

No. _____

In the Supreme Court of the United States

DONALD E. DEARDORFF,
Petitioner,

v.

TERRY RAYBON, WARDEN
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Either Donald Deardorff or Millard Peacock committed capital murder by killing Ted Turner while robbing, burgling, and kidnapping him—the other was guilty of felony (non-capital) murder. The circumstantial evidence against each was essentially equal.

On the eve of a joint trial, Peacock—who had once disposed of a body in a 55-gallon drum, was linked to both of Turner’s cars, and cashed all \$17,000 in checks written on Turner’s accounts—led authorities to Turner’s body. He later testified against Deardorff while claiming he simply participated in the underlying felonies with no intent to kill (felony murder is not capital in Alabama). Peacock received a 15-year sentence, which he finished serving a decade ago, yet Deardorff faces execution.

The key evidence against Deardorff was an accusatory codicil—handwritten by Turner on his last will and testament just weeks before his disappearance—in which he preemptively accused Deardorff of his murder, admitted without objection or limiting instruction. The prosecutor told the jury it was the best evidence that Deardorff killed Turner. In state post-conviction, Deardorff brought an ineffective assistance of counsel claim for failure to object on Confrontation Clause grounds. The state courts denied relief, finding no deficient performance.

Federal habeas relief was denied on alternate grounds—a *de novo* determination that *Strickland* prejudice had not been shown. In doing so, the Eleventh Circuit discussed Peacock’s confession and testimony, along with circumstantial evidence implicating Deardorff—while omitting abundant circumstantial evidence against Peacock—in concluding “ample evidence” supported the jury’s verdict on the capital murder charge.

The Question Presented is:

Does the opinion below substantially conflict with this Court’s decisions, including *Thornell v. Jones* and *Berghuis v. Thompson*, where it failed to mention—let alone consider and weigh—the abundant circumstantial evidence against the testifying co-defendant in assessing prejudice under *Strickland*?

PARTIES

Petitioner is Donald E. Deardorff. Respondent is Terry Raybon, Warden of Holman Correctional Facility. Because Petitioner is not a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

These proceedings are directly related to this case under Rule 14.1(b)(iii):

- *Deardorff v. Warden*, No. 23-11589 (11th Cir. July 17, 2024) (affirming denial of habeas relief)
- *Deardorff v. Bolling, et al.*, No. 1:17-cv-00450-JB-MU (S.D. Ala. Sept. 30, 2022) (denying habeas relief)
- *Deardorff v. State*, No. CR-12-1966 (Ala. Crim. App. Oct. 14, 2016) (mem.) (denying post-conviction relief)
- *Deardorff v. State*, 6 So. 3d 1205 (Ala Crim. App. 2004) (affirming conviction and sentence)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald E. Deardorff respectfully requests this Court grant a writ of *certiorari* to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished decision of the Eleventh Circuit affirming denial of relief is attached. App. 1. The Eleventh Circuit's order denying rehearing is attached. App. 24. The unpublished Memorandum Opinion and Order of the United States District Court for the Southern District of Alabama denying habeas relief is attached. App. 26. The unpublished decision of the Alabama Court of Criminal Appeals (ACCA) affirming denial of postconviction relief is attached. App. 143. The ACCA's decision on direct appeal is published. *Deardorff v. State*, 6 So. 3d 1205 (Ala. Crim. App. 2004).

JURISDICTION

The Eleventh Circuit issued its decision on July 17, 2024, App. 1, and denied rehearing on August 22, 2024, App. 24, originally making this petition due by November 20, 2024. On November 7, 2024, Justice Thomas granted an extension to December 20, 2024. *Deardorff v. Raybon*, 24A460 (Nov. 7, 2024). The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. Deardorff invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

INTRODUCTION

Review and summary reversal are warranted here because the panel’s decision substantially conflicts with this Court’s repeated decisions, including one decided just last term, holding that “a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984); *see also Berghuis v. Thompkins*, 560 U.S. 370, 389-90 (2010); *Thornell v. Jones*, 602 U.S. 154, 164 (2024). Despite this clear directive, the Eleventh Circuit failed to acknowledge (let alone consider and weigh): (1) abundant circumstantial evidence Deardorff’s testifying co-defendant was the actual killer, App. 226-31; (2) the trial court’s decision to instruct on lesser-included offenses in “the interest of justice,” “overrid[ing] the wishes of the defendant” because “I do feel that the evidence . . . supports the lesser included offenses” of felony murder and murder, ECF No. 15-21 at 98-99; and (3) the district court’s determination (in upholding the reasonableness of trial counsel’s strategy on a different IAC claim) that the evidence against Deardorff as the killer, “while convincing, was not supported by eyewitnesses, conclusive forensics, or unquestionable evidence,” App. 111. This Court should grant *certiorari*.

