State charged Mr. Riechmann with first-degree murder, and sought the death penalty.

2. Pretrial, defense counsel failed to undertake any investigation in Germany. App. A-2 at 4. "He spoke to no German witnesses prior to trial, nor did he send an investigator to Germany," even though Mr. Riechmann had "provided his defense counsel with a handwritten list of persons in Germany to depose or contact." *Id.*

3. At trial, Mr. Riechmann maintained that he and Ms. Kischnick "were riding around videotaping some of Miami's sights when they got lost and asked for directions. He contended that the stranger whom they asked fired the shot that killed Kischnick. Riechmann sped away looking for help, driving several miles before he found a police officer." *Id.* The State's theory was that Kischnick was a

prostitute[1] who financially supported Riechmann, and when she no longer wanted to work as a prostitute, Riechmann killed her in order to recover insurance proceeds. App. A-2 at 2-3. The State attempted to prove this theory through four witnesses from Germany. *Riechmann v. State*, 581 So.2d 133, 137 (1991).

4. The four German witnesses who testified for the State were culled from 37 witnesses who were interviewed by German police pretrial at the behest of Miami prosecutors. App. A-2 at 3. Before trial, defense counsel learned of these statements during discovery and requested copies of the statements that he did not already possess. *Id.* At the time, trial counsel possessed only ten of the 37 statements – the statements of those who might testify at trial. *Id.* When the State did not comply, defense counsel moved the court to conduct an *in camera* inspection and then to turn them over to the defense. App. A-2 at 4. The state trial court, however never ruled on this motion, and defense counsel did not renew it. *Id.*

5. The State's closing argument emphasized the testimony of the German witnesses, and argued that their depiction of Mr. Riechmann's relationship with Ms. Kischnick – that of the angry "kept man" living off her proceeds from prostitution – provided the motive for her murder:

6. During guilt deliberations, the jury focused on Mr. Riechmann's relationship with Ms. Kischnick. It requested transcripts of the testimony of the two

[1] Prostitution is fully legal and regulated in Germany.

witnesses who testified extensively regarding that relationship – Ms. Kischnick's sister and her co-worker.

7. `The jury found Mr. Riechmann guilty of first-degree murder. App. A-2 at 18.

8. No evidence was presented by either side at the penalty phase. *Id.* Over defense counsel's objections, the State provided the 37 German witness statements – 27 of which it had withheld from defense counsel – to the trial court *in camera*, and the trial court found that they established that Mr. Riechmann was a "good person." *Id.* The jury recommended death by a 9-3 vote, and the trial court sentenced Mr. Riechmann to death. *Id.* The Florida Supreme Court affirmed. *Id.* at 19.

9. In 1994, Mr. Riechmann filed a state postconviction motion which included the claim that trial counsel was ineffective for failing to investigate and present readily-available evidence to rebut the State's theory of the case at the guilt phase. *Id.* at 19-20. Identified in the motion were 15 potential Swiss and German witnesses who would have provided this evidence, but did not testify at trial because counsel failed to conduct any investigation in Germany. *Id.*

10. The postconviction motion alleged further that counsel's failure to interview and present the testimony of the exact same German witnesses also prejudiced Mr. Riechmann as to penalty. *Id.*

11. The postconviction court held an evidentiary hearing at which many of the witnesses identified in the motion testified, and admitted written statements from others on the list who could not attend the hearing. *Id.* at 20. These German witnesses testified that Mr. Riechmann had a long-term, loving relationship with Ms. Kischnick, and that he was financially independent and therefore did not "live off" her earnings as a prostitute, and thereby rebutted the State's theory of the case.

12. Trial counsel testified at the evidentiary hearing that the relationship between Mr. Riechmann and Ms. Kischnick was "one of the central issues in the case," The postconviction court found that trial counsel "spoke to no witnesses in Germany" and "offered no reasonable explanation as to why" he did not do so. "He conceded he did not send an investigator to Germany and clarified that he was not prohibited by the Defendant from conducting such an investigation. It found further that trial counsel's "file contained the Defendant's hand written list of persons in Germany for him to contact, but he did not recollect calling anyone on the list." "Consequently," it found, "trial counsel failed to unearth a large amount of . . . evidence as to the Defendant's . . . relationship with the Victim."

