A P P E N D I X

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 11, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10145-EE
Case Style: Dieter Riechmann v. Florida Department of Corr.
District Court Docket No: 1:13-cv-20863-JEM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Elora Jackson, EE/lt
Phone #: (404) 335-6173

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10145-EE

DIETER RIECHMANN,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM, GRANT, and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

A-2

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10145

D.C. Docket No. 1:13-cv-20863-JEM

DIETER RIECHMANN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(October 7, 2019)

Before ROSENBAUM, GRANT and HULL, Circuit Judges.

HULL, Circuit Judge:

Dieter Riechmann, a Florida state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 federal habeas corpus petition challenging his convictions for first-degree murder and possession of a firearm during the commission of a felony. This Court granted a certificate of appealability ("COA") on two issues: (1) whether trial counsel provided ineffective assistance by failing to investigate and present available evidence that Riechmann's relationship with the victim was loving and respectful and that he did not "live off" her; and (2) whether the state's failure to disclose to the defense the statements of Swiss and German witnesses interviewed by German police violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). After review, and with the benefit of oral argument, we affirm.

I. STATE TRIAL PROCEEDINGS

In 1987, a grand jury indicted Riechmann on charges of premeditated first-degree murder of Kersten Kischnick and use of a firearm during the commission of the murder. Riechmann and Kischnick, "life companions" of 13 years, were German citizens and residents who came to Florida on October 2, 1987, for a vacation. On October 25, 1987, Kischnick was shot to death in Miami Beach while she sat in the passenger seat of the couple's rental car.

At trial, the state's theory of the case was that the victim, Kischnick, was a prostitute who financially supported Riechmann, who was her pimp. When Kischnick decided to quit prostitution, Riechmann killed her to recover valuable

life insurance proceeds. As to the specific facts of the murder, the state sought to prove that Riechmann stood outside the passenger side of the rental car and fired a single shot through the partially open passenger-side window, striking Kischnick in the head and killing her. Riechmann insisted to police and at trial that a random stranger shot Kischnick when they stopped the car to ask for directions. He consistently denied committing the crime.

A. Pretrial Proceedings

Prior to trial, Riechmann's defense counsel learned that the state was in possession of 37 statements taken by the German police in connection with its parallel investigation of Riechmann. It appears from the record that defense counsel was in possession of the list of names but not all of the statements themselves. These were statements of persons in Germany and Switzerland who knew Riechmann and Kischnick.

Riechmann's defense counsel did have the statements of ten of those 37 witnesses—the statements of those who might testify at trial—and he requested copies of the 27 remaining statements. The state failed to provide the defense with these 27 other statements despite the state trial court's on-the-record ruling that Riechmann was to get "carte blanche discovery . . . . No ifs, ands, or buts. No conditions. Whatever the state has he gets."

When the prosecutor refused to comply, Riechmann's defense counsel moved the state trial court to conduct an in camera inspection of the statements and turn the relevant statements over to the defense. It does not appear that the state trial court ever ruled on that motion, and Riechmann's trial counsel did not renew it.

Despite learning about the existence of several Swiss and German persons who might have had relevant information about the nature of Riechmann and Kischnick's relationship, defense counsel spoke to no German witnesses prior to trial, nor did he send an investigator to Germany. Riechmann also provided his defense counsel with a handwritten list of persons in Germany to depose or contact, but defense counsel did not contact anyone on the list.

B. Riechmann and Kischnick's Relationship

At trial, the government sought to establish the nature of Riechmann and Kischnick's relationship primarily through the testimony of four German witnesses, including Kischnick's sister. These witnesses were culled from the list of 37 German witnesses referenced above.

The first of these witnesses was Peter Carsten Meyer-Reinach, who met Riechmann and Kischnick in Hamburg in 1977. During the time of his acquaintance with the couple, Meyer-Reinach knew Kischnick to be a prostitute

and Riechmann to be her pimp. During that time, Kischnick earned between 1,000 and 1,500 German marks per day as a prostitute.[1]

At some point, Riechmann and Kischnick moved from Hamburg to a German town near the Swiss border, in part because "the work for [Kischnick] . . . wasn't good anymore." Meyer-Reinach saw Riechmann twice more following the move, and during one of these interactions, Riechmann commented that Kischnick "really didn't feel like working anymore."

The second German witness, Ernst Siegfried Steffen, was an insurance agent in Hamburg who sold various life insurance policies to Riechmann and Kischnick. Steffen too had met Riechmann in Hamburg in 1977, and was aware that Kischnick worked as a prostitute under the name Yvonne. Riechmann had also told Steffen that Riechmann worked as a pimp.

Steffen confirmed Riechmann and Kischnick maintained a "high standard of living" while in Hamburg, and he believed Kischnick was making about 1,000 German marks per day as a prostitute. As for Riechmann, Steffen recalled helping him obtain a luxury apartment by verifying a certificate of earnings showing Riechmann made 3,950 German marks per month, though the certificate of earnings did not state the origin of those earnings. Riechmann also told Steffen that he had received training as an insurance agent. Like Meyer-Reinach, Steffen

[1]Prostitution is, and was at the time of the murder, legal in Germany.

was aware that Riechmann and Kischnick had at some point moved to southern Germany near the Swiss border, in part because "[b]usiness apparently wasn't going too well in Hamburg."

The third witness was Kischnick's younger sister, Regina, who first met Riechmann when Kischnick brought him home in 1974. Regina did not learn of her sister's occupation until several years later. During the time that Riechmann and Kischnick lived in Hamburg, Regina never knew Riechmann to work at any particular job, though she recalled Kischnick telling her that Riechmann "had business dealings with Arabs"—specifically, "dealings in gold." Kischnick seemed content, if not happy, in her life with Riechmann in Hamburg, but she became noticeably unhappy upon their move to southern Germany. On the occasions that Regina visited her sister in southern Germany, it did not appear to her that Riechmann was working. Regina learned that Kischnick had gotten married to someone other than Riechmann and obtained a Swiss passport. There were several times when Regina would call the apartment in southern Germany and Riechmann would answer and tell her that Kischnick "was in Switzerland with a girlfriend." Regina often heard Riechmann make derogatory comments about Kischnick's age and figure.

On cross-examination, Regina stated that she believed much of the expensive jewelry and apartment furnishings Riechmann and Kischnick owned had

been paid for by Kischnick's earnings. Regina conceded, however, that the couple's earnings likely were supplemented in some way by Riechmann, and that she had no way of definitively knowing the origin of the money used to purchase particular gifts or furnishings.

The final witness was a woman named Dina Mohler, who then worked as a prostitute in Switzerland. Mohler first met Kischnick a few years after Kischnick and Riechmann moved to southern Germany. Kischnick had replied to an advertisement Mohler placed in the newspaper seeking a "colleague" with whom to share her apartment. By "colleague," Mohler meant another prostitute who would pay rent to use the shared space. Kischnick, who worked under the name Yvonne, was supposed to pay Mohler 1,000 Swiss francs per month to use the apartment, but Kischnick was unable to make this payment because she was physically ill and depressed. Specifically, Kischnick was unable to provide services to her customers for large stretches of time because she was suffering from "gynecological problem[s]," which at times were so severe that she doubled over in pain.

Approximately three months after starting to work with Mohler, Kischnick departed for the United States with Riechmann. Not once during those three months with Mohler was Kischnick able to make a full rental payment, and she confided in Mohler that she was earning far less than she had previously.

On cross-examination, Mohler admitted that she had never spent any time with Riechmann and Kischnick together, and that she had only spoken to him once briefly on the phone. She acknowledged that Kischnick had always referred to Riechmann as her boyfriend, not her pimp, and consistently denied that she supported him financially, as he "had enough money of his own." Despite the fact that the couple had a "very difficult relationship" and "had a lot of fights," Mohler acknowledged that the two "loved each other." When asked specifically whether Riechmann loved Kischnick, Mohler agreed he did, though "not in the same way she loved him." Mohler never saw Riechmann physically abuse Kischnick, nor had she seen any evidence that Kischnick was abused. Just prior to departing for the United States, Kischnick appeared to be in good health and was looking forward to the trip.

However, on redirect, Mohler stated that: (1) prostitutes often refer to their pimps as boyfriends and never admit to supporting them; (2) Kischnick stated "very often" than she wanted to stop being a prostitute; (3) Riechmann was verbally, if not physically, abusive; and (4) Kischnick would avoid answering any time Mohler asked how Riechmann supported himself.

After the state rested, Riechmann testified on his own behalf and painted a different picture of his relationship with Kischnick. Riechmann acknowledged that Kischnick had at times worked as a prostitute, but he categorically denied being

her pimp or having ever been a pimp at all. According to Riechmann, he was able to support himself and his relatively lavish lifestyle through commodities trading, particularly oil. Through unspecified means, Riechmann was able to purchase oil for less than the OPEC price and resell it in Europe for a profit. Riechmann earned a commission of 10 cents per barrel of oil sold.

As for Kischnick's occupation, Riechmann maintained she first got into prostitution as a means of supporting herself while he was serving a ten-month jail sentence for perjury. Riechmann claimed Kischnick ended up in the clutches of "a gang of pimps," and he subsequently "bought her free" by paying the gang six months' worth of her earnings. Kischnick later became involved with another gang of pimps when the couple was briefly separated for six months, and Riechmann again purchased her freedom for 50,000 German marks.

During his testimony, Riechmann reiterated his love for Kischnick and recounted numerous times he had saved her life. The defense also played for the jury a video that Riechmann had taken the night that Kischnick was killed, which depicted the two as being in an apparently loving relationship.

The state trial court allowed the government to impeach Riechmann with evidence of his prior German convictions. At the trial, the jury heard about Riechmann's convictions for: (1) grand theft of an automobile stolen in 1966; (2) involuntary manslaughter and negligent bodily harm connected with a 1972

automobile accident; (3) forgery, which occurred in 1973; and (4) solicitation of perjury, which occurred in 1974.

C. The Murder

According to Riechmann, he and Kischnick traveled to Miami in 1987 as a vacation. The two had previously visited Miami for a week in 1986. While the ostensible purpose of the 1987 trip was pleasure, Riechmann was also scoping out locations for a designer clothing store he hoped to open in Miami. He and Kischnick also took trips to a shooting range during the 1987 trip. Riechmann loved to shoot and collect guns, which he was unable to do in Germany. Riechmann and Kischnick planned to stay in Miami from October 2 through 31.

Upon arriving in Miami from Germany in October of 1987, Riechmann rented an automobile with his Diner's Club card, which automatically insured both passengers in the event of accidental death.[2] In the event of an accidental death in the vehicle—which included homicide—the deceased's legal heir would receive 500,000 German marks.[3] On the evening of October 25, 1987, following a dinner

[2]In 1986, Riechmann and Kischnick had twice traveled to Miami before. On at least one of those trips, Riechmann similarly rented a car using his Diner's Club card.

[3]Records showed that Riechmann and Kischnick had each designated the other as his or her legal heir under the policy. Following Kischnick's murder, the German insurance firm that issued the policy received a letter from Riechmann, claiming entitlement to the 500,000 German marks due to Kischnick's death.

out, Riechmann drove around the Miami area with Kischnick in the passenger seat of the rental car. At some point that evening, Kischnick was shot.

When questioned by police—both at the scene on the evening of October 25 and during subsequent conversations—Riechmann consistently claimed Kischnick had been shot by a random stranger. Specifically, Riechmann told officers that he stopped to ask for directions from a black man who asked if they were tourists. Riechmann noticed that the man had something in his hand. Then Riechmann heard an explosion. At that point, Riechmann "hit the accelerator and took off." Riechmann heard Kischnick "wheezing" and realized she had been shot, at which point he rolled up the window and reclined her seat. He eventually spotted a police officer, whom he flagged down. Despite going on multiple "drive arounds" with police in the days following the murder, Riechmann was unable to identify specifically where the shooting took place.

In his trial testimony, Riechmann provided a more detailed account of his version of events. On the evening of October 25, he and Kischnick had dinner and drinks at Bayside in Miami. They left the restaurant at 10:00 p.m., intending to stop at the "Welcome to Miami Beach" sign to take pictures, but they got lost. At that point, the couple stopped at an unspecified location to ask for directions from a stranger. Realizing they were close to their destination, Riechmann unbuckled his seatbelt and reached behind his seat to retrieve his video camera, apparently

preparing to use it. He placed the camera on Kischnick's lap while she searched her purse for a few dollars to tip the stranger. Riechmann then noticed the stranger had approached the car again and "was holding something in his hand into the car." Sensing danger and feeling threatened, Riechmann instinctively "hit the gas pedal" and stretched out his arm in a "protective manner." At the same time Riechmann hit the accelerator, he heard an explosion and saw Kischnick slump over in her seat. Riechmann then drove around looking for help, eventually spotting a police car and flagging it down.

D. Forensic Evidence

At trial, the state presented testimony from three expert witnesses: a gunshot-residue expert, a firearms expert, and a serologist. The defense also called its own gunshot-residue expert to counter the state's expert.

When questioning Riechmann at the scene, police swabbed Riechmann's hands. The state's expert analyzed the swabs and identified numerous particles typically found in gunshot residue, the number and nature of which indicated that Riechmann had recently fired a gun. The expert specifically testified that he would not have expected to find the same number and type of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while someone else fired a shot from outside the car. In contrast, the defense's gunshot-residue expert testified that the particles of gunshot residue found on Riechmann's hand proved

only that Riechmann was in the vicinity of a gun when it was fired, not that he actually fired a gun.

Upon searching Riechmann's motel room, police found three handguns and 40 Winchester silver-tipped, 110 grain, .38-caliber bullets in a 50-shell box.[4] An expert firearms examiner, who also examined bullet fragments removed from Kischnick's head, testified that the bullets recovered from the motel were the same type as the bullet that killed Kischnick, although none of the specific weapons found in the room were used to commit the murder. However, the bullet that killed Kischnick could only have been fired from one of the following gun models: a .38 Astra, a .38 Special Taurus revolver, or an FIE .38 Special Derringer. Two of those models—the Taurus revolver and the FIE Derringer—were among the three guns recovered from Riechmann's hotel room.

Riechmann claimed to have bought two of the guns on a prior trip to Miami in 1986. During that trip, both Riechmann and the victim took multiple trips to a shooting range, and then left the guns with a local attorney they knew when they returned to Germany. They retrieved the guns from the attorney by October 9, 1987. Riechmann bought the third gun on the 1987 trip. Riechmann claimed he did so because Kischnick saw it in a magazine and liked it. Riechmann also

[4]Another two boxes of .38-caliber Winchester ammunition were also discovered in a safety deposit box in Germany. The parties stipulated that Riechmann had purchased the safety deposit box and was the only person who had access to it.

purchased the ammunition on that trip for the two of them to use at the shooting range.

The state also presented testimony from a serologist concerning the blood found in the car and on Riechmann's clothing. The serologist testified that the "high-velocity blood splatter" found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. Moreover, upon examining Riechmann's clothing, the serologist discovered blood stains, as opposed to high-velocity splatter. Had Riechmann been sitting in the driver's seat during the shooting, his clothes would have shown evidence of blood splatter, rather than blood stains, the serologist stated.

E. Documentary Evidence

The state also presented several pieces of documentary evidence in support of its theory that Riechmann killed Kischnick to recover insurance proceeds. In addition to establishing that Riechmann was entitled to 500,000 German marks as a result of the insurance policy associated with the rental car, the state presented evidence of five additional insurance policies that were taken out on Kischnick's life between approximately 1978 and 1985 and of which Riechmann was the beneficiary.

Specifically, Riechmann had taken out two life insurance policies on Kischnick, each of which insured her life for 200,000 German marks, and one of which provided for double payment in the event of accidental death, which included murder, so long as the murderer was not the beneficiary. Riechmann was the beneficiary of both policies. Riechmann purchased the double-indemnity policy from Ernst Steffen in 1984. Steffen had previously sold Riechmann an accident insurance policy, but Riechmann wanted to cancel that policy and replace it with two risk life insurance policies, one on himself and the other on Kischnick. The risk policy on Kischnick (which was for twice as much as the policy on Riechmann) insured her only from 1984 to 1994, and Riechmann was only able to collect on the policy in the event that Kischnick died within that time frame.

Additionally, in 1980, while Kischnick and Riechmann were separated, Kischnick took out two whole-life policies on herself, which she purchased from Ernst Steffen and which were valued at 29,227 and 29,437 German marks, respectively, at the time of Kischnick's death. Both policies provided for double indemnity in the event of Kischnick's accidental death (which, again, included murder, assuming the murderer was not the beneficiary). Kischnick's parents were the original beneficiaries on both policies, but in 1983, the insurance company received Change of Beneficiary forms designating Riechmann as the new beneficiary on both policies.

Finally, Riechmann, through his Diner's Club membership, applied for an accidental death and disability policy, which provided for a payout of 500,000 German marks to Riechmann in the event of Kischnick's death.[5] Following Kischnick's death, Riechmann attempted to collect on at least four of these insurance policies. All told, Riechmann stood to gain the equivalent of over $961,000 in the event of Kischnick's accidental death. During his testimony, Riechmann claimed to have been unaware that the total payout would be so high. Riechmann claimed he was not aware that murder qualified as an accidental death under the various policies, nor was he aware of the automatic coverage associated with the rental car.

The state also submitted copies of Riechmann and Kischnick's reciprocal wills, in which each was named as the other's sole heir. Evidence showed that the wills were filed in a German court in June of 1987. Riechmann claimed, during his testimony, that it was Kischnick who wanted to file the reciprocal wills.

[5]The two insurance companies that issued the term life insurance policies also issued policies on Riechmann's life for which Kischnick was the beneficiary, though the payout in the event of her death was twice as high. Riechmann also claimed that he had two additional policies taken out on his life—one for 100,000 marks and another for 30,000 marks—for which Kischnick was the beneficiary. Riechmann testified as to the details of these policies and claimed the documentation was in the same safety deposit box in which the German police found the other policies, but no actual documentation of the policies on Riechmann's life was submitted into evidence. Moreover, the accidental death and disability policy also covered Riechmann in the same amount and actually provided for a higher payout—one million marks—in the event of total disability.

Riechmann agreed, as he wanted to ensure that Kischnick, not his family, would inherit his estate.

F. Riechmann's Cell Mate

While incarcerated pending trial, Riechmann spent two months as a cellmate to Walter Symkowski. The two would play chess and discuss their lives. During the course of these conversations, Riechmann repeated to Symkowski the same version of events he told police and recounted at trial: that he and Kischnick had gotten lost and asked a black man for directions, who then shot Kischnick through the open window of the car.

However, Riechmann also told Symkowski that his girlfriend was a "[h]igh class prostitut[e]" and that he had paid a Swiss man to marry her so she could obtain a Swiss passport. Riechmann said that he never had to work because his "[g]irlfriends support him." Riechmann also expressed happiness at the prospect of becoming a millionaire from the insurance money he would receive as a result of Kischnick's death.

Riechmann denied that he had ever expressed any excitement or jubilation at the prospect of receiving insurance payouts. Riechmann claimed Symkowski had a reputation in the jail as an informant.

G. Verdict and Sentence

On August 12, 1988, after hearing testimony from over 20 witnesses over the course of a month, the jury found Riechmann guilty of first-degree murder and possession of a firearm during a criminal offense. No evidence was presented at the penalty phase of the trial, and the jury recommended death by a nine-to-three vote.

At the sentencing hearing, after hearing argument from both sides, the state trial court issued a verbal ruling on the record. In announcing its ruling, the state trial court noted that it had "reviewed certain papers . . . that were delivered to me by the State, the reports from Germany." The state trial court noted that the reports concerned "people over in Germany that knew [Riechmann], knew of him." Defense counsel interrupted, informing the state trial court that he had not seen those documents and "never got any announcement from the Court as to what the Court's ruling on that matter was," apparently referring to his pretrial motion to have the state trial court review in camera the 27 missing statements from German police. In response, the state trial court remarked that "most of the people did not know him well and if they knew him well it was years ago." The state trial court then announced its ruling, agreeing with the jury and imposing a sentence of death.

The state trial court also issued a written sentencing order. Having considered the statements from people in Germany who knew Riechmann, the state

trial court found that "non-statutory mitigation" was warranted because the statements suggested several of the people interviewed "found [Riechmann] to be a good person." However, the state trial court also found the murder was committed for pecuniary gain, and was cold, calculated, and premeditated. The state trial court ultimately concluded that "[t]he aggravating circumstances far outweigh the non-statutory mitigating circumstance," which was why it agreed with the jury's recommendation to impose a death sentence.

H. Direct Appeal

On direct appeal to the Florida Supreme Court, Riechmann raised several issues of trial-court and prosecutorial error, none of which is relevant to the ineffective assistance or Brady claims presently before us. The Florida Supreme Court affirmed Riechmann's convictions and sentences. Riechmann v. State, 581 So. 2d 133, 135 (Fla. 1991). The U.S. Supreme Court denied Riechmann's petition for a writ of certiorari on November 2, 1992. Riechmann v. Florida, 506 U.S. 952, 113 S. Ct. 405 (1992).

II. STATE POST-CONVICTION PROCEEDINGS

A. Rule 3.850 Motion

In 1994, Riechmann filed his first motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Relevant to the instant appeal, Riechmann raised two claims: (1) trial counsel failed to adequately investigate the

case, including the nature of Riechmann's relationship with Kischnick; and (2) the state withheld material exculpatory evidence, including interviews with 27 German and Swiss citizens taken by German police, in violation of Brady.

The ineffective assistance claim identified 15 potential witnesses, seven of whom eventually testified in person at an evidentiary hearing. As to the Brady claim, Riechmann's Rule 3.850 motion made explicit reference to four of the witnesses interviewed by German police and the statements taken by the police during the course of those interviews.

B. Evidentiary Hearing and Ruling

The state 3.850 court held an evidentiary hearing, at which Riechmann presented in-person testimony from seven German witnesses. These witnesses maintained they would have been willing to testify at trial had they been contacted. While several witnesses testified that Riechmann seemed to have money—because he was well dressed, paid the rent on time, or paid for dinners—none of these witnesses had personal knowledge of Riechmann's financial situation or of any actual employment. Several of the witnesses did, however, testify that Riechmann had led them to believe he worked as an insurance agent.

Two of the witnesses, Doris Dessauer and Doris Rindelaub, were former girlfriends of Riechmann and had no contact at all with Kischnick. Although she had been Riechmann's girlfriend from 1971 to 1978, Dessauer conceded she had

no idea "what went on in the relationship between . . . Kischnick and [Riechmann]." She admitted that she was convicted of perjury after she falsely testified on Riechmann's behalf concerning a traffic infraction.[6] For her part, Rindelaub, who dated Riechmann for six months, conceded that "there are a lot of things that [she] [didn't] know about . . . Riechmann."

Even the five witnesses who testified that Riechmann appeared to have a good or loving relationship with Kischnick conceded that their contacts with Kischnick and their observations of the couple were quite limited or not recent. For example, sisters Marlene and Monika Seeger rented one of their many apartments to Riechmann from 1984 through his conviction. Kischnick moved in with him later, and Riechmann always paid the rent on time. Yet both sisters acknowledged that they never even had a conversation with Kischnick beyond exchanging pleasantries, and their interactions with Riechmann largely were limited to brief conversations when he paid the rent.

Martin and Ulrike Karpischek, a couple who operated a high-end hair salon in Germany, also testified about their limited interactions with Kischnick. Riechmann was one of the approximately 2,500 customers at their salon. Their interactions with Kischnick primarily occurred when she came to the salon to pick

[6]This led to Riechmann's conviction for solicitation of perjury, which the state submitted as evidence during Riechmann's trial.

up Riechmann. Kischnick had been to the salon on her own only occasionally. Neither Martin nor Ulrike had any contact with Riechmann or Kischnick outside the salon. Despite this limited contact, Ulrike claimed that Kischnick "had no desire to quit being a prostitute."

The last witness was Wolfgang Walitzki, a friend of Riechmann and Kischnick's. He met the couple around 1978, and would go on day trips with them and attend dinners at their home. While he had no direct knowledge of what Riechmann did for a living, Walitzki spoke vaguely of a business deal Riechmann had apparently entered into with an "Arabian fellow." Once the couple moved to southern Germany, his contact with them was limited, and he could recall only one specific instance in which he had seen them in the two years preceding Kischnick's murder.[7]

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[7]In addition to the seven witnesses who testified in person, Riechmann submitted the affidavits of eight additional witnesses who were unable to testify in person. Riechmann offered the affidavits as evidence that would have been presented "for purposes of mitigation" during the penalty phase. The state 3.850 court admitted the affidavits solely for the purpose of determining whether counsel performed deficiently at the penalty stage, and it considered them only for that purpose. Because we are reviewing only Riechmann's guilt-phase claims, we need not consider the content of those affidavits here.

Further, we reject Riechmann's claim that the affidavits were admitted for purposes of the guilt-phase claims too. The record shows that, at the 3.850 hearing, the state challenged the admission of the affidavits as containing hearsay without any showing of reliability. Riechmann's attorney responded that the statements would be "proffered as mitigation evidence" and that there were "relaxed hearsay and relaxed evidentiary standards for purposes of mitigation." The parties specifically discussed the admissibility of the affidavits under the standard in Fla. Stat. § 921.141, which concerns sentencing proceedings for capital felonies and allows a state court to admit evidence probative of the character of the defendant regardless of its admissibility under the exclusionary rules of evidence. After hearing the parties' arguments, the state 3.850 court admitted the affidavits into evidence as relevant to whether counsel was

As to Riechmann's Brady claim, the state 3.850 court also admitted five written statements taken by German police that were withheld from the defense.[8] But three of those statements came from persons who also testified in person at the evidentiary hearing, and their statements were largely repetitive of that testimony.[9] The fourth statement came from Dr. Horst Neumann, a retired physician who thought Riechmann and Kischnick, as a couple, were "financially quite well-off," in part because they offered him a generous amount to take care of their dogs when they were away on trips. Riechmann told Dr. Neumann that he had won 40,000 German marks in the lottery.[10]

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ineffective by not investigating these potential statements prior to sentencing. The state 3.850 court noted that it was not necessary for it to conclude, at that point, whether the affidavits would necessarily have been admissible in a hypothetical sentencing proceeding.

[8]According to the state 3.850 court's order, of the 27 statements that the state failed to disclose to the defense, only five were actually introduced into evidence. The state 3.850 court's order actually references nine "reports" that were introduced, but four of the exhibits it references are not witness statements but other documentary evidence the state had in its possession.

[9]Because the statements themselves have not been provided as part of the state-court record, we rely on Riechmann's Rule 3.850 motion—which quotes extensively from the statements—in assessing the content of the withheld statements.

[10]The fifth statement was from Karl-Heinz Dreyer. Riechmann made no reference to this statement in his Rule 3.850 motion or during the course of the instant federal habeas proceeding.

The state 3.850 court also admitted several documents that the state similarly withheld. As relevant here, those documents included: (1) a letter (which we discuss later) from the company Hch. Vollenweider Truhand, dated October 25, 1985, that allegedly documents Kischnick's gainful employment in a business other than prostitution; and (2) a lottery winnings receipt.