STATEMENT OF THE CASE

A. State court proceedings.

The evidence established Millard Peacock and Donald Deardorff kidnapped, robbed, and burglarized Ted Turner. Shortly before trial on those charges and capital

murder—with Turner still missing nearly two years after he disappeared¹—Peacock flipped, leading police to Turner’s body and testifying against Deardorff. *Deardorff*, 6 So. 3d at 1214.² The only issue before the jury as to Turner’s murder was whether Peacock or Deardorff was the killer and, therefore, guilty of capital—rather than felony—murder.³

Without objection or limiting instruction, ECF No. 15-13 at 198-99, the State introduced Turner’s will, including an accusatory codicil—written in red ink just weeks before he disappeared:⁴

A photograph of a handwritten note in red ink on a white background. The text reads: "Reaffirmed 7/27/97 just in case Don Deardorff is really crazy. J. D. E. Turner". The handwriting is cursive and somewhat slanted.

The State elicited testimony on the accusatory codicil from four witnesses: (1) Turner’s girlfriend, Gail Goodwin, who “witnessed the original will,” and “identified Turner’s handwriting on the original portion and on the addendum,” *Deardorff*, 6 So. 3d at 1216; (2) Turner’s daughter, Karen Hodge, who “found the will at her father’s

¹ Ted Turner disappeared from his Baldwin County, Alabama, home in September 1999. *Deardorff*, 6 So. 3d at 1211. Although Turner’s body was not discovered until June 2001, Deardorff and Peacock became suspects almost immediately.

² His reward was a 15-year sentence, *id.* at 1211, which he finished a decade ago.

³ In Alabama, “[n]o defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine.” *Ex parte Woodall*, 730 So. 2d 652, 657 (Ala. 1998).

⁴ A “larger” version was also presented “as an aid to the jury.” ECF No. 15-13 at 198-99.

house” and took it to the police, testified “the addendum to the will was in Turner’s handwriting,” and “read for the record the text of the addendum,” *id.*; (3) Turner’s son-in-law who was asked whether the will had “caused him to suspect Deardorff,” *id.* at 1216-17; and (4) FBI Special Agent Tom Montgomery, who testified “that a few days after Turner disappeared, Karen [Hodge] informed him that she had found her father’s will and that Deardorff was mentioned in the addendum to the will.” *Id.* at 1217. During part of Goodwin’s testimony, she and the prosecutor stood before the enlarged version. ECF No. 15-13 at 199-200.

The State argued the codicil was a message Turner left behind for the jury and could resolve any doubts raised by the collection of jailhouse informants upon whom the State otherwise relied:⁵

He named the man he thought might do evil to him. And I submit to you that’s what he has left in his will and why he left it. “Just in case Donald Deardorff is as crazy as I think he is.” *That’s a message.* That’s the man I fear. It was so significant to him that he put it down. And, ladies and gentlemen of the jury, he didn’t just put it down, *he wrote it in red.* You can’t miss it. *It’s designed so you can’t miss it.*

...