13. The postconviction court held that trial counsel's failure to investigate and present this evidence was deficient performance, and prejudiced Mr. Riechmann in the penalty phase. App. A-2 at 24. It therefore granted the motion in part and vacated Mr. Riechmann's death sentence. *Id.* It denied relief, however, as to Mr. Riechmann's conviction. *Id.* It made no findings as to whether counsel's guilt-

phase performance was deficient, but found Mr. Riechmann "failed to establish requisite prejudice" because "most of this evidence had already been presented to the jury, although in a manner different from now desired." *Id.* at 24-25.

14. The Florida Supreme Court affirmed. App. A-2 at 25. It noted that Mr. Riechmann presented witnesses to the postconviction court "who testified in detail about the positive personal qualities Riechmann showed during the extensive period that they knew him. They also established that he had a long-lasting 'loving relationship' with Kischnick." *Riechmann*, 777 So.2d at 348. It found further that these witnesses "testified that they were available, willing and would have testified at Riechmann's trial if they had been contacted and requested to do so." *Id.* It noted that the postconviction court "also accepted affidavits from of other witnesses who were unable to testify." *Id.* at 348-49. "Finally," it noted, "defense counsel testified that he was unable to provide an explanation as to why he did not contact any of the witnesses contained in a handwritten list prepared by Riechmann." *Id.* at 349. Based on these findings, the Florida Supreme Court held that trial counsel's failure to investigate and present the testimony of these German witnesses at the penalty phase was ineffective assistance of counsel. *Id.* at 350-51.

15. Mr. Riechmann also asserted on appeal that trial counsel's failure to investigate these exact same German witnesses prejudiced him at his guilt phase. He argued that "[d]efense counsel did no independent investigation into these witnesses even though Mr. Riechmann gave him a list of people to contact." The

Florida Supreme Court, however, rejected that claim. *See Riechmann*, 777 So.2d at 356-357. It noted that the postconviction court "found a lack of prejudice because it concerned evidence which was already admitted at trial, only in a different manner than now asserted." *Id*. at 357. "For example," the state supreme court stated, "at trial, counsel secured testimony from a State's witness of Riechmann's love for Kischnick," and the jury "was also presented with a videotape of the couple the night of the murder that showed them involved in a loving relationship." *Id*. It therefore found the postconviction judge's "factual findings [] supported by competent and substantial evidence and his legal conclusions [] supported by our prior case law." *Id*.

16. In addition to finding no guilt-phase prejudice, the Florida Supreme Court also found no deficient performance. *Id*. In so doing, however, it confused the list of 37 German witnesses withheld pretrial from the defense by the State with the German witnesses on the list prepared for trial counsel by Mr. Riechmann. It provided no other reasoning to support its conclusion that counsel's failure to interview the witnesses on Mr. Riechmann's list was not deficient performance. *See id*., *passim*.

17. Thereafter, the Florida Supreme Court denied a state habeas corpus petition filed by Mr. Riechmann, *id*. at 364-66, and affirmed the denial of his second state postconviction motion, *Riechmann v. State*, 966 So.2d 298, 303 (Fla. 2007).

18. Following the grant of penalty relief, the trial court resentenced Mr. Riechmann to life imprisonment. App. A-2 at 28. The state court of appeals affirmed in a *per curiam* opinion. *Id.*

19. After exhausting state remedies, Mr. Riechmann filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the Southern District of Florida. *Id*. at 28. The petition alleged, *inter alia*, that counsel was ineffective for failing to present evidence regarding Mr. Riechmann's loving relationship with Ms. Kischnick and his lack of financial dependence on her. *Id.* The district concluded the Florida Supreme Court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984) under § 2254(d)(1), because "it accurately stated that the trial court's factual findings on the claim were supported by competent and substantial evidence, and the legal conclusions were supported by prior case law." *Id.* at 29-30.

20. A panel of the Eleventh Circuit affirmed. *Id.* Unlike the district court, it did not review the state court's decision regarding *Strickland*'s prejudice prong for reasonableness under § 2254(d)(1). Instead, it held that the Florida Supreme Court's finding that the testimony at the evidentiary hearing was cumulative of that presented at trial warranted deference under the Antiterrorism and Effective Death Penalty Act (AEDPA) because it was not an unreasonable determination of the facts under § 2254(d)(2) and denied habeas corpus relief. *Id.* at 35-36.