Following the hearing, the state 3.850 court rejected the majority of Riechmann's claims, but vacated his death sentence and ordered a new sentencing hearing based on: (1) the trial judge's inappropriate ex parte communication with the prosecutor, through which the judge delegated to the prosecutor responsibility for writing the sentencing order; and (2) ineffective assistance of counsel at the penalty phase only.[11]

As to Riechmann's claim that his trial counsel was ineffective at the guilt phase, the state 3.850 court found that Riechmann failed to demonstrate prejudice resulting from trial counsel's failure to investigate and present evidence of Riechmann's relationship with Kischnick. Specifically, the state 3.850 court found that most of the evidence Riechmann identified—in-person testimony from seven of the witnesses on the list Riechmann provided to trial counsel before trial—"had already been presented to the jury, although in a manner different from now desired." It determined that counsel's decision to rely on the evidence presented at trial was a "tactical and strategic" decision that did not constitute ineffective

[11]In finding that Riechmann's trial counsel performed deficiently as to the penalty phase, the state 3.850 court noted that: (1) "trial counsel failed to renew or pursue his motion to obtain the German and Swiss statements which would have provided him with mitigating evidence to present to the jury"; and (2) "trial counsel's sentencing investigation was patently inadequate," and he offered no reasonable explanation for his failure to search for mitigating evidence. As a result of trial counsel's deficient performance, he "failed to unearth a large amount of mitigating evidence as to [Riechmann's] character, family history and relationship with the victim," thus prejudicing Riechmann.

assistance of counsel. The state 3.850 court specifically declined to make any findings "concerning any deficiency [of defense counsel] in the guilt phase."

As to the Brady claim, the state 3.850 court found that the German witness statements were "known to the State and, without dispute, were favorable to the defense," and Riechmann "did not otherwise have ready access to the Swiss and German persons involved (even assuming he knew who they all were)." As to materiality, the state 3.850 court found that "the State's evidentiary suppression undermines confidence in the outcome of the penalty phase, although there is no reasonable probability of a different result in the guilt phase." Although the state 3.850 court found that "a Brady violation had occurred during the penalty phase," it ultimately said Riechmann could not raise the Brady claim in the Rule 3.850 proceeding "because it could have been raised on direct appeal."

C. Appeal

The state appealed to the Florida Supreme Court, challenging the state 3.850 court's decision to order resentencing, and Riechmann cross-appealed, challenging the state 3.850 court's rejection of his remaining claims as to the guilt phase. The Florida Supreme Court affirmed the state 3.850 court's ruling, including its decision to vacate Riechmann's death sentence and to order resentencing. State v. Riechmann, 777 So. 2d 342, 347 (Fla. 2000).

As to Riechmann's guilt-phase ineffective assistance claim, the Florida Supreme Court agreed with the state 3.850 court's finding that Riechmann failed to demonstrate prejudice because the claim "concerned evidence which was already admitted at trial, only in a different manner than now asserted." Id. at 357 ("[W]e find that the trial judge's factual findings are supported by competent and substantial evidence, and his legal conclusions are supported by our prior case law."). In particular, the Florida Supreme Court pointed to "testimony from a State's witness of Riechmann's love for Kischnick" and "a videotape of the couple the night of the murder that showed them involved in a loving relationship." Id.

The Florida Supreme Court went on to note that, in any case, "counsel could not be held ineffective for failing to present witnesses from a list withheld from him." Id. In a footnote, the Florida Supreme Court clarified that it was referring to the list of Swiss and German witnesses that the state withheld which formed the basis of Riechmann's Brady claim. Id. at 357 n.16.

In addressing the Brady claim, the Florida Supreme Court agreed with the state 3.850 court's finding that the witness statements withheld by the state "would have been material to Riechmann in the sentencing phase" and noted that "these statements will be made available to Riechmann" for "the new penalty phase." Id. at 363. Notably, however, the Florida Supreme Court did not indicate that its decision to affirm the state 3.850 court and order resentencing was based on the

Brady violation, nor did it express disagreement with the state 3.850 court's finding that the penalty-phase Brady claim was barred because Riechmann failed to raise it on direct appeal. Id. Instead, the Florida Supreme Court explicitly stated it was affirming the state 3.850 court's order "in its entirety," before specifically agreeing with the state 3.850 court's analysis concerning the ex parte communication and counsel's deficient performance during the penalty phase. Id. at 347, 348–53.

As to the guilt-phase Brady claim, the Florida Supreme Court concluded that the claim was "procedurally barred because [Riechmann] could and should have raised it on direct appeal, since by trial's end he was aware of the statements." Id. at 363. In any case, the Florida Supreme Court also explicitly agreed with the state 3.850 court's finding "that even if disclosed, there was no reasonable probability that a different result would have occurred" in the guilt phase. Id.

In the same opinion, the Florida Supreme Court also denied a separate state habeas corpus petition filed by Riechmann, in which he had raised, inter alia, the same Brady claim raised in his Rule 3.850 motion and a claim for ineffective assistance of appellate counsel. Id. at 364–66, 364 nn.21–22.

On February 1, 2010, Riechmann was resentenced to life imprisonment for first-degree murder.[12] The Florida Third District Court of Appeal affirmed per curiam. Riechmann v. State, 83 So. 3d 734 (Fla. Dist. Ct. App. 2012).

III. FEDERAL HABEAS PROCEEDINGS

A. § 2254 Petition

In March 2013, Riechmann filed a counseled § 2254 petition, raising several claims, including the guilt-phase claims of ineffective assistance and Brady violations detailed above. As to the ineffective assistance claim, Riechmann challenged the Florida Supreme Court's factual finding that the information trial counsel could have gathered from further investigation would have been cumulative.

In addressing the Florida Supreme Court's resolution of his Brady claim, Riechmann made little effort to address the Florida Supreme Court's conclusion that his Brady claim was procedurally barred. Instead, Riechmann offered a brief argument concerning the materiality of the evidence, maintaining that the statements from the German witnesses would have undermined the state's evidence of motive during the guilt phase. The only reference Riechmann made to

[12]Riechmann filed a second Rule 3.850 motion during the pendency of the appeal of the first, raising claims not pertinent to the instant appeal. Riechmann's resentencing was stayed pending the resolution of the second motion, the denial of which was affirmed in 2007. Riechmann v. State, 966 So. 2d 298, 301 (Fla. 2007).

the Florida Supreme Court's procedural ruling was to assert, in a footnote, that "[t]o the extent that the [Florida Supreme C]ourt determined that issue is procedurally barred as it should have been raised on direct appeal, then counsel was ineffective."

B. Report & Recommendation, Objections, and Final Judgment

A magistrate judge prepared a report and recommendation ("R&R"), recommending that the district court deny Riechmann's § 2254 petition. In relevant part, the magistrate judge concluded Riechmann was not entitled to federal habeas relief on his ineffective assistance claim because "[t]he Florida Supreme Court accurately stated that the [state 3.850] court's factual findings on the claim concerning Riechmann's relationship with Kischnick were supported by competent and substantial evidence, and the legal conclusions were supported by prior case law." As to Riechmann's Brady claim, the magistrate judge concluded that the claim was procedurally barred, and Riechmann failed to show cause and prejudice sufficient to overcome that bar. The magistrate judge further noted that Riechmann's § 2254 petition failed to provide any substantive analysis as to the Brady claim; in particular, he failed even to allege that the Florida Supreme Court unreasonably applied federal law in rejecting his Brady claim.

In his objections to the R&R, Riechmann argued for the first time that the procedural bar should not apply because the particular procedural rule invoked by

the Florida Supreme Court was not "adequate" to bar federal habeas relief, primarily because, he asserted, Florida courts did not consistently apply the identified procedural rule.

After considering Riechmann's objections and conducting a de novo review of the record, the district court affirmed and adopted the R&R, and denied Riechmann's § 2254 petition. Riechmann appealed, and this Court granted a COA as to whether the district court had properly denied § 2254 habeas relief on Riechmann's ineffective assistance and Brady claims.

IV. DISCUSSION[13]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, after a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

[13]"We review de novo a district court's denial of a § 2254 petition." Bester v. Warden, 836 F.3d 1331, 1336 (11th Cir. 2016). In an appeal brought by an unsuccessful habeas petition, the scope of our review is limited to the issues specified in the COA. Murray v. United States, 145 F.3d 1249, 1251 (11th Cir. 1998).

The decision of a state court is "contrary to" federal law only if it "contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1355 (11th Cir. 2009) (internal quotation marks omitted) (quoting Kimbrough v. Sec'y, 565 F.3d 796, 799 (11th Cir. 2009)). A federal court making an "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002) (internal quotation marks omitted) (quoting Williams v. Taylor, 529 U.S. 362, 404–05, 120 S. Ct. 1495, 1519 (2000)).

A. Ineffective Assistance of Trial Counsel

Riechmann contends his trial counsel's performance at the guilt-phase of trial was constitutionally ineffective under the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Riechmann argues trial counsel failed to conduct an adequate investigation when he did not interview several German witnesses on a list that Riechmann provided to him prior to trial. "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003).

At the outset, we must determine whether the Florida Supreme Court's resolution of Riechmann's ineffective assistance claim is entitled to deferential review under AEDPA. Riechmann contends that we should review his ineffective assistance claim de novo because the Florida Supreme Court's conclusions regarding both deficiency and prejudice were based on an unreasonable determination of the facts in light of the evidence presented.

"Federal habeas courts generally defer to the factual findings of state courts, presuming the facts to be correct unless they are rebutted by clear and convincing evidence." Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1352–53 (11th Cir. 2011) (internal quotation marks omitted) (quoting Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc)). However, "[w]hen a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." Id. at 1353 (internal quotation marks omitted) (quoting Jones, 540 F.3d at 1288 n.5). In such instances, we need not afford the state court's findings deference under AEDPA, and we review the underlying habeas claim de novo. Id.

As to deficient performance, Riechmann correctly notes that the Florida Supreme Court appears to have somewhat mischaracterized the basis for his

ineffective assistance claim in its deficiency ruling. After agreeing with the state 3.850 court's prejudice analysis, the Florida Supreme Court noted that, in any case, "counsel could not be held ineffective for failing to present witnesses from a list withheld from him" by the state. Riechmann, 777 So. 2d at 357. But the relevant list for purposes of Riechmann's ineffective assistance claim was the list he provided to defense counsel of witnesses to find and interview, not the list of witnesses interviewed by German police. And, while there was considerable overlap between the two lists, Riechmann's list included several names—including Marlene Seeger, Wolfgang Walitzki, and the Karpischeks—who were not on the state's list. Additionally, it was the statements themselves, not the list of witnesses, that the state actually withheld from the defense.

Thus, to the extent that the Florida Supreme Court based its deficient-performance ruling on its finding that defense trial counsel had no way of identifying any or all of the witnesses on the state's list who were then identified in Riechmann's 3.850 motion for relief, that ruling was based on an unreasonable determination of the facts, and it is not entitled to deferential review under AEDPA. See Cooper, 646 F.3d at 1352–53.

However, the Florida Supreme Court did not solely, or even primarily, rest its rejection of Riechmann's ineffective assistance claim on its finding that counsel did not perform deficiently. Rather, its primary basis for rejecting that claim was

Riechmann's failure to show that he was prejudiced by defense counsel's allegedly deficient performance. Riechmann insists this conclusion similarly is not entitled to deferential review because the Florida Supreme Court unreasonably determined that the testimony defense counsel could have elicited from the absent witnesses would have been cumulative.

As discussed above, the Florida Supreme Court explicitly pointed to two pieces of trial evidence in support of its finding that the additional testimony defense counsel failed to present would be cumulative: the testimony of Dina Mohler—specifically her testimony that Riechmann and Kischnick loved one another—and the video the defense played for the jury, which showed Riechmann and Kischnick involved in a loving relationship.

These are, generally speaking, the sentiments Riechmann claims the absent witnesses he identifies would have communicated to the jury about the nature of Riechmann and Kischnick's relationship had trial counsel bothered to find and call them. We acknowledge that Mohler made various concessions during her testimony—including that Riechmann did not love Kischnick "in the same way she loved him"—that undermined some of her more positive testimony. But it remains the case that the jury was presented with testimony expressing the basic sentiments that Riechmann claims would have come from the absent witnesses he identifies.

A review of the evidence presented at the Rule 3.850 evidentiary hearing reveals that much of the desired testimony was repetitious and would have communicated that Riechmann and Kischnick appeared to be in a loving relationship, and that Riechmann was financially independent and did not "live off" of Kischnick's income from prostitution. Indeed, the jury already saw firsthand from the video the nature of their relationship, loving or otherwise. As a result, we cannot say that the Florida Supreme Court's finding that the potential additional testimony—to the extent it would have been admissible under the Florida Rules of Evidence—was cumulative is a wholly unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d)(2); Cooper, 646 F.3d at 1352–53.

Additionally, our exhaustive review of the record reveals that other state witnesses offered testimony—on both direct and cross-examination—that similarly undermined the state's theory of motive, particularly as it concerned Riechmann's financial situation.[14] For example, at trial, Steffen testified that he helped Riechmann rent a luxury apartment by verifying a certificate of earnings showing Riechmann's monthly income. Steffen also stated, like several of the witnesses

[14]While the Florida Supreme Court pointed to only two pieces of evidence—a fact Riechmann focuses on in his brief—it specifically stated that those pieces of evidence were merely examples of evidence that accomplished the same purpose as the 3.850 testimony Riechmann asserted would have been elicited from the absent witnesses he identified.

who testified at the 3.850 evidentiary hearing, that Riechmann claimed to have been trained as an insurance agent.

Kischnick's sister, Regina, recalled Kischnick telling her that Riechmann had "business dealings with Arabs," testimony that mirrors statements presented in the evidentiary hearing concerning Riechmann's dealings with Saudi businessmen. On cross-examination, Regina also conceded that Riechmann and Kischnick's lavish lifestyle likely was not supported by Kischnick's income alone. Thus, the jury was hardly deprived of testimony concerning Riechmann's sources of income beyond Kischnick's prostitution.

Riechmann also had the opportunity to explain the nature of his relationship with Kischnick and the source of his financial success to the jury when he testified in his own defense. For example, Riechmann explained that, far from forcing Kischnick to engage in prostitution, he had in fact bought her freedom from other pimps on two occasions.

In any case, even assuming that we found the Florida Supreme Court's finding that the proffered evidence was cumulative to be unreasonable and reviewed Riechmann's ineffective assistance claim de novo, we would nonetheless affirm on the ground that Riechmann failed to demonstrate prejudice resulting from trial counsel's deficient performance.

Assuming the testimony Riechmann relies on would have been admissible at trial to rebut the state's theory of motive, there is no reasonable probability that admission of that testimony would have changed the outcome at trial. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068 (To demonstrate prejudice, a petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

As Riechmann acknowledges, the 3.850 testimony and evidence he claims competent counsel would have elicited from the identified witnesses would have been in response to only the state's evidence of motive. The absent testimony therefore would have done nothing to undermine the state's circumstantial forensic evidence, which included the following: (1) bullets recovered from Riechmann's motel room matched the type used to kill Kischnick; (2) Riechmann possessed two of the only three models of guns that could have been used to kill Kischnick; (3) the presence of gunshot residue on Riechmann's hands that, according to the state's expert, established to a reasonable degree of scientific certainty that he had fired a gun; and (4) blood splatter evidence that, according to the state's expert, was inconsistent with Riechmann's claim that he was in the car when Kischnick was shot.

Moreover, even as to the state's theory of motive, the 3.850 testimony that would have been elicited from the witnesses Riechmann identifies was weak and

would not have effectively undermined the state's motive theory. Of the seven witnesses whose testimony Riechmann presented at the evidentiary hearing before the state 3.850 court, only Wolfgang Walitzki appears to have spent any significant time with Riechmann and Kischnick as a couple. Both Marlene and Monika Seeger confessed that they never had an actual conversation with Kischnick beyond exchanging pleasantries, and their interactions with Riechmann were largely confined to the times when he would come to pay his rent. Their respective impressions of Riechmann and Kischnick's relationship were formed through observing the couple's rapport "from a distance."

Similarly, the Karpischeks, whose testimony Riechmann repeatedly references on appeal, both admitted that their interactions with Riechmann and Kischnick as a couple primarily occurred when Kischnick would come to pick up Riechmann from his hair appointments. Notably, they had no contact with Riechmann or Kischnick outside of the salon. Riechmann makes much of Ulrike Karpischek's testimony that she knew "for a fact" that Kischnick "had no desire to quit being a prostitute." But Ulrike provided no basis for her purported intimate knowledge of Kischnick's "desire[s]." Rather, her testimony revealed that both she and her husband had limited contact with Riechmann and Kischnick, who, after all, were but two of the Karpischeks approximately 2,500 customers.

Doris Dessauer and Doris Rindelaub, Riechmann's former girlfriends, admitted they had never met Kischnick, and both testified they had barely heard from or seen Riechmann in many years. As to Walitzki, while he at least testified to a friendship with Riechmann and Kischnick, even he acknowledged that he had lost contact with them once they relocated to southern Germany in the years immediately preceding Kischnick's murder.

As for the testimony concerning Riechmann's financial situation, none of the seven witnesses testified to having any direct knowledge of Riechmann's finances or his various business ventures. Rather, they testified that they simply believed him to be financially secure because he generally appeared to be well off, dressed well, did not have trouble making rent payments, often picked up the tab at dinner, and spoke vaguely of his business activities. Importantly, these observations are not even necessarily inconsistent with the state's theory. The fact that Riechmann appeared to be well-off does not preclude the possibility that his financial comfort was due, at least in part, to Kischnick's income from prostitution.

Several of the seven witnesses also testified that Riechmann had represented to them that he was an insurance salesman. The ostensible benefit of such testimony at trial would have been to indicate to the jury that Riechmann had an independent source of income and therefore did not need the income from Kischnick's prostitution. But Riechmann himself at least partially contradicted this

testimony in his own trial testimony, during which he claimed he was able to support himself largely through commodities trading and admitted to lying, in a loan application, about working for an insurance company.

What's more, the jury still would have been presented with evidence of the reciprocal wills and insurance policies on Kischnick's life from which Riechmann stood to benefit. That Riechmann stood to profit greatly from Kischnick's death—to the tune of over $961,000 in U.S. dollars—was further evidence of motive that the testimony of Riechmann's German acquaintances would have done little to counteract. And, in fact, Riechmann did attempt to collect on a number of the policies following Kischnick's murder. The jury also heard from Riechmann's cell mate that Riechmann expressed happiness at the prospect of becoming a millionaire from the insurance money he would receive.

On balance then, we are convinced that whatever marginal benefit would have accrued to Riechmann as a result of the 3.850 testimony did not create a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

B. Brady Violation

Riechmann also contends that the state's withholding of the statements of 27 Swiss and German citizens was violative of Brady v. Maryland. Before we address

the merits of this claim, we must first consider whether the district court properly found that his Brady claim was procedurally barred. Riechmann asserts that we should review his Brady claim on the merits because the procedural bar invoked by the Florida Supreme Court was not actually adequate to bar his claim.

1. Procedural Bar

"A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999). Thus, where a state court "clearly and expressly" rests its rejection of a claim on a procedural bar, and that bar "provides an adequate and independent state ground for denying relief," federal review of that claim is barred by the procedural default doctrine. Atkins v. Singletary, 965 F.2d 952, 956 (11th Cir. 1992) (internal quotation marks omitted) (quoting Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991) (en banc)). A state procedural rule is not "adequate" to bar federal habeas review when it is not "strictly or regularly followed" by the state courts. Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S. Ct. 2421, 2426 (1982) (internal quotation marks omitted) (quoting Barr v. City of Columbia, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736 (1964)).

Here, the Florida Supreme Court "clearly and expressly" rested its rejection of Riechmann's guilt-phase Brady claim on a state procedural bar, pursuant to which issues that were or could have been raised on direct appeal are barred in state post-conviction proceedings. Riechmann, 777 So. 2d at 363 (citing Francis v. Barton, 581 So. 2d 583 (Fla. 1991)). Because Riechmann could have raised his Brady claim on direct appeal—a finding he has not contested—the Florida Supreme Court determined the claim was barred. Id.

Riechmann continues to insist that this procedural rule is not "strictly or regularly followed." Riechmann's primary, if not only, basis for this assertion is that the Florida Supreme Court did not apply the rule consistently within his case. Riechmann argues that, had the Florida Supreme Court been consistent, it would similarly have rejected his penalty-phase Brady claim on the same procedural ground, which it did not. We find this argument lacks merit, as it is based on a fundamental misreading of the Florida Supreme Court's opinion. In discussing the statements in question, the Florida Supreme Court correctly noted that "the [state 3.850] court found that these statements would have been material to Riechmann in the sentencing phase because they would have allowed counsel the opportunity to present some mitigating evidence." Riechmann, 777 So. 2d at 363. It went on to say it agreed with that determination and that the statements would be made available to Riechmann "for the new penalty phase." Id.

Riechmann characterizes these statements as the Florida Supreme Court granting him relief as to his penalty-phase Brady claim. Not so. The Florida Supreme Court at no point stated that its affirmance of the state 3.850 court's decision ordering resentencing was based on the Brady claim. Rather, it merely expressed agreement with the state 3.850 court's finding that the statements were Brady material that would need to be turned over during the subsequent resentencing. Id.

Moreover, the Florida Supreme Court expressly stated that it "affirm[ed] the [state 3.850] court's order in its entirety" before specifically discussing the state 3.850 court's two actual bases for ordering resentencing—ineffective assistance and improper ex parte communications between the sentencing judge and the prosecutors. Id. at 347–53 (emphasis added). While the Florida Supreme Court did not explicitly agree with the state 3.850 court's ruling that the penalty-phase Brady claim was procedurally barred, it did note that the state 3.850 court had "denied the remainder of Riechmann's claims," and expressed no disagreement with any part of that decision. Id. at 348.

Riechmann claims that the Florida Supreme Court implicitly ruled on the penalty-phase Brady claim when it ordered that the previously withheld statements be made available at his resentencing. According to Riechmann, had the Florida Supreme Court applied the procedural bar to his penalty-phase claim, it would not

have had any reason to comment on the materiality of the statements. "Rather, it would have rejected the claim entirely, and . . . Riechmann would have had to proceed at his penalty retrial without the statements." This is incorrect.

Both the state 3.850 court and the Florida Supreme Court acknowledged that the state likely violated Brady at the penalty phase by withholding the statements, but neither was willing to grant relief on that basis due to the procedural bar. This did not somehow relieve the state of its obligation to comply with Brady during the new penalty trial, regardless of whether the new sentencing proceeding was based on its prior failure to do so. There is no inconsistency to be found in a court acknowledging that an otherwise procedurally barred claim is or may be meritorious.

Because Riechmann's argument that the Florida Supreme Court did not "strictly or regularly follow[]" its own procedural rule in its opinion is without merit, we conclude that the district court properly deferred to that procedural ruling, and Riechmann may maintain a claim for federal habeas relief only if he can show cause and prejudice to excuse his failure to properly exhaust his guilt-phase Brady claim. Bailey, 172 F.3d at 1302.

However, Riechmann likely has abandoned any argument regarding the district court's finding that he failed to sufficiently allege that he could show cause and prejudice sufficient to overcome the procedural default. In his initial brief on

appeal, Riechmann focuses his argument concerning procedural default solely on whether the procedural bar invoked by the Florida Supreme Court was adequate to bar relief. This is despite clear language in this Court's COA order stating that "[w]hile the district court correctly determined that Riechmann's Brady claim was procedurally defaulted, . . . reasonable jurists could debate the district court's further determination that he failed to overcome that default."

Because Riechmann has failed to plainly and prominently offer any argument as to whether he established cause and prejudice to excuse the procedural default of his Brady claim, he has effectively abandoned the claim. See United States v. Jernigan, 341 F.3d 1273, 1283 & n.8 (11th Cir. 2003) ("Under our caselaw, a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate. Otherwise, the issue—even if properly preserved at trial—will be considered abandoned."). Riechmann does argue in his reply brief that he can demonstrate cause and prejudice, but "[a]rguments raised for the first time in a reply brief are not properly before a reviewing court." Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005) (alteration in original) (quoting United States v. Coy, 19 F.3d 629, 632 n.7 (11th Cir. 1994)).[15]

[15]Riechmann's failure to properly raise his argument concerning cause and prejudice provides a sufficient basis for us to affirm the district court, but we note that, in any case, he would be unable to overcome the procedural default. While his appellate counsel's failure to raise any Brady issue on appeal was likely sufficient cause for Riechmann's failure to properly exhaust his guilt-phase Brady claim, he cannot demonstrate prejudice because, as we discuss below, the Brady claim ultimately is without merit.

Although we conclude that the district court properly determined that Riechmann's Brady claim was procedurally defaulted, we will briefly address the substance of the underlying Brady claim, which we alternatively find lacks merit.

2. Merits

As with his ineffective assistance claim, Riechmann asserts that we should review de novo the merits of his underlying Brady claim, this time because the Florida Supreme Court invoked a procedural bar to reject his Brady claim, and the Brady claim therefore has not been "adjudicated on the merits" such that we must defer to that adjudication under AEDPA. See 28 U.S.C. § 2254(d); Conner v. Hall, 645 F.3d 1277, 1292 (11th Cir. 2011) (stating that where a claim was "never adjudicated on the merits in state court because of the state court's determination that . . . [the] claim was procedurally barred," a federal habeas court "is not bound by AEDPA's deferential standards in 28 U.S.C. § 2254(d) and federal court review is de novo").

Riechmann overlooks the fact that the Florida Supreme Court offered an alternative merits ruling on his Brady claim. After noting that the Brady claim was barred due to Riechmann's failure to raise it on direct appeal, the Florida Supreme Court stated that "[n]otwithstanding [the procedural default], the [state 3.850] court found that even if disclosed, there was no reasonable probability that a different result would have occurred. We agree." Riechmann, 777 So. 2d at 363. In other

words, the Florida Supreme Court alternatively ruled on the merits of Riechmann's Brady claim, concluding that the statements withheld by the state did not meet Brady's materiality standard. This "alternative holding on the merits" constitutes "an 'adjudication on the merits' within the meaning of § 2254(d)," and we may not grant federal habeas relief unless the state unreasonably applied Brady. See Loggins v. Thomas, 654 F.3d 1204, 1219 (11th Cir. 2011); see also 28 U.S.C. § 2254(d)(1). Here, we cannot say that the Florida Supreme Court's application of Brady was unreasonable given the facts before it.

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

United States v. Stein, 846 F.3d 1135, 1145–46 (11th Cir. 2017) (quoting United States v. Vallejo, 297 F.3d 1154, 1163 (11th Cir. 2002)). That last component, the materiality inquiry, should focus on "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. at 290, 119 S. Ct. at 1952 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995)). "The evidence rises to the level of materiality within the meaning of Brady when there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the

proceeding would have been different." Rimmer v. Sec'y, Fla. Dep't of Corr., 876 F.3d 1039, 1054 (11th Cir. 2017). In making this determination, we must consider the "totality of the circumstances" and "'evaluat[e]' the withheld evidence 'in the context of the entire record.'" Id. (alteration in original) (internal quotation marks omitted) (quoting Turner v. United States, 582 U.S. ___, 137 S. Ct. 1885, 1893 (2017)).