And early in the case, a name surfaced. Early in the case, Deardorff surfaced. And it didn’t surface from some snitch. It didn’t surface from some drug dealer from Miami, Florida. It didn’t surface from some thug

⁵ Three other jailhouse informants testified against Deardorff: (1) William Coleman, serving a federal prison sentence for “[c]onspiracy with intent to distribute crack cocaine,” ECF No. 15-19 at 154, 158; (2) Michael Wayne Hicks, a South Carolina felon jailed in Baldwin County following his escape from prison, *id.* at 163-64; and (3) Walter Fambro, a Miami drug trafficker awaiting federal sentencing for conspiracy to traffic cocaine and murder a witness. *Id.* at 178, 185-86. They—and Mr. Peacock—were so untrustworthy the prosecutor refused to vouch for them. *See, e.g.,* ECF No. 15-21 at 193 (“We put inmates up here. You’ve got to determine whether they’re telling the truth.”).

out in the county [jail], or it didn't surface from some witness David Whetstone [the prosecutor] generated. *It surfaced from Ted Turner.*

ECF No. 15-21 at 111 (emphases added); *see also id.* at 191 (prosecutor's rebuttal closing: "What do we have on Donald Deardorff that points to him? . . . You have Ted Turner's will naming [him].").

Apart from receiving no limiting instruction, ECF No. 15-13 at 198-99, the jury was instructed to consider Turner's "message" as substantive evidence in deciding who killed Turner. ECF No. 15-22 at 12-13 ("You are to base your verdict on the evidence in this case. Evidence to be considered by you is testimony, *exhibits*, and presumptions of law that are not refuted by the evidence.") (emphasis added). The jury was also instructed, ECF No. 15-22 at 30-34, over Deardorff's objection, on felony murder and murder as lesser-included offenses because "the interest of justice . . . override[s] the wishes of the defendant, and I do feel that the evidence – there is evidence that supports the lesser included offenses." ECF No. 15-21 at 98-99.

The jury found Deardorff guilty of, *inter alia*, capital murder and recommended death by a 10-2 vote. ECF No. 15-11 at 4. On direct appeal, the ACCA affirmed the capital murder convictions and death sentence. *Deardorff*, 6 So. 3d at 1215. On plain error review, it considered whether the admission of the will violated rules against hearsay, concluding it had not because it—and testimony about it—was not for the truth. *Id.* at 1215-18.

Deardorff "timely filed a [state] petition for post-conviction relief," in which he raised a Confrontation Clause ineffective assistance of counsel (IAC) claim for failing

to challenge admission of the will. App. 10. The ACCA denied relief based solely on finding no deficient performance. App. 201-02.⁶

B. Federal proceedings.

Deardorff filed a timely federal habeas petition challenging the ACCA's resolution of his Confrontation Clause IAC claim. ECF No. 1 at 16-21. While the parties focused much of their argument on the ACCA's deficient performance analysis, the district court denied relief and a certificate of appealability (COA)⁷ without ruling on the deficient performance prong⁸ because it found Deardorff was not prejudiced. App. 60-63.

"Because the ACCA never reached the issue of prejudice on" the Confrontation Clause IAC claim, the Eleventh Circuit reviewed *de novo*. App. 18 (citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)). In finding no prejudice, the court considered only Peacock's confession and four categories of circumstantial evidence against Deardorff. *Id.* at 19a. Without further elaboration, it found Deardorff could not prove counsel's

⁶ Deardorff fully exhausted this claim. *Deardorff v. State*, CR-12-1966 (Ala. Crim. App. Oct. 14, 2016) (ECF No. 15-78 at 66); ECF No. 15-78 at 137 (denying rehearing); *Ex parte Deardorff*, 251 So. 3d 12 (Ala. 2017) (table).

⁷ The Eleventh Circuit expanded the COA to include: "[w]hether Deardorff's trial counsel was ineffective for failing to object, on Confrontation Clause grounds, to the admission of testimonial statements contained in the codicil of Mr. Turner's will." Order, *Deardorff v. Warden* (11th Cir. Aug. 11, 2023), Doc. 10-1.

⁸ It did, however, discuss it, opining "[a] Last Will and Testament is not an out-of-court statement which one would reasonably consider to be used at a later criminal prosecution, nor is a codicil reaffirming a will" because it "lacks details likening it to an affidavit, deposition, declaration, or the functional equivalent of in-court testimony," App. 57, but "[t]he failure to appropriately limit the jury's use of this evidence with an instruction from the court . . . concerning[.]" *Id.* at 59.

deficient performance was “‘so egregious’ that his trial was rendered unfair and the verdict suspect,” because “ample evidence supports the jury’s guilty verdict which we must consider in the prejudice analysis.” *Id.* (citing, *inter alia*, *Harrington v. Richter*, 562 U.S. 86, 113 (2011)⁹). It did so without discussing the abundant circumstantial evidence against Peacock.