21. The court of appeals denied Mr. Riechmann's petition for rehearing and petition for rehearing en banc. App. A-1.

REASONS FOR GRANTING THE WRIT

I. The circuits are divided on the question presented.

At a state postconviction hearing, Mr. Riechmann presented numerous German witnesses willing to testify at his trial whose testimony would have strongly called into doubt the State's theory as to motive. Trial counsel was aware of these witnesses pretrial. Yet trial counsel failed to contact any of these witnesses or present their testimony at trial. Mr. Riechmann argued to both the state and federal courts that this failure was ineffective assistance of counsel.

Strickland v. Washington, 466 U.S. 668 (1984), articulates the two-prong test for determining whether a defendant was denied his Sixth Amendment right to the effective assistance of counsel. "First, the defendant must show that counsel's performance was deficient." *Id.* at 687. Second, the defendant must show prejudice; that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. With respect to *Strickland*'s prejudice prong, the Florida Supreme Court found no prejudice because the evidence trial counsel failed to present was cumulative of that presented at trial:

As for the claim concerning Riechmann's relationship with Kischnick,

> the [trial court] found a lack of prejudice because it concerned evidence which was already admitted at trial, only in a different manner than now asserted. For example, at trial, counsel secured testimony from a State's witness of Riechmann's love for Kischnick. The jury was also presented with a videotape of the couple the night of the murder that showed them involved in a loving relationship. Again, we find that the trial judge's factual findings are supported by substantial and competent evidence, and his legal conclusions are supported by our prior case law.

See Riechmann, 777 So.2d at 357.

Ordinarily, a federal court would be required to defer to the Florida Supreme Court's prejudice determination. Unless one of two exceptions applies, a habeas petition "shall not be grated with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Those two exceptions are found in subsections (d)(1) and (d)(2), which respectively provide that no deference is warranted where the state court's "adjudication of the claim –"

> (1) resulted in a decision that is contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

§ 2254(d)(1) & (d)(2). Thus, if the state court unreasonably determined the applicable law or the relevant facts, a federal habeas court's review of the claim is *de novo*.

The circuit courts disagree as to which subsection of § 2254(d) applies where an ineffective assistance of counsel claim is predicated on counsel's failure to present

relevant evidence to the jury, and the state court denies relief because it deems that evidence cumulative of other evidence presented to the jury. The Sixth and Seventh Circuits have held such a decision by a state court is a question of law reviewed for reasonableness under § 2254(d)(1). *See Carter v. Bogan*, 900 F.3d 754, 775-76 (6th Cir. 2018) (holding that because "there is a reasonable argument to be made that any additional evidence on these matters would have been cumulative and thus would not have generated a reasonable probability that the outcome . . . would have been different," the state court of appeals "did not unreasonably apply *Strickland*"); *Ward v. Neal*, 835 F.3d 698, 703-04 (7th Cir. 2016) (holding that state supreme court's decision that Ward cannot show *Strickland* prejudice was not an unreasonable application of clearly established law where the evidence counsel failed to present was "largely cumulative" of the evidence the jury "did hear").

The Fifth Circuit has reviewed a state court's conclusion that omitted evidence is cumulative pursuant to both § 2254(d)(1) and (d)(2). *Compare Sheppard v. Davis*, 967 F.3d 458, 468-69 (5th Cir. 2020) (holding that because "the same evidence was substantially before the jury," it "cannot say that" the state court of appeals applied *Strickland* "in an objectively unreasonable manner" when it found Sheppard failed to demonstrate prejudice) (internal quotation marks omitted); with *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014) ("The state court found that the [unpresented] testimony . . . was largely cumulative of the evidence . . . actually presented at trial. . . . Mays has not shown that decision to be based on an unreasonable determination

of the facts in light of the evidence presented in the state court proceedings as required by 28 U.S.C. § 2254(d)(2).")