Before delving into the analysis of Riechmann's Brady claim, we more clearly identify the alleged Brady material under consideration here. It is somewhat unclear from the state court record and the parties' briefs on appeal whether Riechmann's Brady claim is based on the state's failure to disclose the existence of all the witnesses identified and interviewed by German police in addition to the actual statements those witnesses gave. To the extent Riechmann claims the list of witnesses' names is itself Brady material, he cannot reasonably claim that he could not locate those witnesses on his own. See Stein, 846 F.3d at 1146 (finding no Brady violation where the defendant can "locate [the evidence] with reasonable diligence").

For example, the four witnesses explicitly referenced in Riechmann's brief and in his underlying state post-conviction motion—Doris Dessauer (or Röhn), Monika Seeger, Doris Rindelaub, and Dr. Horst Neumann—all were on the handwritten list of people in Germany to contact that Riechmann gave his defense

counsel prior to trial. Moreover, testimony at the evidentiary hearing indicates that defense counsel was in possession of the list itself pretrial, and was merely seeking the disclosure of the statements and reports from German police that the state had in its possession. Accordingly, we limit our analysis here to the materiality of the statements themselves, along with the other documentary evidence referenced in Riechmann's Rule 3.850 motion and presented to the state 3.850 court at the evidentiary hearing.

Moving on to the substance of Riechmann's Brady claim, we will assume that Riechmann has satisfied Brady's first two requirements. See Strickler, 527 U.S. at 281–82, 119 S. Ct. at 1948. Our concern, then, is whether the withheld evidence was "material"—that is, whether "there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different." See Rimmer, 876 F.3d at 1054.

As to the statements themselves, Riechmann has only ever referenced the specific contents of four. Two of the statements came from Riechmann's former girlfriends (Doris Dessauer and Doris Rindelaub), one came from his former landlady (Monika Seeger), and the last came from a friend who took care of his dogs (Dr. Neumann).

Assuming the statements would have been admissible under Florida law, the Florida Supreme Court's conclusion that the statements would likely not have

affected the outcome at trial is not unreasonable. Like the would-be testimony we discussed above in evaluating Riechmann's ineffective assistance claim, the undisclosed statements would have undermined mainly the state's evidence of motive, and only to a limited degree.

Two of the witnesses whose statements were not disclosed—Doris Dessauer and Doris Rindelaub—were former girlfriends of Riechmann who had never even met Kischnick and had no idea what went on in their relationship. Indeed, neither woman had been in contact with Riechmann since their respective relationships with him ended, many years prior to the murder. Riechmann's landlady, Monika Seeger, had very little contact with Kischnick and acknowledged that she and her family did not have a close relationship with the couple.

The fourth statement came from Dr. Neumann, whose statement appears to have exclusively concerned his impressions of Riechmann's financial situation. But his impressions were primarily based on how much Riechmann paid Dr. Neumann for taking care of his dogs and on the fact that Riechmann had recently won 40,000 German marks in the lottery. Notably, the mere fact that Riechmann won the lottery obviously was not information unknown to the defense at the time of trial. See Stein, 846 F.3d at 1146. In any case, all of these statements come nowhere close to undermining the state's powerful evidence of Riechmann's motive to kill Kischnick. Simply put, it was not unreasonable for the Florida

Supreme Court to conclude that, in the context of the entire record, there was no reasonable probability of a different outcome. See Rimmer, 876 F.3d at 1054.

As for the remaining withheld evidence, Riechmann focuses particularly on a letter, purportedly from Kischnick's employer, dated October 25, 1985, which he claims would have undermined the state's theory that Riechmann would have been upset that Kischnick was quitting prostitution, as it showed she had an alternate source of income. Riechmann greatly overstates the value of this letter, assuming he has accurately described its contents. The fact that Kischnick had other sources of income does not preclude her having been a prostitute, nor does it flatly contradict any testimony about the amount of money she made as a prostitute. Further, Riechmann himself acknowledged during his testimony that Kischnick had worked as a prostitute at various points in time. Accordingly, the mere existence of some alternative source of income would hardly have undercut the state's theory that Riechmann was upset by Kischnick's desire to give up her lucrative job as a prostitute.

For all these reasons, the Florida Supreme Court's decision denying Riechmann's Brady claim is not based on an unreasonable determination of the facts and is not contrary to, or an unreasonable application of, clearly established federal law, and we therefore defer to that decision.

V. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Riechmann's § 2254 petition.

AFFIRMED.

A-3

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 13-20863-CIV-MARTINEZ-GOODMAN

DIETER RIECHMANN,
Petitioner,
vs.

FLORIDA DEP'T OF CORR., *et al.*,
Respondents.
_____/

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the reasons stated in the Court's Order Adopting Judge Goodman's Report and Recommendation, judgment is entered in favor of Respondents and against Petitioner.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of December, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

A-4

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 13-20863-CIV-MARTINEZ-GOODMAN

DIETER RIECHMANN,
Petitioner,
vs.

FLORIDA DEP'T OF CORR., *et al.*,
Respondents.
_____/

ORDER ADOPTING MAGISTRATE JUDGE GOODMAN'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Jonathan Goodman, United States Magistrate Judge, for a Report and Recommendation on Petitioner's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. Judge Goodman filed a Report and Recommendation [ECF No. 110], recommending that the petition be denied and that no certificate of appealability issue. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present. After careful consideration, the Court affirms and adopts the Report and Recommendation. Accordingly, it is hereby **ADJUDGED** that United States Magistrate Judge Goodman's Report and Recommendation [ECF No. 110] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Petitioner's habeas corpus petition is **DENIED.** No certificate of appealability shall issue. This case is **CLOSED,** and any pending motions are **DENIED AS MOOT**. A final judgment shall be entered by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of December, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 13-CV-20863-MARTINEZ/GOODMAN

DIETER RIECHMANN

Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

REPORT AND RECOMMENDATIONS ON
PETITIONER'S SECTION 2254 HABEAS CORPUS PETITION

Petitioner Dieter Riechmann, a state prison inmate serving a life term for a first-degree murder conviction, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 [ECF No. 1]. It consists of the standard 15-page form, a 148-page memorandum, and an 11-page reply [ECF No. 37] to the Respondent's 148-page opposition memorandum [ECF No. 17]. United States District Judge Jose E. Martinez referred the case to the Undersigned. [ECF No. 42].

In the petition, Riechmann raises myriad challenges. After reviewing the materials described above and relevant portions of the record dating back to the 1988 indictment for the October 25, 1987 murder of Kersten Kischnick ("Kischnick"),

Riechmann's "life companion" of thirteen years,[1] the Undersigned issued a report and recommendations recommending that Judge Martinez grant, on a limited basis, Riechmann's request for an evidentiary hearing on one (but only one) challenge: i.e., that his trial counsel was ineffective because he surprised Riechmann during trial by announcing that Riechmann should testify. [ECF No. 69]. Judge Martinez affirmed and adopted the report and recommendations. [ECF No. 75].

Respondent later filed a motion requesting that the Court reconsider the Order granting an evidentiary hearing on two grounds: (1) his trial counsel, Edward Carhart, died, and (2) recent case law from the United State Supreme Court and the Eleventh Circuit Court of Appeals. [ECF No. 90]. The Undersigned granted the motion and cancelled the evidentiary hearing. [ECF No. 99].

The Undersigned now **respectfully recommends** that the District Court enter an order **denying** the habeas petition for the reasons set forth below.

Factual Background

The Florida Supreme Court outlined the relevant facts in *Riechmann v. State*, 581 So. 2d 133, 136-37 (Fla. 1991). The Undersigned will use the language from the Florida

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1 *Riechmann v. State*, 581 So. 2d 133, 135 (Fla. 1991) (initial opinion affirming the now-vacated death sentence and murder conviction).

Supreme Court's opinion, as supplemented with transcript citations provided by Respondent.[2]

> Riechmann and Kischnick, "life companions" of thirteen years, were German citizens and residents who came to Florida in early October 1987. Kischnick was shot to death in Miami Beach on October 25, while she sat in the passenger seat of an automobile that had been rented and driven by Riechmann. The state's theory at trial was that Kischnick was a prostitute, Riechmann was her pimp supported by her income, and when she decided to quit prostitution, he killed her to recover insurance proceeds. Relying on circumstantial evidence, the state sought to prove that Riechmann stood outside the passenger side of the car and fired a single fatal shot through the partially open passenger-side window, striking Kischnick above the right ear. Riechmann has consistently denied committing the crime, asserting that a stranger shot Kischnick when they stopped the car somewhere in Miami to ask for directions.
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> Testimony at trial established that as early as the summer of 1986 Kischnick became too sick to work and wanted to quit prostitution. [T. 3162-64, 3211, 2520-21]. In the months immediately prior to the murder Kischnick and Riechmann were not getting along, and Riechmann was often verbally abusive toward Kischnick. [T. 2769-70].
>
> After arriving in Miami from Germany, Riechmann rented an automobile with his Diner's Club card, which automatically insured the passengers for double indemnity in the event of accidental death. [T. 3039-41, 3043, 3045]. On the evening of October 25, Riechmann drove around the Miami area with Kischnick in the passenger seat. At some point that evening, Kischnick was shot. [T. 4484, 4490].

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[2] As explained in Respondent's Response [ECF No. 17, pp. 5-6], the Florida Supreme Court's opinion does not contain transcript citations, so it added them. "T" refers to the trial transcript citations provided by Respondent, "R" refers to the record on direct appeal citations provided by Respondent, "PCT" refers to the first Rule 3.850 hearing transcript citations provided by Respondent, "PC2T" refers to the Respondent-provided citations from the second Rule 3.850 hearing transcript and "PC2R" refers to the second Rule 3.850 record citations provided by Respondent.

The evidence at trial included a series of statements Riechmann made to police during the hours and days that immediately followed the murder.[3] Riechmann, who spoke broken English, made his first statement during the investigation at the scene on October 25. He told officers that when he stopped to ask directions from a black man, he sensed danger and suddenly heard an explosion. [T. 3244, 3290-91]. Realizing that the man had shot Kischnick, he accelerated the car and drove around Miami in a panic looking for help. Finally, he spotted Officer Reid and pulled over. Riechmann made subsequent statements to officers at the police station, during "drive-arounds" when attempting to help police find the location of the shooting, and on the telephone. [T. 3252, 3257-62]. In each pretrial statement Riechmann told virtually the same story, but he was unable to recall details of the shooting or where it took place. Riechmann also told officers that he had not fired a gun on the day of Kischnick's murder.

In his trial testimony, Riechmann gave a more detailed account.[4] Riechmann testified that he and Kischnick had been touring in their car, intending to videotape some of the Miami sights. [T. 4472]. They got lost and asked a stranger for directions. [T. 4484-85]. When Riechmann

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[3] Police did not advise Riechmann of his constitutional rights as enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966), until October 29, 1987, after he made numerous statements to officers that were used against him at trial.

[4] Riechmann testified that he did not give all these details to police because he was in shock after the murder. [T. 4640-42, 4714-17, 4645-47]. While questioning Riechmann at the scene, police "swabbed" his hands for gunpowder residue. [T. 3476-88]. An expert for the state, Gopinath Rao, testified that numerous particles typically found in gunpowder residue were discovered in the swab of Riechmann's hand. [T. 3540-46]. Based on the number and nature of the particles, Rao concluded that there is a reasonable scientific probability that Riechmann had fired a gun. [T. 3540-46]. Rao also said he would not have expected to find the same type and number of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while somebody else fired a shot from outside the passenger-side window. [T. 3677-79]. An expert for the defense, Vincent P. Guinn, testified that the particles of gunpowder residue found on Riechmann's hand proved only that Riechmann was in the vicinity of a gun when it was fired -- not that he actually fired a gun -- and that Rao's opinion was not scientifically supported. [T. 4850-79].

realized they were close to their destination, he unbuckled his seat belt, reached behind him and grabbed a video camera, apparently getting prepared to use it. [T. 4485-87]. He said he put the camera on Kischnick's lap and was in the process of handing her purse to her so she could tip the stranger when he saw the stranger reach behind him. Feeling threatened, Riechmann said he "hit the gas pedal" and stretched out his right arm in a "protective manner," with his palm facing outward in front of him. Instantly he heard an explosion, accelerated the car, and saw Kischnick slump over. [T. 4488-90]. After the shooting he began looking for help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance. [T. 4497-98].

In Riechmann's motel room police found three handguns and forty Winchester silver-tipped, 110–grain, .38–caliber–special rounds of ammunition in a fifty-shell box. [T. 2941-42]. An expert firearms examiner testified that those bullets were the same type that killed Kischnick, [T. 2971], although none of the weapons found in the room were used to murder Kischnick. [T. 2970]. The expert also testified that the bullet that killed Kischnick could have been fired from any of three makes of guns. [T. 2968]. Riechmann owned two of those three makes of weapons. [T. 4358-65, 4364-70].

The state also presented testimony about the blood found in the car and on Riechmann's clothes. Serologist David Rhodes testified that high-velocity blood splatter found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. [T. 3930]. The pattern of blood found on a blanket that had been folded in the driver's seat was consistent with high-velocity blood splatter and aspirated blood, rather than other kinds of blood stains, the serologist said.[5] [T. 3766-84]. Blood splatter was found on the steering wheel, but none was found on Riechmann's seat belt or on the back of the driver's seat. [T. 3744-49]. Additionally, Riechmann had blood stains, rather than blood splatter, on his clothing. [T. 3744-49]. Rhodes testified that had

[5] Riechmann explained that the blood got on the blanket earlier that summer in Germany after his dog had surgery. When he and Kischnick took the dog home from the hospital, the dog's surgical wounds bled on the blanket. He said he brought the blanket with him to Miami to use on the beach, after which he intended to discard it. [T. 4546-48, 4620-21].

Riechmann been sitting in the driver's seat during the shooting, his clothes would have shown evidence of blood splatter rather than just the blood stains that were found. [T. 3744-49].

Evidence seized by German authorities and brought back to the United States included numerous documents. Among them were insurance papers revealing that between approximately 1978 and 1985, Riechmann had become the beneficiary of several German insurance policies on Kischnick, totaling more than $961,000 in the event of her accidental death. [T. 2704-05, 2710-16, 3017-22, 3024, 3073-74]. Under all the policies murder was considered an accidental death. [T. 3069-70, 3081-85]. German documents also showed that on June 9, 1987, Riechmann and Kischnick filed reciprocal wills in a German court designating each other as "sole heir" of their respective estates. [T. 3141].

A fellow inmate of Riechmann, Walter Smykowski, testified that while incarcerated pending trial, Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and Kischnick's will. [T. 4098-99, 4106-07].

The jury found Riechmann guilty of first-degree murder and unlawful possession of a firearm while engaged in a criminal offense. [T. 5177-78]. No evidence was presented in the penalty phase, and the jury recommended death by a nine-to-three vote. [T. 5250, 5304]. The court found the murder was committed for pecuniary gain, and was cold, calculated, and premeditated without any pretense of legal or moral justification. [T. 5322]. Although Riechmann presented no mitigating evidence, the trial court found as a nonstatutory mitigating circumstance that people in Germany who know Riechmann told police they consider him to be a "good person." [T. 5322]. The trial court imposed the sentence of death, concluding that "[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstance." [T. 5323].

Riechmann, 581 So. 2d at 136-37.

Procedural History

DIRECT APPEAL

Riechmann raised, *inter alia,* the following claims on direct appeal: (1) the State was guilty of prosecutorial misconduct and thereby violated Riechmann's rights to a fair trial and due process under the United States and Florida Constitutions; (2) the trial court erred in failing to exclude evidence seized from Riechmann in violation of the United States and Florida Constitutions; and (3) under the totality of the circumstances involved in the case, the judgment and sentence should be reversed in the interest of justice. *Riechmann v. State,* 581 So. 2d at 137-41.

The Florida Supreme Court affirmed the conviction and death sentence. *Id.* at 140-41. Thereafter, the United States Supreme Court denied Riechmann's petition for writ of certiorari. *Riechmann v. Florida,* 506 U.S. 952 (1992).

FIRST RULE 3.850 MOTION

On September 30, 1994, the petitioner filed his initial rule 3.850 motion for post-conviction relief and an amendment thereto, in which he raised the following claims:

1. Riechmann was denied his right to the effective assistance of counsel by his attorney's failure to conduct any independent investigation in this factually complex case and by counsel's consequent failure to present abundant available evidence of his innocence, in violation of his rights under the Sixth, Eighth and Fourteenth

Amendments to the U.S. Constitution and Article I, Sections 9, 16, 21 and 22 of the Florida Constitution. [ECF No. 10-2, p. 21].

2. Newly discovered evidence entitled Riechmann to a new trial. [ECF No. 10-2, p. 133].

3. Riechmann was denied the effective assistance of counsel by his attorney's failure to use available expertise to rebut and disprove crucial prosecution testimony that erroneously and unprofessionally asserted that the bloodstains and gunshot residue evidence obtained from the automobile proved he was guilty. [ECF No. 10-2, p. 158].

4. The State's deliberate withholding of material exculpatory evidence deprived Riechmann of his fair trial rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9, 16, 21 and 22 of the Florida Constitution. [ECF No. 10-3, p. 3].

5. Riechmann was denied his right to the effective assistance of counsel by his attorney's sudden, unilateral, and patently unreasonable decision to have Riechmann testify at trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, sections 9, 16, 21, and 22 of the Florida Constitution. [ECF No. 10-3, p. 99].

6. Riechmann was denied the effective assistance of counsel by his attorney's unreasonable failure to suppress illegally obtained evidence,[6] in violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, sections 9, 16, 21, and 22 of the Florida Constitution. [ECF No. 10-3, p. 126].

7. Riechmann was denied his right to the effective assistance of counsel by his attorney's unreasonable decision to prevent the jury from knowing about his acquittal of a federal gun charge prior to his arrest on the instant murder charge, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9, 16, 21, and 22 of the Florida Constitution. [ECF No. 10-3, p. 158].

8. Riechmann was denied the effective assistance of counsel by his attorney's failure to object to countless instances of flagrant prosecutorial misconduct, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, sections 9, 16, 21, and 22 of the Florida Constitution. [ECF No. 10-3, p. 172].

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[6] Trial counsel's decision to have Riechmann to testify (without preparation) enabled the State to introduce Riechmann's prior felony convictions. Riechmann argues that his counsel was ineffective for failing to exclude a conviction in Germany which was not a felony. This would not have occurred if his counsel had not decided that Riechmann should testify. There are other arguments which, in effect, revolve around the theme that negative developments would not have occurred but for his counsel's decision to have Riechmann testify without any preparation.

9. Riechmann was denied the effective assistance of counsel by his attorney's conduct during jury selection, including counsel's disregard of his desire for African-American representation, counsel's failure to conduct appropriate death qualification inquiry, counsel's accession to the seating of manifestly biased jurors, and other unreasonable errors and omissions, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, sections 9, 16, 21, and 22 of the Florida Constitution. [ECF No. 10-4, p. 6].

10. Riechmann was denied the effective assistance of counsel by his attorney's unreasonable errors and omissions on cross examination of the State witnesses. [ECF No. 10-4, p. 31].

11. The trial court's death sentence was invalid because its findings were not written by the court but were instead secretly written verbatim by the prosecutor, provided to the court *ex parte*, read in part by the court into the record at sentencing, and filed as if they were "the court's" -- all without the knowledge of Riechmann or his counsel, in violation of *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987), *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the Sixth, Eighth and Fourteenth Amendments and Article I, sections 9, 16, 21 and 22 of the Florida Constitution. [ECF No. 10-4, p. 39].

12. Riechmann was denied his right to the effective assistance of counsel by his attorney's closing argument at the guilt phase of trial. [ECF No. 10-4, p. 54].

13. Riechmann was deprived of his rights to the effective assistance of counsel and due process of law by the State's failure to provide him with a Speedy Trial and his attorney's failure to demand it, in violation of the Constitutions and laws of the United States and Florida. [ECF No. 10-4, p. 63].

14. Riechmann was denied the effective assistance of counsel by his attorney's failure to investigate and present mitigating evidence, an omission which resulted directly in the jury's recommendation and court's imposition of the sentence of death. [ECF No. 10-4, p. 66].

After an evidentiary hearing, the trial judge vacated Riechmann's sentence and ordered a new sentencing proceeding, finding that Riechmann received ineffective assistance of counsel at the penalty phase and that the sentencing order (of death) was improperly written by the prosecutor, instead of the judge. [ECF No. 10-6 (First 3.850 Appendix, App. D)]. The trial court denied the remainder of the claims. The Florida Supreme Court affirmed the trial court's order in its entirety, and remanded for a new sentencing proceeding before a new trial judge and jury. *State v. Riechmann*, 777 So. 2d 342, 366 (Fla. 2000).

The Supreme Court also denied Riechmann's petition for writ of habeas corpus, which raised, *inter alia*, the following claims:

1. Ineffective assistance of appellate counsel.

2. The trial court's abuse of discretion regarding the propriety of its rulings at trial.

3. The State's suppression of favorable evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

4. The Florida Supreme Court's denial of Riechmann's equal protection rights by failure to review the entire record and by denying his request to file an oversized brief.

5. Ineffective assistance of post-conviction counsel.

[ECF No. 11-2, p. 1 (Petition for Habeas Corpus Appendix, App. A)].

During the appeal, Riechmann twice moved the Florida Supreme Court to relinquish jurisdiction and the Court denied both motions. The first request involved his claim that the State pressured crime scene officer Hilliard Veski, who did not testify at trial, to give a false statement about the location of a blanket and flashlight in the car in which the victim was murdered. The second motion to relinquish jurisdiction asserted newly discovered evidence consisting of an alleged confession from an individual named Mark Dugen to journalist Peter Mueller that Dugen, not Riechmann, committed the murder.

SECOND RULE 3.850 MOTION

During the pendency of the appeal of the first rule 3.850 motion, Riechmann filed a second post-conviction motion in the trial court, in which he raised, *inter alia,* the following (paraphrased) claims:

1. Newly discovered evidence involving an alleged confession from Mark Dugen.

2. The State deliberately withheld material exculpatory evidence and knowingly used false evidence regarding State witness Walter Smykowski.

3. The conduct of law enforcement officers was so outrageous that it deprived Riechmann of due process.

4. Riechmann was denied his rights to due process and equal protection because certain state agencies withheld access to the files and records pertaining to his case.

5. The cumulative effect of newly discovered evidence warranted a new trial. [ECF No. 22-2, pp. 60-74].

After the Supreme Court issued its opinion in the first rule 3.850 appeal, the trial court decided that the second rule 3.850 motion should be resolved before the resentencing proceeding. [ECF No. 22-8, pp. 90-93]. The trial court conducted an evidentiary hearing on the second post-conviction motion and then entered an order

denying relief.[7] [ECF No. 22-8, pp. 171-91]. The trial court concluded that Riechmann did not exercise due diligence in pursuing his successive motion and amended claims, and the motion was therefore time-barred. [ECF No. 22-8, pp. 171-91]. Additionally, the court held that, even if the motion was not time-barred, the claims were without merit and Riechmann was not entitled to relief. [ECF No. 22-8, pp. 171-91]. The court then scheduled the resentencing for June 16, 2003. The trial court denied a motion for rehearing and denied a motion to stay the resentencing proceedings.

However, the resentencing was ultimately stayed pending the disposition of the appeal of the second motion for post-conviction relief, in which the petitioner raised the following five (paraphrased) claims of trial court error:

1. The lower court erred in refusing to allow Officer Veski's proffered testimony at the evidentiary hearing regarding his recovery of a flashlight and a blanket from Defendant's car and his recollection of the State pressuring him to testify in a certain way at trial. Further, Veski's testimony should be considered as part of the

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[7] In the course of the hearing, the petitioner attempted to amend his rule 3.850 motion again, asserting the following three additional claims that purportedly conformed with the evidence presented at the evidentiary hearing: (1) the State violated due process by not disclosing evidence about Smykowski's state-arranged visit with his daughter -- evidence favorable to Riechmann because it provided impeachment of Smykowski's trial testimony; (2) the State knowingly allowed misleading or false testimony to be presented without correction when Smykowski testified that he had no contact with law enforcement officers between March 1988 and July 1988, before he testified in front of Riechmann's jury that he received no benefit for his testimony other than possibly a letter; and (3) newly discovered evidence of innocence in the form of an eyewitness account of the shooting of the victim.

argument that the State's "outrageous conduct" violated *Brady* and that the trial court erred in failing to grant an evidentiary hearing on the claim.

2. The trial court erred in denying Riechmann's request to perpetuate the testimony of Smykowski in Dubai or, alternatively, should have allowed him to introduce Smykowski's affidavit at the evidentiary hearing. Further, the trial court erred in denying Defendant's *Brady* and *Giglio* claims based on the State's failure to disclose all of its pretrial contacts with Smykowski.

3. The trial court erred in denying his newly discovered evidence claim concerning newly discovered witnesses, Donald Williams and Doreen Bezner.

4. The trial court erred in failing to conduct a cumulative error analysis.

5. The trial court judge engaged in improper and prejudicial *ex parte* communications.

On April 12, 2007, the Florida Supreme Court affirmed the trial court's denial of the petitioner's second rule 3.850 motion. *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007). The United States Supreme Court denied certiorari on October 6, 2008. *Ricchmann v. Florida*, 555 U.S. 879 (2008).

The trial court sentenced the petitioner to life imprisonment. [ECF No. 14-2, p. 70 (Second Direct Appeal Appendix, App. F)]. On March 2, 2010, the petitioner filed a Notice of Appeal of the trial court's February 1, 2010, sentencing order. [ECF No. 14-2, p. 76 (Second Direct Appeal Appendix, App. G)]. On February 22, 2012, the Third

District Court of Appeal affirmed per curiam the trial court. *Riechmann v. State,* 83 So. 3d 734 (Fla. 3d DCA 2012). On March 9, 2012, the Third District Court of Appeal issued its mandate.

Riechmann's Temporary *Pro Se* Status

Riechmann *had* been represented by two criminal defense attorneys: Richard Klugh ("Klugh") and John Bergendahl ("Bergendahl"), who first met Riechmann in 1987 in connection with federal firearms charges. The District Court entered a directed verdict of acquittal on two counts and the federal court jury acquitted Riechmann of the third count. [ECF No. 46, pp. 2-3, n.2]. According to Klugh's declaration filed in the instant case, "it was clear that the federal prosecution was trumped up to win a delay for the state prosecution team." [ECF No. 46, pp. 2-3, n.2]. Regardless of whether Klugh's view of the prosecution's strategy is correct, the point is that he and Bergendahl had been involved in one way or the other with Riechmann since 1987.