Deardorff sought rehearing, noting the panel ignored abundant circumstantial evidence against Peacock, including his:

(1) possessing substantial property belonging to Mr. Turner, including two vehicles and a credit card; (2) cashing or depositing all the checks Mr. Turner signed; (3) having the bloody surgical gauze believed to be from Mr. Turner in his Lucedale, Mississippi, yard; (4) having a history of stalking, very bad temper, and disposing of a body at sea in a 55-gallon drum; and (5) lying repeatedly to investigators after making inculpatory statements and leading them to Mr. Turner’s body.

App. 226.

He also took issue with the panel’s failure to consider the trial court’s having instructed the jury on lesser-included offenses of felony-murder and murder because “the evidence and . . . the interest of justice . . . override the wishes of the defendant, and I do feel that the evidence – there is evidence that supports the lesser included offenses of felony murder and murder[.]” *Id.* at 225 (citing ECF No. 15-21 at 98). Finally, he challenged the panel’s failure to acknowledge the district court’s deficient performance determination—denying relief on a penalty phase IAC claim challenging a residual doubt sentencing strategy—that “the evidence at trial, while convincing,

⁹ The claim in *Harrington* was subject to AEDPA deference.

was not supported by eyewitnesses, conclusive forensics, or unquestionable evidence.”

App. 111. The Eleventh Circuit denied rehearing without explanation. App. 24.

REASON FOR GRANTING THE PETITION

The Eleventh Circuit’s opinion substantially conflicts with this Court’s decisions in *Strickland*, *Berghuis*, and *Jones* and, as in *Berghuis* and *Jones*, merits exercise of this Court’s supervisory authority.

The opinion below substantially conflicts with decisions of this Court—*Strickland*, *Berghuis*, and *Jones*—spanning 40 years. Because there is no principled reason for treating Deardorff differently than fellow habeas petitioners *Berghuis* and *Jones*, this Court should grant *certiorari* and either summarily reverse or order merits briefing.

In *Berghuis*—exercising its supervisory authority—this Court reversed because the Sixth Circuit’s decision granting habeas relief conflicted with *Strickland*’s rule for assessing prejudice. *Berghuis*, 560 U.S. at 389 (“The Court of Appeals, however, neglected to take into account the other evidence presented against Thompkins.”). Just last term, this Court exercised its supervisory authority in *Jones*, finding it “must” summarily reverse a grant of habeas relief because the Ninth Circuit’s decision conflicted with *Strickland*. *Jones*, 602 U.S. at 158 (“[T]he Ninth Circuit substantially departed from the well-established standard articulated by this Court in *Strickland*,” and “[a]s a result, we *must* reverse the judgment below.”) (emphasis added). This case calls for the same treatment.

The panel’s prejudice analysis explained “the following evidence pointed to Deardorff as *Turner’s killer*”:

(1) motive, stemming from the eviction and asset seizure initiated against Deardorff by Turner; (2) Peacock's confession; (3) the money, handgun,¹⁰ and automobile parts paperwork, and pornographic materials found in the vehicle Deardorff was riding in prior to his arrest; (4) the duct tape found in Deardorff's shared storage space that forensically matched the tape used to bind Turner, along with Turner's binoculars and borrowed cameras; and (5) the incriminating statements Deardorff made to police upon his arrest.

App. 19 (emphasis added). Then, citing, *inter alia*, *Harrington* and *Strickland*, the panel briefly reasoned "ample evidence supports the jury's guilty verdict . . . [and] Deardorff simply cannot establish that there was a reasonable probability that, but for counsel's failures, the result of the proceeding would have been different." *Id.*

Given the question (and totality of the evidence) before the jury, the prejudice Deardorff needed to establish was more limited than the panel's decision appreciated. *See Strickland*, 466 U.S. at 695-96 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury," and "a verdict or conclusion only weakly supported by the record is more likely to have been affected . . . than one with overwhelming record support."). Although the evidence showed Deardorff and Peacock kidnapped, burglarized, and robbed Turner, which of the two committed *capital* murder (as the actual killer) versus (non-capital) felony¹¹ murder, was—absent deficient performance—in serious doubt. In fact, the trial court charged the jury on lesser included offenses over Deardorff's objection because "the evidence and . . . the interest of justice . . . override the wishes of the defendant, and I do feel

¹⁰ This was not the murder weapon, ECF No. 15-20 at 176, which remains missing.