And the First, Third, Ninth, and Eleventh Circuits hold that it is a determination of fact, reviewed for reasonableness under § 2254(d)(2). *See Abdul-Salaam v. Sec'y, Pa. Dep't of Corr.*, 895 F.3d 254, 266 (3d Cir. 2018) (holding that state court's "factual determination" that calling additional witnesses "would 'have merely been cumulative'" is "a factual determination [that] must be reviewed under the deferential § 2254(d)(2) framework"); *Vega v. Ryan*, 757 F.3d 960, 974 (9th Cir. 2014) (reviewing, under § 2254(d)(2), a "state court's findings that [a witness's] testimony would have been cumulative and would have had no effect on the verdict"); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) (same).

It is this latter course that was taken by the court below when it denied Mr. Riechmann habeas relief. *See* App. A-2 at 35 ("[W]e cannot say that the Florida Supreme Court's finding that the potential additional testimony . . . was cumulative is a wholly unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).").

II. The decision below falls on the wrong side of the circuit split.

The court below erred in treating as a factfinding to be reviewed under § 2254(d)(2) the Florida Supreme Court's conclusion that the evidence at the state postconviction hearing was cumulative of that presented at trial.

Ironically, this error was recognized by the Eleventh Circuit itself in *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1259 (11th Cir. 2012). There, after the state court rejected a claim that counsel was ineffective for failing to present certain evidence at trial because that evidence was "largely cumulative" of the trial evidence, the prisoner brought the same claim in a federal habeas corpus petition. *Id.* at 1258-59. The *Holsey* panel stated that it had "some serious doubt about treating . . . the [state court's] conclusion that the additional evidence . . . was 'largely cumulative' of the evidence presented" as trial "as a factfinding to be reviewed under 28 U.S.C. § 2254(d)(2)." *Id.* at 1359. This "serious doubt" arose because "[t]he 'largely cumulative' conclusion does not seem to be a factfinding or a 'determination of facts' that is subject to review under the statutory provision." *Id.* Rather, the panel postulated, "it seems to be a conclusion in the nature of an application of law to fact." *Id.* "At the very least," the panel stated, "it is not a finding or determination of the historical facts of the case." *Id.* Rather, "the term 'largely cumulative' seems more of a way of conveying that there was not enough of a difference between the evidence presented during the sentencing phase and the evidence presented in the collateral evidentiary hearing to establish a reasonable probability of a different result" and therefore the state court did not unreasonably apply *Strickland* to its prejudice determination. *Id.* The *Holsey* panel did not review the state court's "largely cumulative" determination pursuant to § 2254(d)(1), however, because it felt itself bound by the Eleventh Circuit's earlier decision in

Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1349 (11th Cir. 2011), which considered the determination of question of fact reviewed pursuant to § 2254(d)(2). *Id.* When the panel below reviewed the Florida Supreme Court's cumulative evidence determination as one of fact reviewable pursuant to § 2254(d)(2), it too followed *Cooper*. App. A-2 at 35.

The analysis predicated on § 2254(d)(1) deemed correct by the panel in *Holsey* is precisely that used by the Sixth and Seventh Circuits. *See Carter*, 900 F.3d at 775-76 (hold that cumulative evidence "would not have generated a reasonable probability that the outcome . . . would have been different" and therefore the state court of appeal "did not unreasonably apply *Strickland*"); *Ward*, 835 F.3d at 703-04 ("Nor can we say the [state supreme court] unreasonably applied *Strickland*…. This evidence is not particularly strong, and it is largely cumulative of the … evidence the jury did hear."). And it is the correct analysis for the reasons stated in *Holsey*.

III. The question presented is important.

The importance of the question presented is self-evident. Under the AEDPA, if a state court adjudicates the merits of a federal claim, a federal habeas court cannot grant relief unless the petitioner has shown that the state court's decision was either contrary to, or an unreasonable application of Federal law under § 2254(d)(1), or an unreasonable determination of the facts under § 2254(d)(2). Thus, in the vast majority of cases, a petitioner cannot obtain relief without leaping one of the two the very high hurdles imposed by § 2254(d). The correct application of these exceptions

therefore likely affects thousands of habeas corpus cases. Indeed, the number of circuit courts to consider the question presented reflects not only the importance of the question presented but also the importance of its resolution by the court.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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