Riechmann's trial counsel, Edward Carhart, contacted Klugh to have him discuss with Riechmann Carhart's decision to have Riechmann testify at his murder trial. Even though they were not always officially retained,[8] both Klugh and Bergendahl were involved in some of Riechmann's post-trial challenges, including the preparation of the instant § 2254 petition. They provided some (and significant) legal services to

[8] Both attorneys were retained to serve as death penalty resentencing trial counsel. [ECF No. 45, p. 2].

Riechmann on a *pro bono* basis and, at times, paid for "substantial"[9] costs associated with myriad legal proceedings.

Because of Klugh's "facility with the German language," he was the primary point of contact between Riechmann and the two attorneys (i.e., Klugh and Bergendahl).[10]

After Klugh and Bergendahl participated in the filing of Riechmann's § 2254 petition and the reply, Riechmann filed a motion to remove them as counsel and for leave to amend his petition. The Undersigned ordered Klugh and Bergendahl to respond, and they each filed a declaration. The State did not oppose Riechmann's motion. [ECF No. 44].

Basically, Bergendahl and Klugh urged the Undersigned to permit them to remain on this § 2254 case even though Riechmann filed a motion to have them removed. Although the Undersigned gave Riechmann the opportunity to submit a reply, he failed to timely do so.[11] Nevertheless, the Undersigned was "reluctant to simply permit Riechmann to represent himself without making certain that this is indeed his desire," and I therefore gave Riechmann additional time to file an optional

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9 *See* Bergendahl declaration [ECF No. 45, p. 4].

10 ECF No. 45, p. 4.

11 It appears Riechmann's reply was lost. The Court received it at a later date. [ECF No. 54].

reply. [ECF No. 47]. He did so [ECF No. 48], and he unequivocally advised that he wanted to remove Klugh and Bergendahl as counsel and to proceed *pro se.*

The Undersigned granted Riechmann's motion and terminated Bergendahl and Klugh's representation of Riechmann in this case. [ECF No. 49]. The Court then denied [ECF No. 52] Riechmann's motion to amend his petition. Riechmann objected to that ruling, but Judge Martinez entered an Order affirming my denial of the motion to amend the § 2254 petition. [ECF No. 55].

The Undersigned's *Initial* Report and Recommendations

The Undersigned issued an *Initial* Report and Recommendations on the pending habeas petition, recommending that the District Court hold an evidentiary hearing on one limited issue concerning Riechmann's allegation that his trial counsel was ineffective because he surprised Riechmann during trial by announcing that he should testify, arranged for another attorney to persuade Riechmann to testify, failed to prepare Riechmann for any part of his week-long testimony and caused prior convictions to be introduced (a development which would not have occurred if Riechmann had not testified). [ECF No. 69]. The District Court adopted the Report and Recommendations. [ECF No. 75].

Subsequent Filings

Riechmann subsequently filed a motion for appointment of counsel for the evidentiary hearing. [ECF No. 82]. The Undersigned granted the request, after finding

Riechmann indigent, and appointed the Federal Public Defender's Office. [ECF Nos. 83; 86]. Riechmann is now represented by Assistant Federal Public Defender ("AFPD") Janice Bergmann.

Afterward, and as explained above, Respondent filed a motion requesting that the Court reconsider the Order granting an evidentiary hearing on two grounds: (1) Riechmann's trial counsel, Edward Carhart, had recently died, and (2) recent case law from the United State Supreme Court and the Eleventh Circuit Court of Appeals. [ECF No. 90].

The purpose of the evidentiary hearing was to explore why Carhart called Riechmann as a trial witness at the last minute and what he did or did not do to prepare his client for his testimony, including the cross-examination. Carhart's death frustrated, and, for all practical purposes, rendered impossible, the objective of the hearing. Accordingly, I granted the motion and cancelled the evidentiary hearing. [ECF No. 99].[12]

Riechmann, through his counsel, also filed a motion for leave to file supplemental briefing [ECF No. 102] and the Undersigned denied the motion [ECF No. 105].

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[12] Respondent had, in response to the Order granting the evidentiary hearing, filed a Motion to Amend and Certify Order for Interlocutory Review. [ECF No. 79]. However, this motion became moot when I cancelled the evidentiary hearing. Judge Martinez entered an Order denying the motion as moot. [ECF No. 101].

Most recently, Riechmann, although represented by counsel, filed a *pro se* "emergency" motion requesting that the Court consider supplemental evidence. [ECF No. 106]. The Undersigned entered an Order striking the motion because a party represented by counsel may not file his own submissions. [ECF No. 109]. I also provided an alternate, substantive ruling that denied the motion on the merits. [ECF No. 109].

Legal Standard

"The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, prohibits federal courts from granting habeas relief unless the state court's on-the-merits adjudication of the claim for relief '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.'" *Burton v. Comm'r, Ala. Dep't of Corr.*, 700 F.3d 1266, 1269 (11th Cir. 2012) (citing 28 U.S.C. § 2254(d)(1)).

In order for a state court's decision to be considered "contrary to" clearly established Supreme Court precedent, it must either: (1) apply a rule that contradicts the governing law as set forth by the Supreme Court; or (2) arrive at a differing result from a Supreme Court decision that had materially indistinguishable facts. *Burton*, 700 F.3d at 1269 (citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). In order for a decision to involve an "unreasonable application" of federal law, a state court must have correctly

identified the governing legal principle from the Supreme Court's decisions but unreasonably applied that principle to the facts of the particular case. *Burton*, 700 F.3d at 1269. Courts will not find the existence of an unreasonable application of federal law where "fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (internal citation omitted).

Under this highly deferential standard of review, the statutory phrase *clearly established federal law* "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A "state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [Supreme Court] opinions . . . [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (internal citation omitted).

Even where a state court denies an application for post-conviction relief without written opinion, its decision is still treated as an adjudication on the merits and is entitled to the same deference as if the state court had entered written findings to support its decision. *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). A state court's findings of fact are presumed to be correct, and the petitioner bears the burden of rebutting that presumption of correctness by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Moreover, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

Given these strict rules, the Undersigned is mindful of the principle that if the standard set by § 2254, as amended by the AEDPA, "is difficult to meet, that is because it was **meant to be**." *Harrington*, 131 S. Ct. at 786 (emphasis supplied). While the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," it preserves the authority of issuing the writ of habeas corpus only in those **exceedingly rare** cases where there is **no possibility** that fairminded jurists could disagree that the state court's decision conflicts with Supreme Court precedent. In order to meet this high standard, a petitioner most prove that the state court's ruling "was so lacking in justification" that it contained "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. (emphasis supplied).

Moreover, the United States Supreme Court has stated that courts should "not lightly conclude that a State's criminal justice system has experienced the 'extreme malfunction' for which federal habeas relief is the remedy." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (internal citations omitted).

Evaluating whether a rule application was unreasonable requires a consideration of the rule's specificity. Therefore, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 786 (internal citation

omitted). The Supreme Court recently explained that the statute "reflects the view that habeas corpus is a guard against **extreme** malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* (internal citation omitted) (emphasis supplied). The Supreme Court has also emphasized that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.*

A habeas petition filed pursuant to 28 U.S.C. § 2254 cannot be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *see Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The purpose of the exhaustion requirement is to give the state the first "opportunity to pass upon and correct alleged violations of prisoners' federal rights" while simultaneously "encourag[ing] state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (internal citations omitted).

In order to fully exhaust a claim, a petitioner must have presented it to the state court "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005) (internal citation omitted). A claim is **not** considered fully exhausted if it is presented to the state court on purely *state* law grounds. *Anderson v. Harless*, 459 U.S. 4, 6-8 (1982). "[T]he habeas petitioner must have 'fairly presented' to the state courts the

'substance' of his *federal* habeas corpus claim." *Id.* at 6 (emphasis supplied) (internal citations omitted).

In Florida, a claim is exhausted in one of the following three ways: (1) by filing a direct appeal; (2) by filing a Florida Rule of Criminal Procedure 3.850 motion and an appeal from its denial; or (3) in the case of a challenge to a sentence, by filing a Rule 3.800 motion and an appeal from its denial. *Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979) (Rule 3.850); *Pagan v. McNeil*, No. 09-23081, 2010 WL 3981351, at *3 (S.D. Fla. Aug. 16, 2010) (Rule 3.800).

Because total exhaustion is required, a court in most cases may not adjudicate a "mixed" petition, which is a petition including both exhausted and unexhausted claims. *Rose*, 455 U.S. at 510. A federal district court must ordinarily dismiss a "mixed" habeas petition without prejudice -- allowing either for the resubmission of only exhausted claims or total exhaustion. *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) (citing *Rose*, 455 U.S. at 519-20). However, "when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, [district courts] can forego the needless 'judicial ping-pong'" and simply "treat those claims now barred by state law as no basis for federal habeas relief." *Id.*

When a petitioner previously filed a Rule 3.850 motion for post-conviction relief in Florida state court, it is well-settled that he cannot return to assert additional claims because, except under limited circumstances not present here, Florida law bars

successive Rule 3.850 motions. *See* Fla. R. Crim. P. 3.850(f); *Kelley v. Secretary*, 377 F.3d 1317, 1351 (11th Cir. 2004).

The Eleventh Circuit Court of Appeals provided a helpful and comprehensive outline of AEDPA in *Ferguson v. Secretary, Florida Department of Corrections*:

> As the Supreme Court has explained, there is a critical difference between the question of whether to reverse for a claimed constitutional error on direct appeal and the question of whether to grant habeas relief after the state courts have rejected the claim of constitutional error. "Under AEDPA . . . it is a necessary premise that the two questions are different." *Harrington v. Richter*, — U.S. ——, 131 S. Ct. 770, 785, 178 L.Ed.2d 624 (2011); *see also Renico*, 130 S. Ct. at 1862 ("This distinction creates 'a substantially higher threshold' for obtaining relief than *de novo* review."). The distinction between those two questions is critical to the proper functioning of the federal writ of habeas corpus in the post-AEDPA age. *See Harrington*, 131 S. Ct. at 780 (explaining that habeas "resources are diminished and misspent . . . and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance").
>
> The Supreme Court has not hesitated to reverse grants of habeas relief ordered by courts of appeals that ignore the distinction between direct appeal type *de novo* review and the more restrictive, highly deferential review mandated by 28 U.S.C. § 2254(d)(1). *See, e.g., Felkner v. Jackson*, —U.S. ——, 131 S. Ct. 1305, 1307, 179 L.Ed.2d 374 (2011) (reversing a decision ordering habeas relief, which apparently had applied the standard of review applicable on direct appeal instead of AEDPA's "highly deferential standard for evaluating state-court rulings"); *Premo v. Moore*, — U.S. ——, 131 S. Ct. 733, 740, 178 L.Ed.2d 649 (2011) (reversing a decision ordering relief and cautioning that "[f]ederal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)"); *Harrington*, 131 S. Ct. at 786 (reversing a decision ordering habeas relief based on a *de novo* review standard, and commenting that "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable"); *Smith v. Spisak*, 558 U.S. 139, 149, 130 S. Ct. 676, 684, 175 L.Ed.2d 595 (2010) (reversing a decision ordering habeas relief because

> "[w]hatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law' ").

716 F.3d 1315, 1331-32 (11th Cir. 2013).

The Eleventh Circuit Court of Appeals recognizes the distinction between challenges raised on direct appeal and challenges made in a § 2254 petition after the state court already considered the arguments on the merits. *See e.g., Moody v. Comm'r, Ala. Dep't of Corr.*, No. 15-11809, 2017 WL 1020303, at *3 (11th Cir. Mar. 16, 2017) (noting that arguments "might give us some pause if we were exercising plenary review of a Sixth Amendment claim on direct appeal from a federal conviction" but then noting that "we are not conducting such an unfettered analysis here. Instead, we are reviewing the decision . . . under AEDPA deference, and that makes a difference").

Moreover, when analyzing a state prisoner's § 2254 petition, federal habeas courts must understand that AEDPA "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (internal quotation marks and citation omitted).

Framed by these stringent standards, the Undersigned's analysis begins below.

I. *Riechmann's claim of being denied the effective assistance of counsel at the guilt phase of his capital trial*

Riechmann alleges he was denied effective assistance of counsel at the guilt phase of his capital trial in various ways. He contends that his trial counsel was

ineffective because he : (1) failed to adequately challenge blood spatter[13] and gun residue evidence; (2) failed to investigate facts of Riechmann's innocence; (3) failed to investigate times and distances; (4) failed to present evidence of Riechmann's relationship with Kischnick; (5) failed to investigate information that would discredit the State's jailhouse informant; (6) failed to introduce the secretly-recorded four-hour tape of the interview of Miami Beach Police Department Sergeant Matthews; (7) forced Riechmann to testify; (8) failed to explore cultural differences; (9) failed to rebut the state's theory of Kischnick's physical condition; and (10) mishandled his acquittal of federal gun charges in the state murder trial.

In its opposition response, the State contests each of these allegations.

To succeed with an ineffective assistance of counsel challenge, a petitioner must satisfy the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Specifically, a petitioner must demonstrate that (1) his counsel's performance was below an objective and reasonable professional norm; and (2) he was prejudiced by this inadequacy. *Id.* at 686.

Because both prongs of the two-part *Strickland* test must be satisfied, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." *Ward v. Hall*, 592 F.3d 1144, 1163 (11th Cir. 2010) (citing *Holladay*

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[13] Riechmann in his petition uses the word "spatter," not "splatter." However, the Florida Supreme Court, which I quoted earlier in this Report, uses "splatter" in its opinion.

v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)). "As stated in *Strickland*: 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Hamilton v. Fla. Dep't of Corr.*, No. 13-864, 2016 WL 6727683, at *8 (M.D. Fla. Nov. 15, 2016) (quoting *Strickland*, 466 U.S. at 697).

"Where the state courts have denied an ineffective assistance of counsel claim on the merits, the standard a petitioner must meet to obtain federal habeas relief is a difficult one." *Chamblin v. Sec'y, Dep't of Corr.*, No. 13-cv-25, 2015 WL 9701074, at *6 (N.D. Fla. Dec. 3, 2015) (citing *Harrington*, 562 U.S. at 102). When evaluating a claim of ineffective assistance "through the lens of AEDPA deference, review of counsel's performance is doubly deferential." *McCartney v. Sec'y, Fla. Dep't of Corr.*, 662 F. App'x 664, 668 (11th Cir. 2016) (citing as an example *Yarborough v. Gentry*, 540 U.S. 1, 6, (2003)). Further, "[t]he standard is not whether an error was committed, but whether the state court decision is contrary to or an unreasonable application of federal law that has been clearly established by decisions of the Supreme Court." *Chamblin*, 2015 WL 9701074, at *6.

Put differently, "'[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher threshold.' . . . If there is 'any reasonable argument that counsel satisfied Strickland's deferential standard,' then a

federal court may not disturb a state-court decision denying the claim." *Hittson v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1248 (11th Cir. 2012) (quoting *Knowles*, 556 U.S. at 123 and then quoting *Richter*, 131 S. Ct. at 788).

Because Riechmann alleges that both his trial and appellate counsel were ineffective and those arguments were decided on the merits by Florida courts, he must confront the reality that "it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Rambaran v. Sec'y, Fla. Dep't of Corr.*, 821 F.3d 1325, 1331 (11th Cir. 2016) (quoting *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013)).

"'[S]urmounting *Strickland*'s high bar is never an easy task.'" *Hamilton*, 2016 WL 6727683, at *8 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Review of counsel's conduct is highly deferential and courts will not second-guess an attorney's strategic decisions. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994) (internal citations omitted). Courts should presume counsel was **effective**. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) (internal citations omitted). Because a wide range of performance is *constitutionally* acceptable, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

To be unreasonable, the performance must be such that "*no competent counsel would have taken the action that his counsel did take.*" *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001) (emphasis in original) (internal citations omitted).

Courts "are not interested in grading lawyers' performances," but "are interested in whether the adversarial process at trial, in fact, worked adequately." *Id.* (quoting *White*, 972 F.2d at 1220–21). In other words, "[e]ven if **many** reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that **no** reasonable lawyer, in the circumstances, would have done so." *Rogers*, 13 F.3d at 386 (emphasis supplied).

"Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 686). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.*

Finally, "an attorney's performance is to be evaluated from his perspective at the time, rather than through the prism of hindsight." *Grayson*, 257 F.3d at 1216 (citing *Strickland*, 466 U.S. at 689). "[T]he trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally

compelled.'" *Chandler v. United States*, 218 F.3d 1305, 1313 (2000) (quoting *Burger v. Kemp*, 483 U.S. 776, 794, (1987)).

First, the Undersigned finds that the Florida Supreme Court decision in this case was not "contrary to" clearly established federal law as determined by the United States Supreme Court. "A state court decision that applies 'the correct legal rule' based on Supreme Court law to the facts of the petitioner's case would not fit within the 'contrary to' clause even if the federal court might have reached a different result relying on the same law." *Robinson v. Moore*, 300 F.3d 1230, 1344 (11th Cir. 2002) (quoting *Fugate v. Head*, 261 F.3d 1206, 1216 (11th Cir. 2001) (quoting *Williams*, 529 U.S. at 405-06)).

Here, the Florida Supreme Court, and the state trial court it was reviewing, correctly identified the principles set forth in *Strickland* as those governing the analysis of Riechmann's claims of ineffective assistance of counsel during the guilt phase. *See Riechmann*, 755 So. 2d at 350-51, 354-55; [ECF No. 10-6, pp. 7-11].

Further, Riechmann does not cite to, nor is the Undersigned aware of, any decision in which the United States Supreme Court, faced with materially indistinguishable facts, reached a decision different from that reached by the state court in this case. *See Robinson*, 300 F.3d at 1345.

Second, the Undersigned finds that the Florida Supreme Court did not unreasonably apply clearly established federal law when ruling on Riechmann's ineffective trial counsel allegations. The ineffective assistance of trial counsel claims

were previously raised in the state habeas petition, and the Florida Supreme Court addressed them and ultimately denied relief. The Undersigned reviewed each of his allegations concerning trial counsel's alleged ineffectiveness during the guilt phase and, based on the reasons that follow, disagrees with Riechmann's assertions.

In deciding whether the state court unreasonably applied federal law, the Undersigned kept in mind that "a federal habeas court may not issue a writ under the unreasonable application clause 'simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Robinson*, 300 F.3d at 1345 (quoting *Bell v. Cone*, 122 S. Ct. at 1850 (quoting *Williams*, 529 U.S. at 411)).

1. Purported failure to investigate facts of Riechmann's innocence

Riechmann contends that trial counsel had a responsibility to investigate the case but did so insufficiently. He explains that the investigator's bill reflects that the investigator spent 18.7 hours on this case attempting to locate the waiter that served the couple the night of Kischnick's death and reviewing police frequency tapes. The investigation was fruitless. The waiter, who Riechmann's counsel searched for just a week before trial, was allegedly critical to the trial "because he observed the couple in good spirits and happy." [ECF No. 1, p. 104]. Additionally, Riechmann contends that if trial counsel had attempted to find eyewitnesses to the murder then "he **might** have

located witnesses Early Stitt and Hilton Williams." [ECF No. 1, p. 104 (emphasis supplied)].

The Florida Supreme Court addressed these same issues in its opinion. *See Riechmann*, 755 So. 2d at 357. It found that trial counsel "either had a tactical reason for each choice or the evidence allegedly not presented had already been presented to the jury, albeit in a different manner." *Id.* The Florida Supreme Court then elaborated on the claims concerning both the waiter and the two eyewitnesses' allegations.

Here, Riechmann fails to demonstrate that the Florida Supreme Court's application of *Strickland* was unreasonable. *See Carter v. Frazier*, No. 3: 12-cv-9, 2012 WL 6761514, at *6 (M.D. Ga. Dec. 4, 2012), *recommendation adopted*, 2013 WL 28027 (Jan. 2, 2013). In fact, Riechmann fails to even allege when addressing this argument that the state's highest court unreasonably applied clearly established federal law. *Id.* He merely reasserts the arguments he previously raised at the state level.

However, the Undersigned noticed that Riechmann's argument disjointedly continues in the petition's subsequent section, where Riechmann asserts that "the state court's finding is both objectively unreasonable and its factual determination is rebutted by clear and convincing evidence." [ECF No. 1, p. 122]. Nevertheless, the Undersigned is not convinced by this argument.

Independent review of the record provides no basis to conclude that the state supreme court's decision regarding the ineffective assistance of counsel claim was

based on an unreasonable application. The Florida Supreme Court did not unreasonably apply *Strickland* to the facts of the petitioner's case. *See Charter*, 2012 WL 6761514, at *3. "When reviewing whether a state court's decision was based on an 'unreasonable determination of the facts' under 28 U.S.C. § 2254(d)(2), federal courts should 'presume the state court's factual findings are correct, and the petitioner has the burden to rebut those facts by clear and convincing evidence." *Id.* (quoting *Wellons v. Warden, Ga. Diagnostic & Classification Prison*, 695 F.3d 1202, 1206 (11th Cir. 2012)). "This statutory presumption of correctness applies to the factual determinations of both state trial court and appellate courts." *Id.*

Significantly, "no absolute duty exists to investigate particular facts or a certain line of defense. Under *Strickland*, counsel's conducting or not conducting an investigation need only be reasonable to fall within the wide range of competent assistance." *Chandler*, 218 F.3d at 1316.

Indeed, as the Florida Supreme Court notes in its opinion, evidence shows -- and Riechmann admits -- that trial counsel attempted to locate the waiter but was unable to do so. Further, Riechmann does not demonstrate that an earlier search for this witness would have resulted in the investigator finding the potential witness. Additionally, the testimony would have been cumulative because the jury was shown a video of the couple together the night of Kischnick's death. [ECF No. 7-18, pp. 39-49].

Similarly, concerning the two additional witnesses subsequently located for the post-conviction hearings, Riechmann does not demonstrate that the witnesses could have been located. In fact, one witness testified at the post-conviction hearing that he avoided the area for about a month after the incident [ECF No. 8-5, p. 14] and the other testified that when the incident first occurred he did not want to get involved [ECF No. 8-5, pp. 74-75]. Thus, both witnesses were actively trying to not be located and pursuing strategies to not assist in the case.

Additionally, defense counsel testified that Riechmann informed him that the incident occurred in a different area than where the witnesses at the evidentiary hearing described. [ECF Nos. 8-5; 22-10, pp. 114-121; 64-1, pp. 60-62]. It is not surprising that defense counsel and his investigator did not find individuals who allegedly witnessed an incident in a completely different area than the one petitioner described to defense counsel. *See Chandler*, 218 F.3d at 1318 ("Because the reasonableness of counsel's acts (including what investigations are reasonable) depends 'critically' upon 'information supplied by the [petitioner]' or the [petitioner]'s own statements or actions,' evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance of counsel claims.") (citing *Strickland*, 104 S. Ct. at 2066).

Accordingly, the Undersigned finds that Riechmann has not demonstrated that the Florida Supreme Court unreasonably applied the *Strickland* standard when

evaluating defense counsel's decisions concerning an investigation of these additional witnesses.

2. Alleged failure to adequately challenge blood spatter and gun residue evidence

Riechmann contends his trial counsel was ineffective because he failed to adequately challenge the blood spatter and gun residue evidence presented to the jury. Concerning the blood spatter evidence, Riechmann asserts that trial counsel had no tactic or strategy for failing to investigate the blood spatter evidence and "had a duty, at least, to investigate the possibility of getting information, evidence, or an expert to rebut the important blood evidence." [ECF No. 1, p. 109]. He alleges that if trial counsel had done this, then he would have known that the State's blood expert (Rhodes) gave suspect testimony. He most emphatically contends that his trial counsel should have retained a rebuttal expert.

Using evidentiary hearing testimony, Riechmann discusses the portions of the trial he thinks trial counsel would have been able to effectively challenge if he had properly prepared for the blood spatter evidence.

In a similar manner, Riechmann contends that trial counsel's "failure to rebut incorrect firearms and bullet examination testimony was equally egregious." [ECF No. 1, p. 117]. For example, he asserts that the State's expert presented false and misleading evidence by stating that there were only three types of guns that could have fired

Kischnick's fatal shot. Riechmann refutes this fact and contends that there are fourteen types of guns that could have been used.

These same arguments were also presented to the lower state court when Riechmann challenged trial counsel's effectiveness. The lower state court provided a lengthy analysis and ultimately found that trial counsel's performance was not deficient. [ECF No. 10-6, pp. 11-26]. The Florida Supreme Court affirmed the lower state court's decision and stated that the "trial court's legal conclusions are supported by the case law" and that it "approve[d] the trial court's factual findings and legal conclusions." *Riechmann*, 777 So. 2d at 355-56.

Here, Riechmann contends that the "state court's determination is objectively unreasonable and its factual findings are rebutted by clear and convincing evidence." [ECF No. 1, p. 112]. However, the Undersigned finds that Riechmann fails to demonstrate that the Florida Supreme Court's application of *Strickland* was unreasonable. *See Carter v. Frazier*, No. 3: 12-cv-9, 2012 WL 6761514, at *6 (M.D. Ga. Dec. 4, 2012), *recommendation adopted*, 2013 WL 28027 (Jan. 2, 2013).

Independent review of the record provides no basis to conclude that the state supreme court's decision regarding this ineffective assistance of counsel claim was based on an unreasonable application. The Florida Supreme Court did not unreasonably apply *Strickland* to the facts of the petitioner's case. *See Charter*, 2012 WL 6761514, at *3.

As previously explained, "[w]hen reviewing whether a state court's decision was based on an 'unreasonable determination of the facts' under 28 U.S.C. § 2254(d)(2), federal courts should 'presume the state court's factual findings are correct, and the petitioner has the burden to rebut those facts by clear and convincing evidence." *Id.* (quoting *Wellons,* 695 F.3d at 1206). Riechmann essentially relies on the same information previously presented to the state courts. Reiterating the same challenges does not demonstrate that the state courts unreasonably applied *Strickland* to trial counsel's performance.

Moreover, my own review of the arguments demonstrates that the manner in which the state courts applied federal law is reasonable. Even if I were to hypothetically assume the role of the state courts and make my own original determination that was contrary to the state court's findings here -- which I am not doing here -- then that different conclusion would be entirely insufficient to prove that the state courts unreasonably applied federal law. As the United States Supreme Court has previously stated, "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington,* 562 U.S. at 102.

Trial counsel took **three** depositions of the State's blood expert. Even after taking three depositions, trial counsel determined that he did not need to retain a blood expert because he found "Rhodes' testimony initially rather benign." [ECF No. 64-1, p. 29]. Trial counsel then testified at the evidentiary hearing that, although he would need to

look at the deposition to see if he thought otherwise earlier, he notes that "[c]ertainly during trial it was clear [Rhodes'] testimony was damaging." [ECF No. 64-1, p. 29].

Therefore, the decision to not hire a separate expert appears to have been tactical. Further, "[r]eliance on 'the harsh light of hindsight' to cast doubt on a trial that took place [many years ago] is precisely what *Strickland* and AEDPA seek to prevent." *Harrington*, 562 U.S. at 107. "Even if it had been apparent that expert blood testimony could support [the petitioner's defense], it would be reasonable to conclude that a competent attorney might elect not to use it." *Id.* at 108. "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Id.* at 111.