¹¹ Felony murder in Alabama is not capital. *See Woodall*, 730 So. 2d at 657 ("No defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine.").

that the evidence – there is evidence that supports the lesser included offenses of felony murder and murder[.]” ECF No. 15-21 at 98; ECF No. 15-22 at 30-34 (so instructing). The district court made a similar observation, which the panel did not mention. App. 111 (“[T]he evidence at trial, while convincing, was not supported by eyewitnesses, conclusive forensics, or unquestionable evidence”).

The opinion below substantially conflicts with this Court’s decisions in *Strickland*, *Berghuis*, and *Jones*, and as a result, the Eleventh Circuit overlooked and failed to consider crucial facts in violation of those decisions. Apart from failing to account for abundant facts implicating Peacock as the actual killer, it also overlooked the trial court having instructed the jury on felony murder, over Deardorff’s objection. Thus, the panel overemphasized evidence irrelevant to the prejudice inquiry and overlooked relevant evidence of Peacock’s culpability and questions about Deardorff’s guilt, resulting in a decision that cannot be squared with *Strickland* or its progeny. *Strickland*, 466 U.S. at 696 (“[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”).

In summarily reversing in *Jones*, this Court faulted the Ninth Circuit for “depart[ing] from . . . well-established rules” governing IAC prejudice determinations “in at least three ways[.]” *Jones*, 602 U.S. at 164. Chief among them was the court’s “fail[ure] adequately to take into account the weighty aggravating circumstances,” beginning with an “initial opinion [that] did not mention those circumstances at all.” *Id.* Only “[a]fter the State petitioned for rehearing and 10 judges voted to grant the

petition” did “the panel issue[] an amended opinion that at least mentioned the aggravating circumstances[.]” *Id.* Even then, “it failed to give them the weight that they would almost certainly be accorded” by the sentencer. *Id.*

In *Berghuis*, this Court faced a situation like *Jones* but involving a guilt phase IAC claim. This Court reversed a grant of habeas relief because, despite *Strickland*’s clear command—that “[i]n assessing prejudice, courts ‘must consider the totality of the evidence before the judge or jury’”—the Sixth Circuit “neglected to take into account the other evidence presented against Thompkins.” *Berghuis*, 560 U.S. at 389 (quoting *Strickland*, 466 U.S. at 695). Then, reviewing *de novo* (presuming no AEDPA deference), this Court “found that Thompkins suffered no prejudice” based on the other evidence, including a surviving victim’s eyewitness identification of Thompkins that was “supported by a photograph taken from a surveillance camera.” *Id.* at 390-91.

The Eleventh Circuit’s decision conflicts with *Strickland* more egregiously than the scenario that compelled this Court to summarily reverse in *Jones*. First, as in the initial decision in *Jones*, the panel “did not mention” any of the “circumstances” implicating Peacock as a viable alternative killer “at all.” Second, Deardorff’s panel—unlike the panel in *Jones*—did not amend its opinion to grapple with the numerous circumstances its opinion wholly omitted, despite Deardorff raising the issue in his rehearing petition. Finally, because Deardorff’s panel violated *Strickland* more egregiously, he was denied *any* consideration of the omitted circumstances.

If *certiorari* was warranted to address serious misapplication of *Strickland* in *Jones* and *Berghuis*, it is even more warranted here, where the error is more pronounced and has resulted in the reasonable probability that a person has been wrongfully convicted and sentenced to death due to a Sixth Amendment violation. Because the facts ignored by the Eleventh Circuit are “sufficient to undermine confidence in the outcome,” *Strickland*, 466 U.S. at 694, this Court should grant *certiorari*, vacate, and remand.

CONCLUSION

This petition for a writ of *certiorari* should be granted and the case scheduled for plenary review. In the alternative, the petition should be granted, the opinion vacated, and the case remanded for analysis under the proper standards.

Respectfully submitted,

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