In addition, the Undersigned agrees with the Florida Supreme Court's finding that trial counsel was not ineffective. Although defense counsel did not retain his own blood spatter expert, he elicited weaknesses in the State's presentation during cross-examination. *Riechmann*, 777 So. 2d at 355-56. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington*, 562 U.S. at 111. Many of the weaknesses revealed during cross-examination related to the very subjects Riechmann contends a defense expert would have testified about.

Finally, even though I need not agree with the Florida Supreme Court and I must find only that they applied federal law reasonably, I happen to agree with its finding that Riechmann failed to demonstrate he was prejudiced by some of the evidence trial

counsel should have allegedly challenged. For instance, Riechmann contends that there was evidence presented about the conclusion that only three types of guns could have fired Kischnick's fatal shot and that two of those types of guns were found in Riechmann's hotel room. However, although Riechmann at the evidentiary hearing presented expert testimony indicating that there were fourteen types of guns that could have been used, those experts were unable to state whether the list of fourteen types was even available at the time Riechmann stood trial.

As such, the Undersigned finds that Riechmann has not demonstrated that the Florida Supreme Court unreasonably applied the *Strickland* standard when evaluating defense counsel's decisions about the blood spatter and gun residue evidence.

3. Alleged failure to investigate times and distances

Riechmann contends that defense counsel failed to investigate -- and should have investigated -- the time frame in which the events occurred based on the waiter who saw Riechmann and Kischnick for "several hours until 10 or 10:30 p.m. the night of the shooting" [ECF No. 1, p. 120] to Riechmann "flagg[ing] down a police officer for help at 10:32 p.m." Additionally, he asserts that his trial counsel made no effort to verify the plausibility of his story while the State went through great lengths to belittle it. Because of trial counsel's decisions, Riechmann argues, the jury and the state court were left with the impression that Riechmann inexplicably spent too much time "looking for

help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance." [ECF No. 1, p. 121 (quoting *Riechmann*, 581 So. 2d at 136)].

In addition, Riechmann contends his trial counsel could have also presented data demonstrating that Biscayne Boulevard from 36th Street to 79th Street "was a likely place to get lost coming from Bayside going north and is one of the highest crime zones in Miami." [ECF No. 1, p. 121].

Riechmann failed to allege that the Florida Supreme Court unreasonably applied *Strickland* when evaluating his ineffective assistance of trial counsel claim for the alleged failure to investigate times and distances. As Riechmann is required to demonstrate this, the Undersigned does not need to further evaluate this claim.

Nevertheless, independent review of this claim further solidifies the conclusion that Riechmann is not entitled to federal habeas relief for this claim. Riechmann's assertions are not supported. For example, he contends that defense counsel should have provided information about a particular area being a high crime area. However, Riechmann did not testify during trial that he was in that area. Instead, he explained that he was in an area approximately one-hundred blocks away.

Additionally, Riechmann does not assert or demonstrate that defense counsel's actions fell below an objective standard of reasonableness. It is Riechmann's burden to show that counsel made errors so serious that counsel was not functioning at the level guaranteed by the Sixth Amendment. *See Harrington*, 562 U.S. at 104.

Accordingly, the Undersigned finds that Riechmann did not demonstrate that the Florida Supreme Court unreasonably applied federal law when evaluating this claim.

4. Alleged failure to present evidence of Riechmann's relationship with Kischnick

Riechmann contends that defense counsel failed to present evidence showing that his relationship with Kischnick was a close, loving, and respectful one and that he did not "live off" of her. Riechmann contends that, although the lower court found that this type of evidence was relevant to, and erroneously not included in, the penalty phase, it erred in not finding that the same evidence was also relevant to and necessary for the guilt phase.

Riechmann asserts that the Florida Supreme Court's finding that positive relationship evidence at trial would have been cumulative was objectively unreasonable. He then refers to portions of the trial without consistently providing record citations. The Undersigned will not spend hours combing through thousands of pages to determine which parts of the record Riechmann is referring to and relying on.

However, the ultimate question before this Court is not whether additional information shedding a more positive light on Riechmann's relationship with Kischnick existed, nor is it whether the Florida Supreme Court unreasonably found that the trial already contained cumulative evidence demonstrating a positive relationship. Rather, Riechmann is before this Court attempting to demonstrate that the Florida Supreme

Court unreasonably applied federal law when determining that his counsel was not ineffective for failing to present guilt phase evidence of his relationship with Kischnick.

As previously stated, "'[i]f there is 'any reasonable argument that counsel satisfied Strickland's deferential standard,' then a federal court may not disturb a state-court decision denying the claim." *Hittson v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1248 (11th Cir. 2012) (quoting *Harrington*, 131 S. Ct. at 788). Here, after independently reviewing the record, the Undersigned finds that this allegation does not warrant federal habeas relief. The Florida Supreme Court accurately stated that the trial court's factual findings on the claim concerning Riechmann's relationship with Kischnick were supported by competent and substantial evidence, and the legal conclusions were supported by prior case law. *Riechmann*, 777 So. 2d at 357.

Thus, Riechmann has failed to establish that the Florida Supreme Court unreasonably applied *Strickland* when evaluating this claim. Therefore, the Undersigned respectfully recommends that the District Court deny federal habeas relief in relation to trial counsel's alleged failure to present evidence about Riechmann's relationship with Kischnick.

5. Purported failure to investigate information to discredit the State's jailhouse informant

Riechmann contends his trial counsel was ineffective because he failed to investigate information to discredit Smykowski, the State's jailhouse informant. He alleges that his trial counsel failed to even pursue this possibility after receiving a letter

from Hans Lohse, an individual offering himself as a witness to Smykowski's lack of credibility.

Riechmann asserts that the "state court's finding that trial counsel made a reasonable strategic decision not to call witnesses to rebut Smykowski's testimony is contrary to, and an unreasonable application of, clearly established federal law. A tactical decision cannot be 'reasonable' when defense counsel is unaware of the relevant evidence or information. Here, trial counsel never spoke to any witnesses regarding this issue." [ECF No. 1, p. 128 (inner citation omitted)].

Riechmann includes the important and required buzzwords -- "contrary to and an unreasonable application of clearly established federal law." However, he does not *support* his conclusory argument. He merely makes an assertion that defense counsel's decision here cannot be "reasonable" when he is "unaware." Therefore, he does not meet his burden.

In any event, independent review of this claim also supports that the district court should deny federal habeas relief. The Florida Supreme Court did not unreasonably apply *Strickland* when evaluating this ineffective assistance of counsel claim. As the Florida Supreme Court accurately described, defense counsel's decision to not have other inmates testify against the State's jailhouse informant was a tactical decision. More importantly, the decision was a reasonable one. *See Chamblin*, 2015 WL 9701074, at *6 ("The relevant question is not whether counsel's choices were strategic,

but whether they were reasonable.") (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).

Review of the post-conviction evidentiary hearing transcript reveals that defense counsel received the letter from an inmate offering himself as a witness to testify against Smykowski's credibility -- and therefore he was "aware" of this information. [ECF No. 64-1, p. 40]. Defense counsel explained at the hearing that he made a decision not to ask that individual to testify because he did not think the testimony would be compelling or effective. [ECF No. 64-1, p. 41]. He also testified that he and Riechmann discussed other inmates. Ultimately, defense counsel decided it was not necessary to have another inmate testify against Smykowski because (1) Smykowski's interest in testifying -- to curry favor with the state and federal governments -- was "obvious from the circumstances;" and (2) Smykowski claimed that Riechmann made certain statements directly to only him and not to a group of people. [ECF No. 64-1, p. 114].

Accordingly, the Undersigned finds that the Florida Supreme Court did not unreasonably apply federal law when concluding that trial counsel was not ineffective because he did not use other inmate testimony to discredit Smykowski.

6. Failure to introduce the secretly-recorded four-hour tape of the interview of Miami Beach Police Department Sergeant Matthews

Riechmann next alleges that his trial counsel was ineffective for failing to introduce the four-hour tape of Riechmann's interview by Miami Beach Police Department Sergeant Matthews. Riechmann asserts that the recording would have

assisted the jury in evaluating both his credibility and police tactics. Riechmann states that "[i]mportantly, the tapes also exposed the tricks Sgt. Matthews used in an attempt to get Mr. Riechmann to implicate himself in the murder." [ECF No. 1, p. 130].

Riechmann asserts that the "state court's determination [that counsel was not ineffective] is contrary to and an unreasonable application of clearly established federal law." [ECF No. 1, p. 132]. However, he fails to demonstrate *how* the state court's decision is purportedly contrary to, or an unreasonable application of, *Strickland*.

Nevertheless, the Undersigned finds that the Florida Supreme Court did not unreasonably apply *Strickland* when evaluating trial counsel's failure to introduce the four-hour interview tape. Defense counsel was aware of the tape and, in fact, tried to suppress the tape. [ECF Nos. 23-3; 23-5]. The trial court ultimately denied the request to suppress the tape.

The Undersigned finds it would have been contradictory, and even counterintuitive, for Riechmann to expect that, after arguing against the admissibility of the tape at a suppression hearing, his trial counsel would then seek to *introduce* it at trial. Defense counsel must have strategically determined that the video was more harmful than beneficial, as he attempted to suppress it, albeit unsuccessfully.

Additionally, review of the trial transcript reveals that defense counsel elicited testimony about Sergeant Matthews' approach when interrogating Riechmann. [ECF No. 7-12, pp. 52-58]. Therefore, defense counsel introduced the same information using

an alternate approach. *See State v. Bright*, 200 So. 3d 710, 737 (Fla. 2016) ("We have held that a failure to present cumulative evidence does not establish unconstitutional ineffective assistance of counsel because its omission neither constitutes deficient performance nor results in sufficient prejudice. In fact, the opposite can be true. As we have observed, more evidence is not necessarily better.") (citations and quotation marks omitted).

Accordingly, the Undersigned finds that Riechmann is not entitled to federal habeas relief under this claim.

7. Trial counsel's so-called ineffectiveness for forcing Riechmann to testify

Riechmann contends that his trial counsel was ineffective because he forced him to testify when he did not want to testify and trial counsel did not sufficiently prepare him beforehand.[14]

When asserting this allegation, Riechmann does not contend that the Florida Supreme Court unreasonably applied *Strickland* when analyzing this claim. Instead, Riechmann contends that, "[c]ontrary to the state court's determination, this could not have been a reasoned tactical decision by counsel." [ECF No. 1, p. 133]. However, he does not adequately explain how or why the tactical decision was unreasonable.

[14] Although the Undersigned initially scheduled an evidentiary hearing on this limited issue, that decision of course did not indicate one way or the other whether I would recommend that the District Court provide actual, substantive habeas relief on this issue. Moreover, from a practical perspective, the hearing did not go forward because the primary fact witness passed away. He was the only reason for the limited-purpose evidentiary hearing.

Therefore, Riechmann has not met his burden in demonstrating that the Florida Supreme Court unreasonably applied federal law.

Additionally, review of the transcripts from the trial and the evidentiary hearings demonstrates that the Florida Supreme Court's decision to deny relief was a reasonable one. The state court found that defense counsel had extensive experience in the field of capital cases and the Florida Supreme Court found that the evidence supported that conclusion. Independent review of the evidentiary hearing transcripts also confirms that defense counsel was an experienced and skilled attorney. [ECF No. 64-1, pp. 16-17].

In addition, the Florida Supreme Court found sufficient evidence to support the state court's finding that defense counsel made a reasonable tactical decision to arrange for Riechmann to testify based on the facts known to him at the time. Review of the record, particularly the evidentiary hearing transcripts, confirms that the Florida Supreme Court reasonably applied *Strickland* in evaluating this claim.

Although Riechmann was informed about his counsel's plan to have him testify just shortly before he needed to take the stand, defense counsel describes his decision-making as an evolving process: "it came on slowly. You know. I didn't just suddenly say 'I am putting you on the stand.' But a series -- you know, a trial is a living thing and it changes day-to-day. And it came on slowly. It was not my first choice, to be honest, to

put Mr. Riechmann on the stand. . . So it is one of those hard choices you make." [ECF No. 64-2, p. 117].

Accordingly, the Undersigned finds that the state court did not unreasonably apply *Strickland* when it evaluated this claim.

8. Alleged failure to explore cultural differences

Riechmann contends that trial counsel was ineffective because he failed to present testimony concerning Kischnick's prostitution other than the testimony provided through the cross-examination of Dina Mohler, the State's witness. He alleges there were other individuals who defense counsel could have contacted to demonstrate that prostitution is legal, safe, and not "looked down upon" in Germany. [ECF No. 1, p. 135]. He asserts that this "testimony would have rebutted the State's theory that Mr. Riechmann was a pimp and living off of the victim." [ECF No. 1, p. 135].

When asserting this argument, Riechmann fails to allege that the Florida Supreme Court (when addressing this same argument) unreasonably applied *Strickland.* Thus, Riechmann also fails to establish that federal habeas relief is warranted under this allegation.

An independent evaluation of the circumstances results with the same conclusion -- that the requested federal habeas relief is unwarranted. During trial, the jury heard testimony stating that prostitution was legal where Kischnick worked. Dina Mohler, who knew and worked with Kischnick, explained this fact. Review of the

transcript reveals testimony (both on direct and cross-examination) about how prostitution was legal in Switzerland. [ECF Nos. 7-10, p. 127; 7-11, pp. 14-16]. The Court notes that Riechmann, the State, and the Florida Supreme Court stated that Mohler testified that prostitution is legal in Germany. As this fact is not contested and no other record citations are provided, the Undersigned does not further address this discrepancy (between prostitution being legal in Switzerland, as opposed to, or in addition to, being legal in Germany).

Nevertheless, the jury heard testimony that Kischnick's prostitution in Europe was legal. Riechmann simply wishes defense counsel had presented *more* evidence elaborating this information. However, defense counsel is not ineffective for failing to provide cumulative evidence. *See Bright*, 200 So. 3d at 737.

Additionally, although this information may have shed a different light on Riechmann during the trial (such as making him appear less "criminal" because prostitution is not legal in Florida but was legal for Kischnick in Europe), it is unclear how the legality of prostitution would have refuted the portrayal of Riechmann as her pimp, who was living off of her earnings.

For these reasons, the Undersigned recommends that the District Court deny Riechmann federal habeas relief under this claim of ineffective assistance of trial counsel.

9. Alleged failure to rebut the State's theory of Kischnick's physical condition

Riechmann contends his counsel was ineffective because he failed to rebut the State's theory concerning Kischnick's physical condition. He asserts that the Florida Supreme Court's determination is objectively unreasonable. He states that his counsel should have looked further into whether Kischnick, as depicted by the State, had a serious gynecological problem that allegedly made it impossible for her to continue working as a prostitute and furthered Riechmann's motive for murder to collect life insurance benefits. Riechmann asserts that he was prejudiced because the jury did not know that Kischnick's medical records one month before her death did not depict a serious condition. Instead, the records reflected a common diagnosis and malady treated successfully with antibiotics. He asserts that the jury was under the false impression that Riechmann's motive, as presented by the State, was true.

The Florida Supreme Court also previously analyzed this allegation. Riechmann again fails to demonstrate that the Florida Supreme Court unreasonably applied the *Strickland* standard when determining whether trial counsel was ineffective. Thus, Riechmann is not entitled to federal habeas relief.

The Court notes that the medical evidence Riechmann contends his defense counsel should have elicited during trial **was** in fact introduced -- which the Florida Supreme Court accurately observed and noted in its opinion. At trial, Dr. Vila, the medical examiner, testified that he observed cervical erosion in Kischnick, which he

described as a "small superficial laceration in the cervix." [ECF No. 7-9, pp. 54, 64]. He also stated that Kischnick did not have serious or life-threatening medical conditions. [ECF No. 7-9, pp. 56-57]. Additionally, Dr. Vila testified that cervical erosion was normal in sexually active women, women who had been pregnant or women who had infections. [ECF No. 7-9, p. 65].

Interestingly, Dr. Vila's trial testimony is consistent with Dr. Brickler's tesitmony. Dr. Brickler is the expert gynecologist who testified at the post-conviction hearing. [ECF No. 8-1, pp. 164, 169]. He explained at the post-conviction hearing, similar to Dr. Vila, that Kischnick's condition was not a debilitating condition and it could be treated with antibiotics. [ECF No. 8-1, pp. 174-75, 181]. In fact, when reviewing Dr. Vila's testimony, Dr. Brickler stated that the cervical condition described by Dr. Vila was "minor" and "not unusual." [ECF No. 8-1, p. 179].

As previously stated, trial counsel is not deemed ineffective for failing to present cumulative evidence. Riechmann here simply wishes his attorney had presented the same evidence differently. Thus, the Undersigned finds that Riechmann is not entitled to federal habeas relief for this claim.

10. Alleged ineffective assistance of counsel concerning his earlier acquittal of federal gun charges

Riechmann contends that trial counsel was ineffective for failing to elicit additional testimony regarding his prosecution on federal gun charges. He claims this prejudiced him because he was unable to show the jury that his statements to

Smykowski and his attempt to assign insurance benefits to Kischnick's family were made at a time when he did not know he would be charged with murder.

Riechmann does not allege that the Florida Supreme Court, when addressing the same allegation and evaluating trial counsel's actions, unreasonably applied *Strickland* to the facts of this case. Thus, Riechmann has not satisfied his burden.

The Florida Supreme Court found that the issue was both without merit and procedurally barred because he raised the same claim on direct appeal and in his motion for rehearing, but "couch[ed the claim] in terms of ineffective assistance of counsel." *Riechmann*, 755 So. 2d at 353 n. 14. The Florida Supreme Court, when considering it as an ineffective assistance of counsel claim, found that, even if more information related to these charges had been disclosed to the jury, there was "no reasonable probability that the outcome would have been different because the evidence shows that Riechmann knew of the likelihood of being arrested for the murder soon after the murder." *Id.*

Although the Undersigned need not specifically agree with the Florida Supreme Court's rationale (because I need to determine only whether the outcome was a reasonable application of the applicable federal law), I nevertheless do, in fact, agree with the Florida Supreme Court's evaluation. Further, the state court concluded that the same "evidence could have been used to show that although he had not been arrested

for the murder at the time he assigned the insurance policies, he was aware that his arrest was imminent." *Id.*

Therefore, the Undersigned finds that the Florida Supreme Court did not unreasonably apply *Strickland* in this scenario. Accordingly, the Undersigned recommends that the District Court deny Riechmann federal habeas relief for this claim.

11. Purported cumulative effect of ineffective assistance of trial counsel

In his conclusion for the ineffective assistance of trial counsel section, Riechmann alleges that "when considered cumulatively with other instances of deficient performance and suppression by the State of exculpatory evidence it is clear that Mr. Riechmann was denied an adversarial testing."

The Supreme Court has not expressly recognized the cumulative error doctrine for ineffective assistance of counsel claims. "As the Eleventh Circuit noted, 'the Supreme Court has held, in the context of an ineffective assistance of counsel claim, that 'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of guilt undermined the reliability of the finding of guilt.'" *Chamblin*, 2015 WL 9701074, at *14 (quoting *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564-64 (11th Cir. 2009) (quoting *United States v. Cronic*, 466 U.S. 648, 659 n. 26 (1984))). "Under a cumulative-error analysis, the Court should evaluate only the effect of matters to be determined in error, not matters the Court determined to be non-errors." *Id.* (citing *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984)).

Here, Riechmann has failed to establish that the state court unreasonably determined that his trial counsel was not ineffective. Because none of the *individual* claims have any merit, Riechmann's claim of cumulative error also fails. Therefore, Riechmann is not entitled to federal habeas relief under this theory either.

II. *Riechmann's claim of ineffective assistance of appellate counsel on direct appeal to the Florida Supreme Court*

Riechmann contends he was denied effective assistance of appellate counsel on his direct appeal to the Florida Supreme Court. Specifically, Riechmann contends that appellate counsel failed to challenge the following on appeal: (1) the allegedly improper admission of the pimp/prostitute lifestyle; (2) the allegedly improper admission of *Treffpunkt*, a Swiss magazine; (3) the Prosecutor's allegedly improper comment on Riechmann's right to remain silent; (4) the Prosecutor's allegedly improper arguments; (5) the trial court's allegedly improper handling of the jury's request to have testimony read back; (6) the State's alleged failure to bring Riechmann to a speedy trial; (7) the alleged failure to raise the proper argument on Riechmann's prior convictions; (8) the alleged failure to raise the issue of the purportedly illegal search of Riechmann's apartment in Germany; and (9) the alleged failure to properly raise the illegality of Riechmann's statements.

In its opposition response, the State explained that the Florida Supreme Court already considered Riechmann's claims for ineffective assistance of appellate counsel and held that the claims were without merit.

The *Strickland* standard is also used to evaluate a claim of ineffective assistance of appellate counsel. *Chamblin*, 2015 WL 9701074, at *6 (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). As previously discussed in the section concerning ineffective assistance of counsel during the guilt phase, in order to prevail under *Strickland*, a petitioner must demonstrate that (1) his counsel's performance was below an objective and reasonable professional norm, and (2) he was prejudiced by this inadequacy. *Strickland*, 466 U.S. at 686. It is not necessary for both prongs of the *Strickland* test to be satisfied. *See Ward v. Hall*, 592 F.3d at 1163 (citing *Holladay*, 209 F.3d at 1248); *Hamilton*, 2016 WL 6727683, at *8 (quoting *Strickland*, 466 U.S. at 697).

A petitioner seeking to demonstrate prejudice "must show a reasonable probability that, but for his counsel's unreasonable failure to brief a particular issue, Petitioner would have prevailed on appeal." *Ballard v. McNeil*, 785 F. Supp. 2d 1299, 1326 (N.D. Fla. 2011) (citing *Robbins*, 528 U.S. at 285).

"The Eleventh Circuit has issued several decisions interpreting the *Strickland* standard with regard to claims of ineffective assistance of appellate counsel. Appellate counsel cannot be deemed ineffective for failing to raise issues 'reasonably considered to be without merit.'" *Ballard*, 785 F. Supp. 2d at 1326 (citing *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000)).

"Additionally, where an issue is not preserved for appellate review, appellate counsel's failure to raise the issue is not constitutionally deficient as it is based on the

reasonable conclusion that the appellate court will not hear the issue on its merits." *Id.* (citing *Atkins v. Singletary*, 965 F.2d 952, 957 (11th Cir. 1992); *Francois v. Wainwright*, 741 F.2d 1275, 1285–86 (11th Cir. 1984)). "Moreover, the arguments omitted from the appeal must have been significant enough to have affected the outcome of the appeal." *Id.* (citing *Nyhuis*, 211 F.3d at 1344).

Ineffective assistance of appellate counsel claims are properly asserted in a state habeas petition, as was done here. *See Ballard*, 785 F. Supp. 2d at 1317-18.

The Undersigned reiterates that the standard Riechmann must meet to obtain federal habeas relief is a difficult one when the state courts have already denied the ineffective assistance of counsel claims on the merits. *See Chamblin*, 2015 WL 9701074, at *6 (citing *Harrington*, 562 U.S. at 102). "The standard of review is 'doubly deferential.'" *Id.* (citing *Knowles*, 556 U.S. at 123). I need not determine whether the state court committed an error, but rather whether the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. *Id.*

Each of the ineffective assistance of appellate counsel claims asserted here were previously asserted in the state habeas petition and addressed by the Florida Supreme Court. The Florida Supreme Court found that each of Riechmann's ineffective assistance of appellate counsel claims was without merit. Significantly, Riechmann's federal habeas petition does not allege that the state court's decision on his ineffective assistance of appellate counsel allegation is contrary to, or an unreasonable application

of, federal law. *See Chamblin*, 2015 WL 9701074, at *6. Instead, Riechmann replicates -- nearly verbatim -- many of the ineffective assistance of appellate counsel claims he previously raised at the Florida Supreme Court.

As previously discussed, great deference is given to the state court's decision. "The **challenger's burden is to show** 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Richter*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 688) (emphasis supplied). Here, Riechmann has not offered any basis for calling into question the state habeas court's conclusion that these claims lack merit. He has offered no facts or argument suggesting that the Florida Supreme Court's determinations were unreasonable. *See Brown v. Oubre*, 12-cv-4160, 2014 WL 2766094, at *7, 13 ("In his federal habeas petition, Petitioner raises the same eleven grounds for relief, word for word, that he raised in his state habeas petition. He offers no argument in support of his federal grounds.").

At most, Riechmann raises occasional arguments in the footnotes. For example, in a footnote, Riechmann contends that "the state court misses the point that appellate counsel failed to argue there was no evidence to support these allegations. The state court's determination is objectively unreasonable and its factual findings are rebutted by clear and convincing evidence." [ECF No. 1, p. 127 n. 139]. However, a footnote is the incorrect place for substantive arguments on the merits. *See Mazzeo v. Nature's Bounty,*

Inc., No. 14-60580, 2014 WL 5846735, at *2 n. 1 (S. D. Fla. Nov. 12, 2014) (not considering argument raised in a footnote). Courts have deemed arguments raised in this fashion waived. *See Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (2010) (deeming argument waived because it was raised in passing only in a footnote).

The failure to properly assert a proper federal habeas ineffective assistance of appellate counsel claim alone provides sufficient reason to deny the requested relief. In any event, the Undersigned will, in an abundance of caution, still consider the sub-claims raised in the overall ineffective assistance of appellate counsel claim.

The Florida Supreme Court found that each of Riechmann's ineffective assistance of appellate counsel claims was without merit. *Riechmann*, 777 So. 2d at 365 ("All of these points are without merit."). The Florida Supreme Court elaborated on some claims more than others. *Id.*

"When faced with an ineffective assistance of appellate counsel claim that was denied on the merits by the state courts, a federal habeas court 'must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decisions; and then it must ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.'" *Chamblin*, 2015 WL 9701074, at *5 (quoting *Harrington*, 562 U.S. at 100) (alterations in original).

The Florida Supreme Court succinctly stated that it denied certain ineffective assistance of appellate counsel claims on the merits: (1) the allegedly improper admission of *Treffpunk* (a Swiss magazine); (2) the Prosecutor's allegedly improper arguments; (3) the alleged failure to raise the proper argument on Riechmann's prior convictions; and (4) the alleged failure to properly raise the illegality of Riechmann's statements. The Florida Supreme Court's determinations on these claims, even if succinct, are still entitled to deference for purpose of federal habeas review. *See Wright*, 278 F.3d at 1255. The Florida Supreme Court found those claims to be "without merit because appellate counsel indeed raised the issues on direct appeal." *Riechmann*, 777 So. 2d at 365..

The fundamental problem with Riechmann's argument that his appellate counsel failed to raise these issues is that it is simply factually incorrect; the appellate brief and the supplemental appellate brief filed by his counsel indeed *did* raise these issues.

For example, review of the record demonstrates that the magazine issue was raised in the supplemental brief. [ECF No. 9-6, p. 14]. Therefore, at the risk of stating the obvious, appellate counsel cannot be ineffective for failing to raise a claim that he did, in fact, raise. Also, in yet another improper footnote argument, Riechmann contends there is no indication in the direct appeal opinion that the supplemental brief was considered. However, as previously stated, the state court was not even required to provide any elaboration in its opinion. *See Hamilton*, 2016 WL 6727683, at *5 ("all that is required is a

rejection of the claim on the merits, not an opinion that explains the state court's rationale for such a ruling."). In addition, the magazine is also mentioned in the original appellate brief. [ECF No. 9-4, p. 75].

Similarly, concerning the alleged failure to raise the Prosecutor's improper arguments, review of the appellate brief demonstrates numerous challenges to the prosecutor's arguments and comments throughout trial. For instance, the federal habeas petition highlights issues with the Prosecutor's opening statement, but the appellate brief clearly challenges the statements made by the Prosecutor during that portion of the trial. [ECF No. 9-4, pp. 194-95].

Additionally, the instant habeas petition contends that the prosecutor improperly commented on Riechmann's right to remain silent. Review of the appellate brief reveals that appellate counsel also alleged that prosecutorial statements came close to being a comment on Riechmann's right to remain silent. [ECF No. 9-4, p. 194]. Ultimately, the state court found that the alleged prosecutorial misconduct claims were meritless or were not preserved for appellate review. *Riechmann*, 581 So. 2d at 139.

Therefore, for these claims, considering that Riechmann's appellate counsel did raise what Riechmann contends he should have argued, he cannot demonstrate that his appellate counsel's performance was below an objective and reasonable professional norm under prong one of the *Strickland* test. *See Chamblin*, 2015 WL 9701074, at *7.

Further, he cannot demonstrate that the Florida Supreme Court's decision based on the *Strickland* standard was contrary to, or an unreasonable application of, federal law.

In addition, Riechmann contends that appellate counsel failed to raise the *proper* arguments concerning Riechmann's prior convictions and also failed to *properly* raise the illegality of his statements obtained by police after his acquittal in federal court and his bond hearing in the state court. Significantly, the very allegations themselves concede that appellate counsel in fact raised these issues on appeal. Riechmann, however, contends that appellate counsel failed to raise the arguments in the "proper" way.

Concerning Riechmann's prior convictions, review of the record demonstrates that Riechmann's appellate counsel successfully argued, in part, on direct appeal that "the trial court erred in admitting evidence of four German convictions as impeachment evidence and in denying his requested instruction to the jury regarding this evidence." *Riechmann*, 581 So. 2d at 139. Although the state court found that one of Riechmann's claims challenging the four convictions had merit, it found that the state court's abuse of discretion was harmless beyond a reasonable doubt. *Id.* As for the other three prior convictions, the state court found that "trial judge did not abuse his discretion in concluding that their probative value outweighed the danger of unfair prejudice." *Id.*

Here, Riechmann wants to challenge those same prior German convictions that were previously contested on appeal -- but with an alternative argument. However, the

standard for whether appellate counsel was ineffective is not whether counsel could have done more or done something differently. "The test is whether what counsel did was within the wide range of reasonable professional assistance." *Hamilton* 2016 WL 6727683, at *17 (citing *Ward v. Hall*, 592 F.3d at 1164; *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007)). Stated differently, "[i]n order to establish that counsel's conduct was unreasonable, . . . the petitioner must prove that no competent counsel would have taken the action that his counsel did take." *Ward*, 592 F.3d at 1164.

Riechmann has failed to demonstrate that counsel's failure to raise this particular nuanced argument on appeal was unreasonable and prejudicial. Further, Riechmann has not even argued that the state court's denial of the claim on the merits resulted in an unreasonable application of federal law.

Similarly, Riechmann has failed to demonstrate that appellate counsel was ineffective for failing to "properly" argue the legality of statements Riechmann made to police after his acquittal in federal court. He failed to explain **how** this failure was unreasonable. Further, Riechmann did not contend that the state court's determination on this claim was an unreasonable application of federal law.

Moreover, Riechmann just vaguely objects to the introduction of statements he purportedly made after his federal acquittal. However, Riechmann does not indicate what statements supposedly attributable to him were introduced into evidence at his state court murder trial.

The record citations Riechmann references for this argument do not provide any helpful information either. Instead the transcript pages Riechmann refers to -- ECF No. 23-5, pp. 184, 210, 216 -- concern the fact that he spoke to police after his federal acquittal and that the lower state court denied his motion to suppress "statements made there, if any." They do not, however, specify what he supposedly said nor do they reveal what statements were supposedly introduced into evidence at his state trial. Therefore, it is impossible for the Undersigned to evaluate Riechmann's claim that his appellate counsel did not properly raise on appeal the introduction of his post-acquittal statements. Similarly, it is not feasible for the Undersigned to assess any prejudice caused by this alleged inefficiency. Accordingly, Riechmann failed to meet his burden.

In addition to reasserting those claims that the Florida Supreme Court succinctly found to be without merit, Riechmann challenges additional actions by appellate counsel that the Florida Supreme Court also denied as being without merit but elaborated more on these other claims.

Specifically, Riechmann contends that his trial counsel failed to raise the allegedly improper admission of the pimp/prostitute lifestyle. [ECF No. 1, p. 142]. He asserts that the State argued throughout trial that he was a pimp who prostituted Kischnick, lived off of her earnings, and, that a month or two before travelling to Miami, Kischnick informed him that she intended to stop working for him as a

prostitute. The State's motive theory was that Riechmann got angry, insured Kischnick, and then fatally shot her.

Riechmann explains that trial counsel attempted to suppress this information before trial but the trial court denied his motion. Also, trial counsel objected to the State raising the issue in the opening statement and throughout trial. Here, Riechmann contends that *appellate counsel* should have raised the issue on direct appeal. In another inappropriate footnote, Riechmann adds that the Florida Supreme Court "misses the point that appellate counsel failed to argue there was no evidence to support these allegations" and that this is objectively unreasonable.

Review of the appellate brief for the direct appeal demonstrates that appellate counsel discussed "pimping" in the opening statement when describing the various allegedly inappropriate comments made by the prosecutor. [ECF No. 9-4, p. 195]. When the Florida Supreme Court previously addressed this identical claim, it stated that appellate counsel could not be deemed ineffective for failing to raise the issue. Even if the argument had been omitted, the omission would not generate grounds to support an ineffective assistance of counsel argument because the prosecutor presented the evidence in order to demonstrate Riechmann's motive to kill and "evidence may be admitted in a criminal case if it is relevant as to the motive for the crime involved." *Riechmann*, 777 So. 2d at 365. Thus, Riechmann is unsuccessfully challenging his counsel's failure to make an incorrect legal argument. Consequently, he fails to make

the rigorous showing required to prevail on a claim of ineffective assistance of counsel in a federal habeas proceeding.

To the extent it is even appropriate to consider an argument raised only in a footnote (which it is not), the record refutes Riechmann's contention that the "state court misse[d] the point that appellate counsel failed to argue there was no evidence to support these allegations." For example, the trial transcript demonstrates that Ernst-Siegfried Steffen, an insurance agent, testified that Riechmann was Kischnick's pimp and that Kischnick was a prostitute. [ECF No. 7-7, pp. 125-30]. Likewise, Peter Mayer-Reinach, a real estate broker, also testified that Kischnick was a prostitute and Riechmann was her pimp. [ECF No. 7-6, pp. 81-82, 85-87]. Finally, Riechmann admitted during his trial testimony that he wrote a letter stating that Kischnick supported him financially, but then stated that the statement in the letter was intentionally false. [ECF No. 7-21, p. 5].

Therefore, even though Riechmann did not assert a proper claim here concerning the admission of the pimp/prostitute lifestyle, review of the transcript nonetheless demonstrates that there **was** evidence to support the prosecutor's comments about this alleged lifestyle. Accordingly, Riechmann's argument is still unsuccessful.

Additionally, Riechmann contends that appellate counsel was ineffective for failing to challenge the *manner* in which the trial court responded to the jury's request for the transcript of the testimony of prostitute Dina Mohler and Kischnick's sister,

Regina Kischnick. [ECF No. 1, p. 148]. When addressing this claim, the Florida Supreme Court found the claim without merit and provided its reasoning -- mainly that "[t]rial judges have broad discretion in deciding whether to read back testimony."

Riechmann contends that the state trial court never informed the jurors that, pursuant to Florida Rule of Criminal Procedure 3.410, they had a right to require that the testimony be read back. He alleges that the Florida Supreme Court's determination that the issue is meritless is objectively unreasonable. In making this assertion, however, Riechmann does not demonstrate **how** the Florida Supreme Court's determination is unreasonable. He simply says it -- a scenario present in many of Riechmann's arguments in his federal habeas petition.

Nonetheless, "[t]here is no United States Supreme Court precedent governing whether a state trial judge must read back testimony. Rule 3.410 allows trial courts to have a read back, and Florida trial judges have broad discretion to decide when to order a read back." *McAffee v. Sec'y, Dep't of Corr.*, 8:07CV1206-T-30TBM, 2009 WL 3067218, at *10 (M.D. Fla. Sept. 23, 2009). "If Petitioner's [trial] counsel had objected to the judge's decision to not have a read back it would have been a **meritless** objection, therefore counsel's failure to object was not an error. Failure to make a frivolous objection does not render counsel's assistance so ineffective that it fell outside the wide range of professionally competent assistance." *Id.* (emphasis supplied).

Review of the record reveals that trial counsel did not object to the trial court's decision to not read back the transcript to the jury. [ECF No. 7-24, p. 146]. Therefore, the issue was not even preserved for appeal. Even if trial counsel had objected and appellate counsel raised it on appeal, then both claims would have been meritless. *See Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304, 1311 (11th Cir. 2008) (agreeing that "appellate counsel is not ineffective for failing to raise a meritless issue on appeal"). Therefore, Riechmann has failed to demonstrate how the Florida Supreme Court's decision concerning the alleged ineffective assistance of appellate counsel to not challenge the reading of the trial transcript was unreasonable.

Next, Riechmann contends that his appellate counsel was ineffective because he failed to address the State's failure to bring Riechmann to a speedy trial. [ECF No 1, p. 133]. The Florida Supreme Court, however, found the claim to be without merit because Riechmann failed to move for discharge and he waived his right to a speedy trial by taking a continuance. *Riechmann*, 777 So. 2d at 365. Therefore, the Florida Supreme Court found that it could not deem appellate counsel ineffective for failing to raise this issue. *Id.*

Riechmann fails to demonstrate that the Florida Supreme Court's decision is unreasonable. Although Riechmann contends that the State was intentionally trying to circumvent the speedy trial rule, his arguments in the federal habeas petition do not refute the fact that Riechmann sought a continuance. "[W]hen a defendant requests a

continuance prior to the expiration of the applicable speedy trial time period for the crime with which he is charged, the defendant waives his speedy trial right as to all charges which emanate from the same criminal episode." *Knight v. State*, 211 So. 3d 1, 12–13 (Fla. 2016) (quoting *Stewart v. State*, 491 So. 2d 271, 272 (Fla. 1986)).

Additionally, Riechmann does not refute that he did not demand a speedy trial and move for discharge. Appellate counsel cannot be ineffective for not asserting a claim which he could not, in good faith, assert. Accordingly, Riechmann fails to establish that the Florida Supreme Court's determination was an unreasonable application of *Strickland*.

In his federal habeas petition, Riechmann also contends that "[i]n one vague reference, appellate counsel raised the issue of the illegal search and seizure of Mr. Riechmann's apartment in Germany, but failed to say why the search was illegal and why it prejudiced Mr. Riechmann." [ECF No. 1, p. 137]. Riechmann in his federal habeas petition then provides a chronology of the searches, but he does not himself explain how the search was illegal and why it prejudiced him (so that the Undersigned could evaluate whether the Florida Supreme Court was unreasonable when applying *Strickland*). Notably, the record demonstrates that none of the items retrieved from the January 14, 1988 search were admitted at trial.

In addition to failing to properly assert the claim, the allegation itself admits that appellate counsel indeed raised it on appeal, albeit in a different form than how

Riechmann now contends appellate counsel should have asserted it. The Florida Supreme Court also recognized this and specifically stated that Riechmann raised this issue on appeal, "but on different grounds." *Riechmann*, 777 So. 2d at 365-66. However, as previously discussed, the standard for appellate counsel is not whether counsel *could* have done more or done something differently. Rather, "[t]he test is whether what counsel did was within the wide range of reasonable professional assistance." *Hamilton* 2016 WL 6727683, at *17 (citing *Ward v. Hall*, 592 F.3d 1144, 1164 (11th Cir. 2010); *Dingle*, 480 F.3d at 1099).

In sum, Riechmann does not adequately support his various ineffective assistance of appellate counsel claims. For each claim, there was a "reasonable argument that counsel satisfied *Strickland*'s deferential standard" and therefore this Court "may not disturb a state-court decision denying the claim." *Hittson*, 759 F.3d at 1248. Riechmann failed to demonstrate that the Florida Supreme Court unreasonably applied federal law -- namely, the *Strickland* standard. Accordingly, the Undersigned respectfully recommends that the District Court deny Riechmann's request for habeas relief for all those claims alleging ineffective assistance of appellate counsel.

III. *Riechmann was allegedly deprived of his right to a constitutionally "adequate adversarial testing" when the State withheld material and exculpatory evidence and/or knowingly presented false or misleading evidence and/or argument*

Riechmann contends the State violated its duty under *Brady* by not disclosing evidence or information in its possession that was favorable to the defense, and its duty

under *Giglio* by deliberately deceiving the state court and jurors through the knowing presentation of false evidence. Riechmann asserts that he presented extensive evidence of the State's failure to disclose material, exculpatory evidence and its presentation of knowingly false evidence at two previous post-conviction hearings. [ECF No. 1, p. 66].

The State, however, contends that the state courts properly denied these claims, both individually and cumulatively, because Riechmann "failed to show that the State possessed the evidence, that Riechmann could not have found it, or that it would have affected the outcome." [ECF No. 17, p. 29].

To establish a *Giglio* claim, a habeas petitioner must prove: "the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e. that there is any reasonable likelihood that the false testimony [ ] could have affected the judgment." *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011). If there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, then the defendant is entitled to a new trial. *See id.* (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)). This standard is equivalent to the harmless beyond a reasonable doubt standard.

In *Brady*, the Supreme Court held that the suppression of material, exculpatory evidence by a prosecutor violates due process. 373 U.S. at 83. There are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the

accused, which means it is either exculpatory or impeaching; (2) the evidence must have been willfully or inadvertently suppressed by the prosecution; and (3) the accused must have been prejudiced as a result. *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1303 (11th Cir. 2014) (citing *Stickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

"A defendant cannot meet the second prong when, 'prior to trial, [he] had within [his] knowledge the information by which [he] could have ascertained the alleged *Brady* material.'" *Wright v. Sec'y, Florida Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014) (quoting *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005)). "In such cases, '[w]hen the defendant has equal access to the evidence[,] disclosure is not required' and 'there is no suppression by the government.'" *Id.* (quoting *Maharaj*, 432 F.3d at 1315); *see also United States v. Menefee*, 641 F. App'x 953, 955 (11th Cir. 2016) (quoting *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005)) ("Under Brady, 'the defendant must prove that (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the government suppressed the favorable evidence; and (4) the evidence was material.'").

Nondisclosed evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability

sufficient to undermine confidence in the outcome." *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008).

"The *Brady* materiality standard is more stringent than the *Giglio* standard because *Brady* requires a showing that the result *would* have been different had the prosecution disclosed the withheld evidence, whereas *Giglio* requires that the result *could* have been different had the prosecution not used perjured testimony." *Id.* (internal citations omitted).

As previously stated, the District Court cannot grant federal habeas relief unless the state court's prior adjudication "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), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2).

Riechmann separately discusses the various matters with which he takes issue and which he contends are *Brady/Giglio* violations. The Undersigned will evaluate each of these allegations and then discuss them cumulatively:

1. Police report regarding opening of the passenger window

Riechmann contends that the State withheld information concerning the size of the opening of the passenger window. He alleges that this information could have been "potential impeachment." [ECF No. 1, p. 63]. Riechmann asserts that the Florida

Supreme Court was objectively unreasonable when affirming the denial of post-conviction relief and determining that Riechmann had not satisfied the materiality prong. Riechmann also contends that the "state court inexplicably attached no significance to the Trujillo police report where the State purposely whited out a discrepancy in the height of the passenger window to keep it away from defense counsel." [ECF No. 1, p. 63].

The Florida Supreme Court affirmed the state court's determination that the reports concerning the passenger window opening did not establish a *Brady* claim. The Undersigned reviewed the Florida Supreme Court's determination and finds that it did not unreasonably apply federal law when considering this claim.

Although Riechmann alleges that it was objectively unreasonable for the Florida Supreme Court to determine that he did not satisfy the materiality prong, he does not successfully show *how* that application of the *Brady* requirements was unreasonable despite his attempts to make it at least appear as such.

For instance, Riechmann highlights a portion of defense counsel's evidentiary hearing testimony by quoting the following: "everything about the physical circumstances as to the interior of the car, position of the window . . . became very crucial." [ECF No. 1, p. 63 (ellipsis in original)]. This makes it appear that these few pieces of information were critical.

However, review of that section of the evidentiary transcript shows that Riechmann did not present the full context of the testimony. Defense counsel, in response to a question concerning whether he could have made use of "a police report that reflects that the window was down all of the way," stated the following:

> Well, yes, because I have to say to you, here is what the case ended up turning on, apparently, aside from the motive, to wit, the insurance; and the opportunity, to wit, Dieter was in the car. The other issue was the physical circumstances, were they consistent with Dieter's version of the shooting?
>
> And so everything about the physical circumstances as to the interior of the car, position of the window, position of the seats, the blanket, Kersten, Dieter, et cetera, became very crucial, because I think a fair reading of the evidence would be that physical evidence is inconsistent with Dieter's version, therefore, Dieter lied about how the shooting occurred and since he stood to gain insurance money from the shooting, he therefore had to be guilty.

[ECF No. 64-1, p. 77].

The window evidence was part of several aspects that were "crucial" to the physical circumstances evidence, which was in turn part of other various important aspects in the case. Thus, Riechmann still fails to demonstrate how the withheld evidence was material. Having a defense attorney say, in a wholly conclusory way, that several factors were crucial does not demonstrate that any one factor was, in fact, crucial, nor does it sufficiently explain how it would have been crucial.

Further, Riechmann contends that "the state court inexplicably attached no significance to the Trujillo police report where the State purposely whited out a

discrepancy in the height of the passenger window.'" [ECF No. 1, p. 63]. However, Trujillo's police report was, according to the lower state court, the "only significant information withheld . . . which stated, 'Crime lab stated that the window had to be all down but subject claimed window as half down for security." [ECF No. 10-6, p. 109]. The lower state court ultimately found that Riechmann had not demonstrated a reasonable probability that the results at trial would have been different had this information been disclosed or that its omission undermined the confidence in the outcome of the trial. [ECF No. 10-6, p. 109].

Then, the Florida Supreme Court affirmed the lower state court's decision and stated that Riechmann had not satisfied the materiality prong. *Riechmann*, 755 So. 2d at 362-63. It noted that "the statement by the crime lab that the window was completely down would not be completely favorable to Riechmann, because he testified at trial that the window was only open half-way. Additionally, it would have been inconsistent with the testimony of his expert, who stated that the window was only 3 ¾ inches open." *Id.*

Again, Riechmann has not demonstrated how the state courts unreasonably applied federal law in their decisions. Interestingly, defense counsel's explanation (as quoted earlier in this section) includes a concern about the physical evidence being inconsistent with Riechmann's version of the shooting. This withheld evidence -- stating that the window was **completely** down -- would have made Riechmann's testimony

inconsistent as explained by the Florida Supreme Court. Thus, the portion of the report which was not made available may well have actually *hurt* Reiechmann's theory, not helped it. Therefore, it is difficult to see how this would have led to a different result.

Accordingly, Riechmann has failed to establish that the Florida Supreme Court unreasonably applied federal law.

Also, at the end of this particular section, Riechmann asserts that a *cumulative* analysis will undermine the confidence of the outcome of trial and require that the District Court grant a new trial. The Undersigned will later discuss the cumulative assessment of the alleged *Brady/Giglio* violations.

2. 1996 Evidence regarding Smykowski

Riechmann contends the State suppressed evidence of an alleged deal between the State and Smykowski, the inmate who was in jail with Riechmann and who testified as a State witness. The claim was originally based on a prosecutor's letter written to the United States Parole Commission. It was also based on the prosecutor's handwritten notes concerning a conversation with an inmate stating "Reno to communicate with magistrate to have him reward." The final word of that handwritten note was debated. Alternatively, the word was thought to have read "remand" and the prosecutor testified at the evidentiary hearing that he wrote "remain."

In an argument identical to the one raised at the Florida Supreme Court, Riechmann contends that the "State allowed Smykowski to testify to the contrary at trial

and in deposition, conveying to the jury and court that this important witness had no expectation of reward for his testimony. This violation alone requires that Mr. Riechmann's conviction to be vacated." [ECF No. 1, p. 65]. Additionally, Riechmann contends that the handwritten notes, regardless of what the actual last word of the sentence reads, was favorable to him and should have been disclosed.

Although Riechmann describes the evidence he takes issue with, he does not demonstrate that he is entitled to habeas relief. The state courts' rejection of this claim was neither contrary to nor an unreasonable application of established federal principles.

In an inappropriate footnote argument, Riechmann contends that the state court's finding that there was no undisclosed deal between Smykowski and the State is rebutted by clear and convincing evidence. Review of the record, as also noted by the Florida Supreme Court, supports the manner in which the state court ruled. Finally, Riechmann has failed to present any evidence contradicting the explanation put forth by the State and adopted by the state court.

The Undersigned therefore finds that Riechmann is not entitled to relief under this claim.

3. Statements from thirty-seven witnesses

Riechmann discusses the State having withheld the statements of thirty-seven German individuals before trial.

When considering the German statements, the Florida Supreme Court found them material to Riechmann in the *sentencing* phase because they could be used as mitigating evidence. *Riechmann*, 777 So. 2d at 363. However, when addressing the statements as they might have related to the guilt phase, it agreed with the lower state court that the claim was "procedurally barred because trial counsel could and should have raised it on direct appeal, since by trial's end he was aware of the statements." *Id.* Further, the Florida Supreme Court also agreed with the lower state court's additional analysis stating that "even if disclosed, there was no reasonable probability that a different result would have occurred." *Id.*

Here, Riechmann does not provide substantive **analysis** as to why the District Court should provide habeas relief. He does not allege that the state court unreasonably applied federal law as it relates to this issue. Thus, Riechmann fails to demonstrate relief is warranted under this basis.

Additionally, he does not put forth an argument to overcome the procedural bar. The only argument Riechmann appears to assert is in a footnote where he states that, "[t]o the extent the state court determined that the issue is procedurally barred as it should have been raised on direct appeal, then counsel was ineffective." [ECF No. 1, p. 67].

Concerning the procedurally barred aspect, the failure of a federal habeas petitioner to adhere to any state procedural rules governing the proper presentation of

claims serves as a bar to the federal review of those claims in a subsequent federal habeas corpus proceeding. *Brown v. McNeil*, No. 08-21409-CIV, 2009 WL 2970419, at *19 (S.D. Fla. Sept. 15, 2009) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Sims v. Singletary*, 155 F.3d 1297, 1311 (11th Cir. 1998)). Because federal habeas relief exists solely to remedy serious state court errors in the application of federal law, federal courts will not review a claim if the state court applied a "procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred." *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). "A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." *Id.* at 1302.

In such an instance, the federal court must determine whether the last state court rendering judgment clearly and expressly stated that its judgment rested on a procedural bar. In Florida, a District Court of Appeal's *per curiam* affirmance of a trial court's ruling explicitly based on procedural default "is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts." *Harmon v. Barton*, 894 F.2d 1268, 1273 (11th Cir. 1990). A state procedural bar is adequate when its application can support the judgment denying the claim and is independent when it does not raise a question of federal law. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). However, the state court's basis for rejecting the

claim must be firmly established and regularly followed and not applied in an arbitrary or unprecedented fashion or in a manifestly unfair manner. *Ford v. Georgia,* 498 U.S. 411, 424-25 (1991); *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001); *Upshaw v. Singletary,* 70 F.3d 576, 579 (11th Cir. 1995).

The Florida Supreme Court has explained that:

> habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.

Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); *see also Byrd v. State,* 597 So. 2d 252, 256 (Fla. 1992); *Steinhorst v. Wainwright,* 477 So. 2d 537 (Fla. 1985); *Harris v. Wainwright,* 473 So. 2d 1246 (Fla. 1985); *McCrae v. Wainwright,* 439 So. 2d 868 (Fla. 1983).

The rule limiting federal habeas review of claims for which a state prisoner has defaulted in state court pursuant to an independent and adequate state procedural rule promotes the "important interest in finality served by state procedural rules" and acknowledges the "significant harm to the States that results from the failure of federal courts to respect them." *Coleman,* 501 U.S. at 724. Therefore, an adequate and independent finding of procedural default by a state court will bar federal habeas review of the federal claim, "unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' . . . or demonstrate that failure to consider

the federal claim will result in a 'fundamental miscarriage of justice.'" *Harris v. Reed*, 489 U.S. 255, 262 (1989) (internal citations omitted).

Here, as previously stated, the Florida Supreme Court affirmed the lower state court's finding that the claim concerning the thirty-seven German witnesses' statements was procedurally barred. Riechmann has not shown cause excusing the default and actual prejudice. Thus, this Court is foreclosed from considering this claim.

4. Police reports of Officers Marcus and Aprile

Riechmann states that exculpatory police reports which provided details of the activities of the couple immediately before the shooting were withheld from the defense. [ECF No. 1, p. 67]. He contends that the reports would have corroborated Riechmann's version of events -- that the couple was in "a good mood and appeared to be intoxicated" and "left around 10:00 or 10:30, and appeared to be in good spirits." [ECF No. 1, p. 68].

The State alleges that Riechmann himself knew this information (which is why Riechmann logically alleges that this information would have corroborated his version of events). It also states that his defense counsel took the depositions of the officers who interviewed the waiter who served Riechmann the night of the incident.

When reviewing this argument, the Florida Supreme Court affirmed the state court's denial of post-conviction relief and stated that "the waiter's statements made to the police that Riechmann and Kischnick were in a festive mood the night of the murder

. . . does not establish a *Brady* claim because it serves as cumulative evidence." *Riechmann*, 777 So. 2d at 363.

Riechmann asserts that the Florida Supreme Court's finding is "objectively unreasonable and is rebutted by clear and convincing evidence" and that the "evidence was not cumulative. Contrary to the state court's finding, this evidence was not cumulative of the video tape shown at trial, or cumulative to the police testimony of the State's witnesses." [ECF No. 1, p. 68].

Riechmann fails to demonstrate *how* the other evidence presented at trial was not cumulative. Similar to his approach on many of his myriad arguments, he simply and boldly concludes, without analysis, that it was not. He therefore fails to establish that the state court's application of *Brady* was unreasonable and rebutted by clear and convincing evidence. Accordingly, Riechmann has not established that federal habeas relief is warranted.

5. Police reports describing Riechmann's mental state

Riechmann states that the State withheld police reports describing his conduct after he flagged down a police officer: "distraught," "upset," "sobbing," "dejected," "emotionally upset," "hysterical," "crying and holding his face," "with tears coming out of his eyes," "smelling of alcohol," and "he obviously had been through a terrible experience." [ECF No. 1, p. 54].

Other than including some of the words used in the withheld reports, Riechmann makes no argument as to how the Florida Supreme Court unreasonably applied *Brady* when considering this claim. As such, Riechmann has not demonstrated that relief is warranted.

The Court notes that Riechmann contends in a footnote that the Florida Supreme Court "failed to address this point in its opinion, either individually or in a cumulative analysis." However, as previously discussed, arguments raised in footnotes are deemed waived. Setting aside that problematic (for Riechmann) point, the Florida Supreme Court is not required to expressly discuss each argument. The presumption is that the state courts know and follow the law, particularly in a § 2254 case where there is a highly deferential standard for evaluating state-court rulings and demands that they be given the benefit of the doubt. *See Allen*, 611 F.3d at 748 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)); *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1293 (11th Cir. 2012). There is nothing indicating that the state court did not follow the law here.

6. Officer Psaltides' Report

Riechmann contends the Florida Supreme Court improperly failed to find a *Brady* violation when evaluating the withholding of the third/last page of a police report containing Kischnick's father's statement to the police (describing Kischnick and Riechmann's relationship positively). He alleges that the Florida Supreme Court's

determination was objectively unreasonable because it did not follow the test for a *Brady* claim.

The Florida Supreme Court stated that "Riechmann failed to show how he could have used this report (or the statement therein) at trial, since the father never testified and Riechmann introduced no evidence that the father would have done so if asked." *Riechmann*, 777 So. 2d at 363. Without providing other support for his assertion, Riechmann then contends that "trial counsel could have utilized it [to] establish that Riechmann had no motive to kill Kischnick." [ECF No. 1, p. 70].

Riechmann again fails to demonstrate *how* the Florida Supreme Court unreasonably applied *Brady* to the State's withholding of this page. As previously stated, § 2254 habeas petitions involve a highly deferential standard for evaluating state-court rulings. "In order to merit AEDPA deference, the state court need not expressly identify the relevant Supreme Court precedent, nor make a perfect statement of the applicable rule of law, nor provide a detailed opinion covering each aspect of the petitioner's argument." *Allen*, 611 F.3d at 748 (quoting *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009)). With this deferential presumption in mind, the Undersigned does not doubt that the Florida Supreme Court followed the applicable rule of law particularly because it stated the correct, overall standard for assessing *Brady* claims earlier in the opinion.

Further, the Florida Supreme Court did not unreasonably apply *Brady* when it found that Riechmann had not demonstrated that the evidence would be admissible. "*Brady's* materiality standard defines evidence as "material" only if there is a reasonable probability that its disclosure would have affected the outcome of the proceeding. *Breedlove v. Moore*, 279 F.3d 952, 964 (11th Cir. 2002) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). It would be rare for inadmissible evidence to meet this standard." *Id.* ("Inadmissible evidence could only rarely meet this standard -- indeed, no Supreme Court case, either before or since the Florida Supreme Court's decision in *Breedlove II*, has found inadmissible evidence was material for *Brady* purposes.").

If the father did not testify, then the police officers' testimony about their interview of him would be inadmissible hearsay.

Thus, the Undersigned finds that Riechmann has not demonstrated that the District Court should provide federal habeas relief as to this claim.

7. German search

Riechmann also contends that the State knowingly misled the state court regarding the legality of the search conducted in Germany because the German search warrant was based on false and misleading information.

However, Riechmann does not demonstrate that the Florida Supreme Court unreasonably applied federal law when determining this issue. Moreover, Riechmann is unable to establish prejudice here because the evidence seized during the German

searches was **not used at trial.** Therefore, Riechmann has not demonstrated that the evidence concerning this claim would have changed the outcome of the proceedings.

8. Evidence of Riechmann's finances

Riechmann contends the State withheld "materials [that] detailed legitimate employment and business ventures and independent sources of Mr. Riechmann's financial resources." [ECF No. 1 p. 57]. He alleges that the materials showed that he did not "live off" of Kischnick's prostitution earnings and that he did not fake a vacation in Florida.

Riechmann does not assert how the Florida Supreme Court unreasonably applied federal law when considering this claim. Therefore, Riechmann has not demonstrated that relief is warranted to this individual claim.

The Court notes that Riechmann argues in another inappropriate footnote -- one identical to an earlier footnote -- that the Florida Supreme Court "failed to address this point in its opinion, either individually or in a cumulative analysis." The Undersigned deems this argument waived. Nonetheless, even if I were to substantively consider an argument asserted only in a footnote, the Florida Supreme Court is not required to expressly discuss each argument. The presumption is that the state courts know and follow the law, particularly in a § 2254 case where there is a highly deferential standard for evaluating state-court rulings and demands that they be given the benefit of the

doubt. *See Allen*, 611 F.3d at 748 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)); *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1293 (11th Cir. 2012).

In addition, Riechmann is alleging a *Brady* violation concerning information that *he* presumably would be aware of before trial. Riechmann should have the easiest access to his own finances, and if he actually believed that he had legitimate income, then he could have demonstrated this with his own financial records. *See Ward v. Hall*, 592 F.3d at 1183 (citing *Maharaj*, 432 F.3d at 1315 n. 4 ("We also have held that there is no suppression if the defendant knew of the information or had equal access to obtaining it."); *Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1334 (11th Cir. 2012) (quoting *Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1995)) (finding that defendant's own statement to police was not *Brady* material and stating "[e]vidence is not considered to have been suppressed if 'the evidence itself . . . proves that [the petitioner] was aware of the existence of that evidence before trial.'").

9. Smykowski

Riechmann contends that the State withheld information about Smykowski and did not correct his false trial testimony on various items. First, Riechmann states that Smykowski testified he met with the State and/or police only twice: once in an interview at the Eglin Air Force Base and then shortly before trial. Riechmann then explains that during the evidentiary hearing the state court heard testimony indicating that detectives met with him a few times in between those two dates. Riechmann takes

issue with the State not correcting Smykowski's trial testimony because he had additional contact with the police and was taken to the police station for interviews.

Next, Riechmann asserts that the State failed to disclose a favor given to Smykowski -- detectives took Smykowski to visit his daughter, per his request, and bought fried chicken for them to eat. He contends that the State failed to correct Smykowski's false trial testimony indicating that he had never asked for any favors.

Similarly, although Smykowski testified that he did not ask for any favors, the prosecutor stated at a post-conviction evidentiary hearing that Smykowski sent a letter requesting assistance with ensuring his daughter's welfare. Riechmann takes issue with the prosecutor not revealing the letter's existence because he says it was another example of Smykowski seeking assistance.

Finally, Riechmann contends the State again failed to correct Smykowski's allegedly false testimony that he did not seek assistance because it failed to disclose that Smykowski, according to his daughter and his wife, *was* promised reward money if the defendant was convicted.

Riechmann then explains that the state court's application of the *Brady* materiality standard when addressing the Smykowski issues was contrary to *Kyles*. He then provides the following legal explanation and analysis in a footnote:

> In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court made it very clear that the proper analysis of a *Brady* claim requires looking at the undisclosed information from the defenses [sic] perspective and how the defense could have used the information had its existence been disclosed.

> In the state court's analysis, there was no effort made to look at the undisclosed impeachment from the defenses' perspective and how the defense could have used the impeachment had it been disclosed. Instead, the state court's view seemed to be that the question was whether the suppressed information changed the court's opinion regarding the defendant's guilt.

[ECF No. 1, p. 82 n. 83].

Additionally, Riechmann takes issue with the state court's indication that additional impeachment of Smykowski would be cumulative. He contends that the court failed to recognize that the credibility of a witness already subjected to impeachment is more vulnerable and more likely to collapse with still more impeachment. [ECF No. 1, p. 83].

The Florida Supreme Court, after reviewing the record and the lower state court's reasoning, affirmed the lower state court's *Brady/Giglio* determinations concerning the various Smykowski issues.

As previously discussed, in order for the District Court to provide federal habeas relief, the District Court must find that the Florida Supreme Court's merits denials of his *Giglio* and *Brady* claims were "contrary to, or involved an unreasonable application of" the holdings in those decisions, or were "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). Riechmann has the burden of demonstrating such error but he has failed to meet this burden.

Here, the Florida Supreme Court and the lower state court determined on the merits that the Smykowski-related evidence was not material. Both courts discussed each of the aspects raised by Riechmann above -- the number of times Smykowski spoke with police and/or the State; the home visit; the letter to the State asking for help with his daughter; and the reward money. The additional information was not sufficient, even when considered cumulatively with one another and with other evidence, to undermine the confidence in the outcome of the case.

Further, Riechmann points to nothing in the record, beyond what the state courts previously evaluated, to substantiate his claims. Riechmann therefore fails to provide the Undersigned with a reason why the Florida Supreme Court's affirmance should not be afforded AEDPA deference.

Concerning the allegation that the Florida Supreme Court failed to apply *Kyles*, part of Riechmann's argument concerns what the state court said -- or rather did **not** say -- in its analysis. However, "[a]ll that is required under § 2254(d) is an adjudication on the merits, not a full state court opinion." *Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 776 (11th Cir. 2003).

In any event, the Undersigned finds that the state court did not evaluate whether the "suppressed information changed the **court's** opinion regarding the defendant's guilt." [ECF No. 1, p. 82 n. 82 (emphasis supplied)]. Rather, the Florida Supreme Court, immediately after stating the materiality standard under *Brady* ("defendant must

demonstrate a reasonable probability that had the suppressed evidence been disclosed the **jury would have reached a different verdict**") and the materiality standard under *Giglio* ("false evidence is deemed material if there is any reasonable possibility that it **could have affected the jury's verdict**"), found that the evidence did not undermine the confidence of the outcome of the trial. *Riechmann*, 966 So. 2d at 313. The Florida Supreme Court then proceeded to discuss the evidence the jury heard at trial.

Additionally, concerning Riechmann's allegation that a witness already subject to impeachment is more vulnerable with more impeachment, the Undersigned notes that Riechmann provided no legal citation to support this point. Nevertheless, the Florida Supreme Court's determination is still not an unreasonable application of federal law. "The jury heard at trial that Smykowski had once pled guilty to two bad check charges, that he was concerned about his daughter's welfare because both he and his wife were in jail, that he regularly acted as an informant, that he hoped he might receive a letter favorable to him from the State, and that he had been convicted of seventeen counts of fraud." *Riechmann*, 966 So. 2d at 313-14. In this context, where there is substantial impeachment evidence concerning a witness, it was not unreasonable for the Florida Supreme Court to conclude that the jury's verdict would not have been affected. *See Ventura v. Attorney General, Fla.*, 419 F.2d 1269, 1292 (11th Cir. 2005) ("The substantial volume of interlocking corroborating and impeachment evidence soundly supports the Florida Supreme Court's conclusion that a jury would not have discounted

McDonald's testimony even if it knew he had been promised a deal on potential bond-jumping charges in exchange for his testimony, and thus that there was no reasonable likelihood that McDonald's false testimony could have affected the judgment of the jury").

For these reasons, the Undersigned finds that Riechmann has not demonstrated that he is entitled to federal habeas relief as to this claim.

10. Smykowski's affidavit

Although the State in its responses states that Riechmann "argues that the Florida Supreme Court erred when it affirmed the trial court's rejection of Smykowski's affidavit at the post conviction hearing," it is unclear where *Riechmann* actually asserts this argument. Review of the habeas petition concerning Smykowski's affidavit does not raise any specific arguments to the claim. Instead, Riechmann includes only excerpts of the affidavit. If anything, the affidavit supports Riechmann's position in the previous claim (i.e., alleging that the State provided certain benefits to Smykowski and did not disclose them).

In any event, Riechmann has not demonstrated that the Florida Supreme Court unreasonably applied any established federal law when addressing Smykowski's affidavit.

11. Hilliard Veski

Riechmann states that Hilliard Veski alleged in an affidavit that a prosecutor pressured him to testify contrary to the facts as he knew them concerning the location of certain pieces of evidence he found in Riechmann's rental car at the time of his inventory. The State pressured Veski to falsely testify as to the location of certain items in the vehicle and he testified falsely at his deposition. Veski then, as Riechmann states in his petition, immediately notified trial counsel that he testified falsely at the deposition. [ECF No. 1, p. 86]. Although Riechmann's trial counsel knew that Veski was pressured and had testified falsely at his deposition, he did not call Veski as a witness. The State also did not call him as a trial witness.

Trial counsel testified at the post-conviction hearing that Veski indicated he had been pressured to make a false statement but did not disclose who had pressured him. Riechmann sought to have Veski testify at the evidentiary hearing but the state court sustained the State's objection and did not permit him to testify.

The Florida Supreme Court addressed Riechmann's arguments concerning the exclusion of Veski's testimony and determined that "the claim was procedurally barred for not having been properly asserted earlier in this case." *Riechmann*, 966 So. 2d at 305. Here, Riechmann contends that the Florida Supreme Court's affirmance of the lower state court's determination that the Veski claim was procedurally barred is rebutted by clear and convincing evidence. [ECF No. 1, p. 87]. Riechmann asserts that, based on the

State's earlier arguments against Riechmann's Veski-related challenges below, the State treated the claim as a *Brady/Giglio* claim and never asserted that the claim was untimely or procedurally barred.

However, the Undersigned finds that the Florida Supreme Court was not wrong in finding that the claim was procedurally barred. Riechmann's counsel was aware before the trial even took place that the State had pressured Veski to testify falsely. Veski admitted immediately to defense counsel that he testified falsely at his deposition. However, despite being armed with that information, Riechmann's trial counsel chose not to further pursue it and to not have Veski testify as a defense witness. Veski's testimony was ultimately not introduced at trial by either party.

Because the state court found that this claim was procedurally barred, this Court is barred from federal habeas review of the federal claim, "unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' . . . or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.'" *Harris v. Reed*, 489 U.S. 255, 262 (1989) (internal citations omitted).

Here, as previously stated, the Florida Supreme Court affirmed the lower state court's finding that the claim was procedurally barred. Riechmann has not shown cause excusing the default and actual prejudice nor has he demonstrated a fundamental miscarriage of justice. Riechmann does not try to overcome the procedural bar aspect by demonstrating cause for the default and prejudice. Instead, Riechmann focuses on

contending that the Florida Supreme Court's decision was wrong. Still, this Court is foreclosed from considering this procedurally barred claim.

Nevertheless, even if Riechmann is correct that "the Florida Supreme Court's assertion that he did [not previously assert the claim] is just simply wrong," the Florida Supreme Court continued its analysis and found that, even if it had considered Veski's proferred testimony at the evidentiary hearing, Riechmann could not have established a *Brady* or *Giglio* claim.

12. "Kool" and the brown Impala

Riechmann contends the State did not disclose evidence "indicating that another suspect provided exculpatory information three days after the crime." [ECF No. 1, pp. 103-04]. "He explains that police were advised that two drug dealers, one named 'Kool,' were overheard by an informant bragging about ripping off and wasting someone. These drug dealers were selling drugs from a brown Impala." [ECF No. 1, p. 104]. Riechmann states that this information appeared in a police report that was withheld from the defense. He explains that he only realized the significance of the withheld information from the police report after receiving additional testimony from other individuals at the post-conviction evidentiary hearings.

This additional testimonial evidence that allegedly relates to the withheld information was considered as newly discovered evidence by the lower state court and reviewed by the Florida Supreme Court. The Florida Supreme Court affirmed the state

court's findings that the newly discovered evidence would probably not have created a reasonable doubt in the minds of the jury and would not have produced an acquittal on retrial were supported by competent, substantial evidence. *Riechmann*, 777 So. 2d at 360; *Riechmann*, 966 So. 2d at 316-17.

Although Riechmann details in four paragraphs the information related to the undisclosed evidence, he does not allege that the state court unreasonably applied federal law nor does he demonstrate that he is entitled to federal habeas relief based on this claim.

Moreover, Riechmann did not previously assert a *Brady* violation concerning "Kool" and the brown Impala. Thus, the claim is procedurally barred and is therefore foreclosed from federal court review absent a showing of cause and prejudice, which Riechmann has not demonstrated.

Accordingly, the Undersigned finds that federal habeas relief is not warranted under this claim.

13. Cumulative analysis

Riechmann contends the state court failed to conduct a cumulative analysis. He alleges that in the *Brady* context, "the United States Supreme Court has explained that the materiality of evidence not presented to the jury must be considered 'collectively, not item-by-item.' *Kyles*, 514 U.S. at 436." [ECF No. 1, p. 106]. Riechmann asserts that, when cumulative consideration is given to all of the State's purported due process

violations, confidence in the trial's outcome is undermined. Ultimately, Riechmann contends that the Florida Supreme Court's review of the claim was contrary to and/or an unreasonable application of clearly established federal law.

On the other hand, the State contends that cumulative error analysis should evaluate only matters determined to be in error, not the cumulative effect of **non**-errors. The State therefore asserts that Riechmann must show error with respect to at least two of his individual claims. It explains that, because none of the alleged errors counsel considered alone meets the threshold for a *Brady* or *Giglio* violation, Riechmann is not entitled to federal habeas relief on the cumulative effect claim.

Based on an independent review of the lower state court's orders addressing the post-conviction motions and the Florida Supreme Court opinions, the Undersigned disagrees with Riechmann's allegation that the state courts failed to conduct cumulative analyses. The Florida Supreme Court affirmed the trial court's denial of Riechmann's *Brady* claim in its entirety. Review of the affirmed trial court order clearly states that there was no reasonable probability the outcome of the proceeding would be different "after considering each [claim] separately, and then all cumulatively." [ECF No. 10-6, p. 45].

Regardless, even if the state courts did not expressly refer to a "cumulative analysis of materiality, or to the United States Supreme Court's discussion of that issue in *Kyles*, our deference to state court decisions does not depend on the use of

keywords." *Allen*, 611 F.3d at 748. Again, "[i]n order to merit AEDPA deference the state court need not expressly identify the relevant Supreme Court precedent, nor make a perfect statement of the applicable law, nor provide a detailed opinion covering each aspect of the petitioner's argument." *Id.* (quoting *Smith*, 572 F.3d at 1333).

The Undersigned sees no affirmative indication suggesting that the Florida Supreme Court and the lower state court declined to follow the applicable federal law.

To the extent Riechmann may be alleging that the state courts did not engage in a cumulative analysis because it instead evaluated the claims on an item-by-item basis, the Undersigned also finds this argument unpersuasive. An item-by-item analysis is not inconsistent with a cumulative analysis. "Indeed, the only way to evaluate the cumulative effect is to first examine each piece standing alone." *Maharaj*, 432 F.3d at 1310; *see also Kyles*, 514 U.S. at 436 n. 10 ("We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect . . . separately."); *Hammond*, 586 F.3d at 1313 ("[W]e size up each piece of evidence before aggregating it and considering the cumulative impact. We then weigh that cumulative impact against the inculpatory evidence presented at trial to decide whether our confidence in the guilty verdict is undermined."); *Smith*, 572 F.3d at 1346.

Accordingly, the Florida court's rejection of the *Brady* claims is not contrary to or an unreasonable application of federal law as established by the United States Supreme Court.

Additionally, the Undersigned finds that the state court reasonably applied clearly established federal law when evaluating each one of Riechmann's claims. The Undersigned did an item-by-item analysis of each one and agrees that there were no *Brady* or *Giglio* violations. Moreover, even though an item-by-item discussion is permitted to then reach a cumulative result, the Undersigned wants to make it abundantly clear that even when Riechmann's claims are considered cumulatively (including those claims where I indicated that the proper arguments were not even asserted), Riechmann's request for federal habeas relief should still be denied.

IV. *Riechmann's claim that the State engaged in prosecutorial misconduct and thereby violated his rights to a fair trial and due process of law*

Riechmann contends the State engaged in prosecutorial misconduct and, as a result, violated his rights to a fair trial and due process of law. He asserts that the prosecution during trial "made impermissible, improper, and inflammatory comments and arguments" and that they were "fundamentally unfair and deprived him of due process." [ECF No. 1, p. 142]. With minimal, if any, analysis, Riechmann asserts that the "state court's determination that Riechmann's claim of prosecutorial misconduct is meritless is contrary to and/or an unreasonable application of clearly established federal law. [Therefore, h]abeas relief is warranted." [ECF No. 1, p. 163].

Riechmann also contends that, to the extent trial counsel failed to preserve the various statements for appellate review, his trial counsel's performance was deficient and it resulted in prejudice that barred him from having the issues reviewed on direct

appeal. Additionally, in yet another inappropriate footnote, Riechmann appears to contend that, to the extent his argument is procedurally barred, a merits review is still needed because he has shown cause and prejudice as his counsel was allegedly ineffective for failing to timely present the issue in state court. [ECF No. 1, p. 162 n. 145]. Again, it is inappropriate for parties to raise new substantive arguments in footnotes. Accordingly, the Court deems this argument waived.

The State, on the other hand, explains that the Florida Supreme Court ruled on Riechmann's prosecutorial misconduct allegation on direct appeal and contends that the Florida Supreme Court's opinion was not contrary to, and did not involve an unreasonable application of, clearly established federal law, nor was its decision based on an unreasonable determination of the facts.

In addition, the State contends that the specific acts of alleged prosecutorial misconduct were not properly preserved for appellate review. As previously discussed, a federal court is precluded from addressing the merits of a procedurally defaulted ground unless the petitioner can show "cause and prejudice" or "manifest injustice."

On his direct appeal, Riechmann argued that numerous incidents of prosecutorial misconduct denied him a fair trial. Review of the appellate brief [ECF No. 9-4] demonstrates that the alleged acts of prosecutorial misconduct that Riechmann enumerates in his federal habeas petition were already discussed in his appellate brief. Therefore, each of these claims has already been raised by his counsel below.

The Florida Supreme Court, in ruling on the prosecutorial misconduct claim, stated the following:

> The record shows that in many instances Riechmann did not contemporaneously object. As to those instances when he did object, the court either properly overruled the objections, or where the objections were sustained Riechmann did not indicate that sustaining the objections was not enough to cure the error by following with appropriate motions to strike, for special instructions, or for a mistrial.[ ] Thus, his claims of prosecutorial misconduct are meritless or are not preserved for appellate review. *See, e.g., Holton v. State,* 573 So.2d 284 (Fla. 1990). In any event, our independent review of the record persuades us that the alleged acts of misconduct, individually or collectively, did not deny Riechmann his right to a fair trial.

Riechmann, 581 So. 2d at 139.

The Florida Supreme Court's opinion makes it clear that it considered both the prosecutorial comments that defense counsel objected to and those for which defense counsel did not object. Its review of the objected to and the non-objected to prosecutorial comments resulted in a conclusion that Riechmann was not denied his right to a fair trial.

Because the Florida Supreme Court already addressed the prosecutorial misconduct claim concerning various comments and actions made by the prosecutor during trial, Riechmann needs to clear a high hurdle in order to demonstrate he is entitled to federal habeas relief.

As previously discussed, a state court's decision needs to be contrary to, or involve an unreasonable application of, clearly established federal law. "If the

misconduct fails to render the trial fundamentally unfair, habeas relief is not available. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1182 (11th Cir. 2010) (citing *Land v. Allen*, 573 F.3d 1211, 1219 (11th Cir. 2009)).

Although Riechmann asserts that the state court's determination was contrary to or was an unreasonable application of federal law, he does not **demonstrate** it. "The threshold inquiry when evaluating a prosecutorial misconduct claim is to determine whether the prosecutor's remarks were improper. However, it is not enough simply to establish that the prosecutor's remarks were 'undesirable or even universally condemned.'" *Ford v. Schofield*, 488 F. Supp. 2d 1258, 1324 (N.D. Ga. 2007), *aff'd sub nom. Ford v. Hall*, 546 F.3d 1326 (11th Cir. 2008) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

That is because "[a] defendant must establish that the 'prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1291 (11th Cir. 2012) (quoting *Dardeni*, 477 U.S. at 181). "The Petitioner must also show that the improper remarks 'so infected the **trial** with **unfairness** as to make the resulting conviction a denial of due process.'" *Id.* (emphasis in original) (quoting *Darden*, 477 U.S. at 181).

Again, Riechmann provided minimal, if any, analysis on this point. Thus, Riechmann has not established that the Florida Supreme Court unreasonably denied

Riechmann's prosecutorial misconduct claim. In other words, he has not cleared the substantial legal hurdle which blocks his path.

The Undersigned's independent review of each of the alleged acts of prosecutorial misconduct does not support Riechmann's conclusory argument that the state court unreasonably applied federal law. Indeed, there were claims for which defense counsel did not assert objections. However, as the Florida Supreme Court stated, these comments (even combined with the objected-to comments) do not collectively establish a violation of Riechmann's fair-trial right. Accordingly, the Undersigned does not find that this claim warrants federal habeas relief and respectfully recommends that the District Court deny this claim.

Conclusion

The Undersigned **respectfully recommends** that Judge Martinez **deny** the habeas petition and **close** this case.

Certificate of Appealability

In order for a petitioner to appeal a district court's denial of a habeas corpus petition, the district court must issue a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). When the district court enters a final order adverse to the applicant, it must issue or deny a COA. *See* Rules Governing § 2254 Cases 11(a). Pursuant to 28 U.S.C. § 2253(c)(2), a district court may issue a COA "only if the

applicant has made a substantial showing of the denial of a constitutional right." (emphasis supplied).

In order to make such a showing, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see United States v. Fuchs*, 518 F.3d 887, 895 (11th Cir. 2008).

After denying a petitioner's claims -- as the Undersigned recommends here -- a district court may issue a COA only if the petitioner made a substantial showing of the denial of a constitutional right by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See* 28 U.S.C. § 2253(c)(2); *Tennard*, 542 U.S. at 282; *Fuchs*, 518 F.3d at 895. If the District Court issues a COA, then the petitioner must still file a timely notice of appeal.

Here, the Undersigned finds no substantial showing of the denial of a constitutional right. Therefore, I recommend that the District Court deny issuing a COA in its final order.

As now provided by Rule 11(a), "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, then that party may bring this

argument to the attention of the district judge in the objections permitted to this Report and Recommendations.

Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with United States District Judge Jose E. Martinez. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on June 2, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Jose E. Martinez
All Counsel of Record

Dieter Riechmann
D.O.C. # 113993
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A-6

581 So.2d 133
Supreme Court of Florida.

Dieter RIECHMANN, Appellant,
v.
STATE of Florida, Appellee.

No. 73492.
|
May 30, 1991.
|
Rehearing Denied Aug. 28, 1991.

Synopsis

Defendant was convicted, in the Circuit Court, Dade County, Harold Solomon, J., of murder and sentenced to death. He appealed. The Supreme Court, Barkett, J., held that: (1) defendant's statements were admissible; (2) evidence seized in Germany was properly admitted; (3) admission of defendant's German conviction for involuntary manslaughter and negligent bodily harm was harmless error; (4) evidence was sufficient to support conviction; and (5) death penalty was appropriate.

Affirmed.

McDonald, J., concurred in result only to conviction and concurred with sentence.

West Headnotes (20)

[1] **Criminal Law** ⇐ Custody

Determination that defendant could not have reasonably believed that he was in custody when he made incriminating statements prior to his arrest and that statements were thus admissible was supported by sufficient evidence, even though defendant was apparently placed in holding area by mistake just before he made statement to detective. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[2] **Criminal Law** ⇐ Custodial interrogation in general

Because custodial police interrogations are inherently coercive, law enforcement authorities must advise persons of their constitutional rights before subjecting them to custodial interrogations. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[3] **Criminal Law** ⇐ Custodial interrogation in general

Miranda does not apply to questioning outside custodial situation. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[4] **Criminal Law** ⇐ Custody

Determination that noncustodial interrogation of defendant was not so overbearing as to deprive defendant of his Fifth Amendment privilege was supported by sufficient evidence, including testimony of police officers. U.S.C.A. Const.Amend. 5.

[5] **Searches and Seizures** ⇐ Waiver and Consent

That defendant's hand was swabbed for gun powder residue without a warrant was not improper where evidence showed that defendant consented to swabbing procedure. U.S.C.A. Const.Amend. 4.

[6] **Searches and Seizures** ⇐ Places, persons, and things within scope of warrant

Search of defendant's motel room and rental car and seizure of items found therein was proper where conducted pursuant to validly issued search warrant. U.S.C.A. Const.Amend. 4.

[7] **Criminal Law** ⇐ Evidence procured by foreign agents

Evidence seized in Germany was properly admitted in criminal prosecution where State showed that German authorities seized evidence pursuant to search warrants lawfully issued by

German court, defendant presented no competent evidence to challenge validity of those warrants or seizure of evidence relevant to case, and probable cause existed to support German searches on facts of the record. U.S.C.A. Const.Amend. 4.

[8] **Criminal Law** ⇐ Necessity

Defendant's claims of prosecutorial misconduct were waived where he did not make contemporaneous objections at trial.

[9] **Criminal Law** ⇐ Requests for correction by court

Defendant could not complain on appeal of prosecutorial misconduct, even though defendant objected at trial, where defendant did not indicate at trial, by bringing appropriate motions to strike, for special instructions or for mistrial, that sustaining objections was insufficient to cure error.

2 Cases that cite this headnote

[10] **Criminal Law** ⇐ Matters not within issues

Prosecutor's comment that defendant had been indicted by "23 grand jurors" was improper because indictment was not evidence for jury to consider as any proof of guilt.

1 Cases that cite this headnote

[11] **Witnesses** ⇐ Offenses committed in other jurisdictions

Witnesses ⇐ Fraud or forgery

Witnesses ⇐ Perjury or bribery

Defendant's German convictions for solicitation of perjury and forgery were admissible for impeachment purposes as crimes of false statement or dishonesty. West's F.S.A. § 90.610(1).

[12] **Witnesses** ⇐ Offenses committed in other jurisdictions

Witnesses ⇐ Larceny or shoplifting

Defendant's German conviction for grand theft was admissible for impeachment purposes as crime of dishonesty. West's F.S.A. § 90.610(1).

[13] **Witnesses** ⇐ Offenses committed in other jurisdictions

Foreign conviction may be admitted for impeachment in Florida court provided accused has not shown evidence of lack of fairness in foreign justice system. West's F.S.A. § 90.610(1).

[14] **Witnesses** ⇐ Offenses committed in other jurisdictions

Witnesses ⇐ Assault and battery; homicide

Trial court abused its discretion in allowing defendant's German conviction for involuntary manslaughter and negligent bodily harm to be used for impeachment purposes, inasmuch as offense was not crime involving dishonesty or false statement and State failed to establish that crime was punishable by more than one year of imprisonment under German law; trial court erred in ruling conviction admissible because offense was a felony in the United States. West's F.S.A. § 90.610(1).

[15] **Criminal Law** ⇐ Witnesses

Although trial court should not have admitted defendant's German conviction for involuntary manslaughter and negligent bodily harm for impeachment purposes, error was harmless in light of all evidence properly admitted to impeach defendant. West's F.S.A. § 90.610(1).

2 Cases that cite this headnote

[16] **Witnesses** ⇐ Offenses committed in other jurisdictions

Witnesses ⇐ Time of prior conviction; remoteness

Defendant's 1974 German conviction for solicitation of perjury, 1966 German conviction for grand theft and 1973 German conviction for

forgery were not so remote in time as to be inadmissible for impeachment purposes. West's F.S.A. §§ 90.403, 90.610.

2 Cases that cite this headnote

[17] **Criminal Law** ⇐ Limiting effect of impeaching evidence

Trial court did not abuse its discretion in refusing defendant's proposed instruction to have jury consider his prior German convictions only as impeachment evidence and not as evidence of guilt, inasmuch as convictions for forgery and perjury were germane to issue of defendant's credibility, which bore directly on ultimate issue of his guilt or innocence.

1 Cases that cite this headnote

[18] **Homicide** ⇐ Miscellaneous particular circumstances

Homicide ⇐ Motive

Defendant's conviction for murder was supported by sufficient evidence, including scientific evidence showing that defendant had fired a gun, blood spatter evidence that was inconsistent with defendant's theory of defense, and insurance policies and reciprocal wills establishing a motive.

[19] **Criminal Law** ⇐ Degree of proof

When State relies on circumstantial evidence to convict accused, State must prove circumstantial evidence is consistent with defendant's guilt and inconsistent with any reasonable hypotheses of innocence.

1 Cases that cite this headnote

[20] **Sentencing and Punishment** ⇐ Personal or pecuniary gain

Sentencing and Punishment ⇐ Planning, premeditation, and calculation

Sentencing and Punishment ⇐ Offender's character in general

Death sentence for defendant convicted of murder was appropriate where evidence clearly was sufficient to support aggravating factors that murder was committed for pecuniary gain and was cold, calculated and premeditated, and only mitigating evidence was testimony from defendant's friends and acquaintances that defendant was a "good person."

Attorneys and Law Firms

*135 Lee Weissenborn of the Law Offices of Lee Weissenborn, Miami, for appellant.

Robert A. Butterworth, Atty. Gen. and Ralph Barreira, Asst. Atty. Gen., Miami, for appellee.

Opinion

BARKETT, Justice.

Dieter Riechmann appeals from his convictions and sentence of death for the 1987 slaying of Kersten Kischnick. We affirm. [1]

1 We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

Riechmann and Kischnick, "life companions" of thirteen years, were German citizens and residents who came to Florida in early October 1987. Kischnick was shot to death in Miami Beach on October 25, while she sat in the passenger seat of an automobile that had been rented and driven by Riechmann. The state's theory at trial was that Kischnick was a prostitute, Riechmann was her pimp supported by her income, and when she decided to quit prostitution, he killed her to recover insurance proceeds. Relying on circumstantial evidence, the state sought to prove that Riechmann stood outside the passenger side of the car and fired a single fatal shot through the partially open passenger-side window, striking Kischnick above the right ear. Riechmann has consistently denied committing the crime, asserting that a stranger shot Kischnick when they stopped the car somewhere in Miami to ask for directions.

Testimony at trial established that as early as the summer of 1986 Kischnick became too sick to work and wanted to quit prostitution. In the months immediately prior to the

murder Kischnick and Riechmann were not getting along, and Riechmann was often verbally abusive toward Kischnick.

After arriving in Miami from Germany, Riechmann rented an automobile with his Diner's Club card, which automatically insured the passengers for double indemnity in the event of accidental death. On the evening of October 25, Riechmann drove around the Miami area with Kischnick in the passenger seat. At some point that evening, Kischnick was shot.

The evidence at trial included a series of statements Riechmann made to police during the hours and days that immediately followed the murder.[2] Riechmann, who spoke broken English, made his first statement during the investigation at the scene on October 25. He told officers that when he stopped to ask directions from a black man, he sensed danger and suddenly heard an explosion. Realizing that the man had shot Kischnick, he accelerated the car and drove around Miami in a panic looking for help. Finally, he spotted Officer Reid and pulled over. Riechmann made subsequent statements to officers at the police station, during "drive-arounds" when attempting to help police find the location of the shooting, and on the telephone. In each pretrial statement Riechmann told virtually the same story, but he was unable to recall details of the shooting or where it took place. Riechmann also told officers that he had not fired a gun on the day of Kischnick's murder.

2 Police did not advise Riechmann of his constitutional rights as enunciated in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), until October 29, after he made numerous statements to officers that were used against him at trial.

In his trial testimony, Riechmann gave a more detailed account.[3] Riechmann testified that he and Kischnick had been touring in their car, intending to videotape some of the Miami sights. They got lost and asked a stranger for directions. When Riechmann realized they were close to their destination, he unbuckled his seat belt, reached behind him and grabbed a video camera, apparently getting prepared to use it. He said he put the camera on Kischnick's lap and was in the process of handing her purse to her so she could tip the *136 stranger when he saw the stranger reach behind him. Feeling threatened, Riechmann said he "hit the gas pedal" and stretched out his right arm in a "protective manner," with his palm facing outward in front of him. Instantly he heard an explosion, accelerated the car, and saw Kischnick slump over. After the shooting he began looking for help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance.

3 Riechmann testified that he did not give all these details to police because he was in shock after the murder.

While questioning Riechmann at the scene, police "swabbed" his hands for gunpowder residue. An expert for the state, Gopinath Rao, testified that numerous particles typically found in gunpowder residue were discovered in the swab of Riechmann's hand. Based on the number and nature of the particles, Rao concluded that there is a reasonable scientific probability that Riechmann had fired a gun.[4] Rao also said he would not have expected to find the same type and number of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while somebody else fired a shot from outside the passenger-side window. An expert for the defense, Vincent P. Guinn, testified that the particles of gunpowder residue found on Riechmann's hand proved only that Riechmann was in the vicinity of a gun when it was fired —not that he actually fired a gun—and that Rao's opinion was not scientifically supported.

4 Rao also testified that a similar test performed on Kischnick showed that she had not fired a gun.

In Riechmann's motel room police found three handguns and forty Winchester silver-tipped, 110–grain, .38–caliber–special rounds of ammunition in a fifty-shell box. An expert firearms examiner testified that those bullets were the same type that killed Kischnick, although none of the weapons found in the room were used to murder Kischnick. The expert also testified that the bullet that killed Kischnick could have been fired from any of three makes of guns. Riechmann owned two of those three makes of weapons.

The state also presented testimony about the blood found in the car and on Riechmann's clothes. Serologist David Rhodes testified that high-velocity blood splatter[5] found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. The pattern of blood found on a blanket that had been folded in the driver's seat was consistent with high-velocity blood splatter and aspirated blood, rather than other kinds of blood stains, the serologist said.[6] Blood splatter was found on the steering wheel, but none was found on Riechmann's

seat belt or on the back of the driver's seat. Additionally, Riechmann had blood stains, rather than blood splatter, on his clothing. Rhodes testified that had Riechmann been sitting in the driver's seat during the shooting, his clothes would have shown evidence of blood splatter rather than just the blood stains that were found.

5 In simple terms, high-velocity blood splatter is caused when the great force of energy of a bullet strikes the blood, Rhodes said. The pattern is characterized by a splatter of blood of various size droplets including a mist-like spray. Rhodes said blood splatter caused by the impact of a bullet or aspirated blood is distinguishable from other causes of blood splatter.

6 Riechmann explained that the blood got on the blanket earlier that summer in Germany after his dog had surgery. When he and Kischnick took the dog home from the hospital, the dog's surgical wounds bled on the blanket. He said he brought the blanket with him to Miami to use on the beach, after which he intended to discard it.

Evidence seized by German authorities and brought back to the United States included numerous documents. Among them were insurance papers revealing that between approximately 1978 and 1985, Riechmann had become the beneficiary of several German insurance policies on Kischnick, totalling more than $961,000 in the event of her accidental death. Under all the policies murder was considered an accidental death. German documents also showed that on June 9, 1987, Riechmann and Kischnick filed reciprocal wills in a German court *137 designating each other as "sole heir" of their respective estates.

A fellow inmate of Riechmann, Walter Symkowski, testified that while incarcerated pending trial, Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and Kischnick's will.

The jury found Riechmann guilty of first-degree murder and unlawful possession of a firearm while engaged in a criminal offense. No evidence was presented in the penalty phase, and the jury recommended death by a nine-to-three vote. The court found the murder was committed for pecuniary gain,[7] and was cold, calculated, and premeditated without any pretense of legal or moral justification.[8] Although Riechmann presented no mitigating evidence, the trial court found as a nonstatutory mitigating circumstance that people in Germany who know Riechmann told police they consider him to be a "good person." The trial court imposed the sentence of death, concluding that "[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstance."

7 § 921.141(5)(f), Fla.Stat. (1987).

8 *Id.* § 921.141(5)(i).

[1] [2] [3] The first issue we address is Riechmann's claim that the trial court should have suppressed his statements both because he was not apprised of his fifth amendment rights, and because the statements were coerced by improper and harassing police procedures. The fifth and fourteenth amendments of the United States Constitution protect all persons from being compelled to give testimony against themselves. Because custodial police interrogations are inherently coercive, law enforcement authorities must advise persons of their constitutional rights before subjecting them to custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, *Miranda* does not apply to questioning outside a custodial situation. *E.g., Beckwith v. United States*, 425 U.S. 341, 346, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1 (1976). To determine whether *Miranda* applied in this case, the trial court had to ascertain whether, in view of all the circumstances, a reasonable person in Riechmann's position would have believed he was not free to leave when he made the statements. *See, e.g., Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

The trial court conducted a lengthy hearing on the motion to suppress. Much of the evidence was uncontradicted, but there were distinct conflicts between Riechmann's account and those of police officers. Riechmann testified that he was distraught; unable to speak English adequately enough to understand the questions; and although he had freedom of movement between the times he made the statements, he was in custody when the statements were taken. Specifically he points to an occasion when police placed him in a holding area at the police station for a period of time[9] after the shooting, just prior to making a statement to Detective Matthews. Conversely, numerous police officers testified that they considered Riechmann to be merely a material witness and he was not taken into custody until after he made the statements at issue; he remained free to walk around the crime scene perimeter during the investigation; Riechmann was not handcuffed at the scene or at any time during

the investigation; police did nothing to restrict Riechmann's movements during the four-day period when the contested statements were made, evinced by the fact that without consulting with the police, Riechmann left his motel at will, rented a car, and moved to a different motel during the period in question; and Riechmann initiated some of the statements by calling the police himself. As to the occasion Riechmann was in the holding area, Detective Matthews apologized to Riechmann ***138** and ordered his release immediately when he discovered that Riechmann had been placed there, apparently by mistake.

[9] There is no question that Riechmann was placed in the holding area. Riechmann claimed that he was locked in the holding area for four hours, but police testified that he was there for no more than one hour.

After hearing all the evidence, the trial court resolved the factual disputes in favor of the state and found that Riechmann could not have reasonably believed he was in custody when he made those statements prior to his arrest on October 29. The record supports the court's decision. There was no abuse of discretion.

[4] We recognize that even if the interrogation were noncustodial, overbearing police conduct still could deprive an accused of the fifth amendment privilege. "When such a claim is raised, it is the duty of an appellate court, including this Court, 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " *Beckwith,* 425 U.S. at 348, 96 S.Ct. at 1617 (quoting *Davis v. North Carolina,* 384 U.S. 737, 741–42, 86 S.Ct. 1761, 1764–65, 16 L.Ed.2d 895 (1966)). To the extent that we can judge the evidence from the record, we conclude the trial court was within its discretion to find the statements were voluntary and admissible. [10]

[10] We also find no error in the trial court's decision not to suppress Riechmann's post-arrest statements.

[5] **[6]** Next we address Riechmann's constitutional claims that the hand swab and physical evidence seized in the searches of his motel room and rental car should have been suppressed. Riechmann alleges that the hand swab was coerced, the search warrants were invalid, police acted in bad faith, and that warrant exceptions did not apply.

The only alleged contested search conducted without a warrant was the swabbing of Riechmann's hand at the scene. After reviewing all the evidence at the suppression hearing, the trial court concluded that Riechmann consented to the hand swabbing. The trial court also found that police searched Riechmann's room and rental car pursuant to validly issued search warrants, and that the subsequent seizures were proper. The record supports the trial court's conclusions. Thus, we find no error on these facts.

[7] Riechmann also challenges the admissibility of evidence seized in Germany, arguing that his constitutional rights were violated because the searches did not comply with German or American law. In response, the state urges us to follow *United States v. Verdugo–Urquidez,* 494 U.S. 259, 110 S.Ct. 1056, 1066, 108 L.Ed.2d 222 (1990), which held that the fourth amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country when that nonresident alien has no voluntary attachment to the United States. Riechmann's claim is not controlled by *Verdugo–Urquidez* because Riechmann did have a voluntary attachment to the United States and thus had greater entitlement to fourth amendment protection, having assumed the benefits and burdens of American law when he chose to come to this country. Nonetheless, we conclude that Riechmann's fourth amendment rights were not violated. In the suppression hearing, the state showed that German authorities seized the relevant evidence pursuant to search warrants lawfully issued by a German court, and Riechmann presented no competent evidence to challenge the validity of those warrants or the seizure of evidence relevant to this case. [11] Probable cause existed to support the German searches on the facts in this record. We find no constitutional violation.

[11] At the suppression hearing, Riechmann attempted to offer expert opinion testimony to establish that the German searches and seizures violated German law. After a voir dire of the witness, the trial court declined to accept the evidence as expert opinion testimony, ruling that Riechmann failed to qualify the witness as an expert in the relevant field of German criminal law. *See* § 90.702, Fla.Stat. (1987). We conclude that the trial court did not abuse its discretion on the facts in this record.

[8] **[9]** **[10]** Riechmann next argues that numerous incidents of prosecutorial misconduct denied him a fair trial. The record shows that in many instances Riechmann ***139** did not contemporaneously object. As to those instances when he did object, the court either properly overruled

the objections, or where the objections were sustained Riechmann did not indicate that sustaining the objections was not enough to cure the error by following with appropriate motions to strike, for special instructions, or for a mistrial. [12] Thus, his claims of prosecutorial misconduct are meritless or are not preserved for appellate review. *See, e.g., Holton v. State,* 573 So.2d 284 (Fla.1990). In any event, our independent review of the record persuades us that the alleged acts of misconduct, individually or collectively, did not deny Riechmann his right to a fair trial.

12 We note as an example that the state told jurors Riechmann had been indicted by "23 grand jurors." Riechmann objected because the statement was designed to leave an improper implication of guilt in the minds of the jurors. The trial court correctly sustained the objection. *See Dougan v. State,* 470 So.2d 697, 701 (Fla.1985) (an indictment is nothing more than a vehicle to charge a crime and is not evidence for a jury to consider as any proof of guilt), *cert. denied,* 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986). Once the objection was sustained, however, Riechmann did not move to strike the remark, for a special instruction, or for a mistrial.

Likewise we reject Riechmann's claim that he was denied a fair trial due to alleged discovery violations. Riechmann alleged at trial that the state had failed to provide him with certain evidence seized by German authorities, including photographs and documents. The trial court appropriately held a hearing pursuant to *Richardson v. State,* 246 So.2d 771 (Fla.1971), and determined that defense counsel was permitted to examine this evidence when German police arrived in Florida for depositions. The trial court's conclusion after the *Richardson* hearing, that Riechmann had access to all the documents in dispute, was supported by the evidence.

[11] [12] [13] Riechmann next claims that the trial court erred in admitting evidence of four German convictions as impeachment evidence and in denying his requested instruction to the jury regarding this evidence. The convictions were: solicitation of perjury, which occurred in 1974; involuntary manslaughter and negligent bodily harm connected with a 1972 automobile accident; grand theft of an automobile stolen in 1966; and forgery, which occurred in 1973. Riechmann argues that the evidence was inadmissible under sections 90.610 [13] and 90.403 [14] of the Florida Statutes (1987). We find merit in one of Riechmann's claims.

13 Section 90.610 of the Florida Statutes (1987) provides:

90.610 Conviction of certain crimes as impeachment.—

(1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

(2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

(3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

14 Section 90.403 of the Florida Statutes (1987) provides:

90.403 Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

A foreign conviction may be admitted for impeachment in a Florida court, pursuant to section 90.610(1), provided the accused has not shown evidence of a lack of fairness in the foreign justice system. [15] *See Alvarez v. State,* 467 So.2d 455, 456 (Fla. 3d DCA), *review denied,* 476 So.2d 675 (Fla.1985); *accord United States v. Manafzadeh,* ***140** 592 F.2d 81, 90 (2d Cir.1979); *United States v. Wilson,* 556 F.2d 1177, 1178 (4th Cir.), *cert. denied,* 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 481 (1977); *United States v. Rossi,*

219 F.2d 612, 616 (2d Cir.), *cert. denied,* 349 U.S. 938, 75 S.Ct. 782, 99 L.Ed. 1266 (1955). Riechmann's convictions of solicitation of perjury and forgery were admissible under section 90.610(1) as crimes of false statement or dishonesty. So too was the grand theft charge. *See State v. Page,* 449 So.2d 813 (Fla.1984) (crimes involving theft are crimes of dishonesty under section 90.610(1)).

15 Riechmann made no suggestion that the foreign convictions were unfair.

[14] However, as to the conviction for involuntary manslaughter and negligent bodily harm, we find the trial court abused its discretion. Clearly the offense was not a crime involving dishonesty or a false statement. Thus, the state had to establish that it was punishable by more than one year of imprisonment under German law. The state failed to carry its burden. The record shows that Riechmann had been sentenced to eight months' probation on that charge, and defense counsel asserted that Riechmann understood the offense was a misdemeanor under German law. The state produced no evidence to establish that the offense was punishable by more than one year of imprisonment under German law. Nonetheless, the trial court ruled the conviction admissible, saying, "In this country it is a felony. We'll consider it a felony because of this country." The trial court misapplied the clear and express language of section 90.610(1), which provides that the offense must be punishable "by death or imprisonment in excess of 1 year *under the law under which he was convicted.*" § 90.610(1), Fla.Stat. (emphasis supplied). A trial court may not draw blind analogies between foreign and Florida law. [16]

16 In *Alvarez v. State,* 467 So.2d 455, 456–57 (Fla. 3d DCA), *review denied,* 476 So.2d 675 (Fla.1985), the court said in dicta that, under section 90.610(1), trial courts may determine whether or not crimes committed in foreign jurisdictions would be felonies if committed in Florida. We disapprove *Alvarez* to the extent it conflicts with our decision.

[15] Nonetheless, after considering all the facts in this record, and specifically all of the evidence properly admitted to impeach Riechmann, [17] we conclude the trial court's abuse of discretion in admitting the manslaughter conviction was harmless beyond a reasonable doubt in accordance with the principles announced in *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

17 We note that the state in cross-examination brought out other evidence to impeach Riechmann's credibility. For example, Riechmann admitted he lied in Germany about being an insurance agent; he cheated German tax authorities; he has been engaged in an oil and foreign currency business, which he knows may violate German law; and he admitted to making a "white lie" to get out of a contract to buy a car.

[16] The remaining three convictions were admissible pursuant to section 90.610. We agree with Riechmann's contention that, under section 90.403, the nature and remoteness of prior convictions may create a danger of unfair prejudice substantially outweighing the probative value of the evidence. *See* C. Ehrhardt, *Florida Evidence* § 610.5, at 346–47 (1984). Section 90.403 bars prior-conviction impeachment evidence "if the probative value is substantially outweighed by the danger of unfair prejudice." *Page,* 449 So.2d at 816. However, applying these principles to the facts, we do not find error in the admission of Riechmann's convictions of grand theft, perjury, and forgery. Justice was best served by allowing jurors to hear that the man whose critical testimony they were scrutinizing was convicted of these crimes. Although those offenses were somewhat remote in time, the trial judge did not abuse his discretion in concluding that their probative value outweighed the danger of unfair prejudice.

[17] In a related claim, we find no abuse of discretion in the trial court's rejection of Riechmann's proposed instruction to have the jury consider the prior convictions only as impeachment evidence and not as evidence of guilt. Riechmann's convictions of forgery and perjury were germane to the issue of Riechmann's credibility, which ***141** bore directly on the ultimate issue of Riechmann's guilt or innocence.

[18] **[19]** The last issue worthy of discussion [18] is Riechmann's claim that the evidence of guilt was not legally sufficient to support the convictions. Florida law requires that when the state relies on circumstantial evidence to convict the accused, the state must prove the circumstantial evidence is consistent with the defendant's guilt and inconsistent with any reasonable hypotheses of innocence. *E.g., State v. Law,* 559 So.2d 187, 188 (Fla.1989); *Cox v. State,* 555 So.2d 352, 353 (Fla.1989); *Jaramillo v. State,* 417 So.2d 257, 257 (Fla.1982); *McArthur v. State,* 351 So.2d 972, 976 n. 12 (Fla.1977); *Davis v. State,* 90 So.2d 629, 631 (Fla.1956).

18 We find no merit in Riechmann's claim that reversal is mandated "in the interest of justice" because of numerous errors.

We are satisfied that the state met its burden of proof in this instance. Bullets recovered from Riechmann's motel room matched the type used to kill Kischnick. Riechmann possessed two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that particular type of weapon. An expert testified that particles found on Riechmann's hands established a reasonable scientific probability that Riechmann had fired a gun. Evidence of blood splatter and stains on the car, blanket, and clothes was consistent with the state's theory of what transpired that night. Insurance policies, reciprocal wills, and other evidence established a motive. Meanwhile, the state's scientific evidence about blood and gunpowder residue was inconsistent with Riechmann's theory of defense, and the state offered considerable evidence to impeach Riechmann on the witness stand. Where there were conflicts in testimony and the theories of the case, the jury had the prerogative to resolve those conflicts in favor of the state, as it apparently did. *See Law*, 559 So.2d at 189 (once the state introduces substantial competent evidence inconsistent with the accused's theory of the case, it becomes the jury's duty to determine whether evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt).

[20] There is substantial competent evidence in the record to support the convictions. Riechmann makes no claims regarding the penalty and did not present any evidence in the penalty phase. The trial court found the death penalty applicable on the basis that the murder was committed for pecuniary gain and was cold, calculated, and premeditated. The trial court found as a nonstatutory mitigating circumstance from the evidence in the guilt phase that Riechmann's friends and acquaintances told police he was a "good person." We find the evidence clearly sufficient to support the aggravating factors applied. In the absence of any other evidence of mitigation, we find no error in the trial court's conclusion that "[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstance." Accordingly, the convictions and sentence of death are affirmed.

It is so ordered.

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

McDONALD, J., concurs in result only to conviction and concurs with sentence.

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