

No. 24-6194
CAPITAL CASE

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

◆

DONALD E. DEARDORFF,
Petitioner,
v.
TERRY RAYBON, Warden,
Holman Correctional Facility,
Respondent.

◆

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Donald Deardorff murdered Ted Turner. The two had a lengthy feud that culminated in a state-court judgment against Deardorff for his failure to pay rent owed to Turner. As a result, Deardorff became “very angry” and wanted to “get even,” so he and an accomplice broke into Turner’s home, held the man hostage, forced him to withdraw large sums of money, and ordered car parts using his credit cards. Police found numerous incriminating items in a storage facility to which only Deardorff had access, including Turner’s binoculars and cameras. Deardorff was seen driving Turner’s car after the murder. After his arrest, Deardorff told officers, “the jig is up”; when asked to clarify, he said “I’ll tell you” if capital punishment is “off the table.” In jail, Deardorff disclosed the general location of Turner’s body to another inmate, whose testimony was later corroborated—the body was found in close proximity to a place where Deardorff used to live and hunt. Police also had recorded a call between Deardorff and his mother in which Deardorff told her he knew where the body was.

At trial, the prosecution developed evidence about how law enforcement came to identify Deardorff as a suspect in Turner’s murder and the subsequent steps in their investigation. One piece of evidence was a handwritten addendum to Turner’s last will and testament, which read: “Reaffirmed 7/27/99 just in case Don Deardorff is really crazy.” The will and the addendum were admitted without objection. On appeal, the state court determined that the will was not inadmissible hearsay, and in

post-conviction proceedings, the state court ruled that it was not ineffective assistance of counsel for the defense not to object to the will's admission.

In his federal habeas petition, Deardorff raised the same *Strickland* claim premised on the fact that his counsel did not object to admission of the will at his 2001 trial on Confrontation Clause grounds. The claim cannot satisfy either prong of *Strickland*, but the Eleventh Circuit addressed only prejudice. The question presented is:

1. Whether every fairminded jurist would agree that objecting to the admission of Turner's will on Confrontation Clause grounds would have altered the outcome of Deardorff's trial.

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STATEMENT OF THE CASE

A. Statement of facts

In 1999, Donald Deardorff, armed with a gun, lay-in-wait with codefendant Millard Peacock for their victim, Ted Turner, to return home. *Deardorff v. State*, 6 So. 3d 1205, 1211 (Ala. Crim. App. 2004), *aff'd sub nom. Ex parte Deardorff*, 6 So. 3d 1235 (Ala. 2008). Once Turner arrived home, Deardorff bound Turner with duct tape, held Turner captive inside a small closet of his own home for two days while Deardorff and Peacock cashed multiple checks they forced Turner to sign, and then drove Turner to a remote area where Deardorff shot Turner four times in the head. *Deardorff*, 6 So. 3d at 1211.

B. Trial and direct appeal

Deardorff was indicted for four counts of capital murder, five counts of first-degree theft of funds, two counts of first-degree theft for stealing Turner's car and truck, one count of first-degree receiving stolen property, and eleven counts of conspiracy. *Id.* at 1210. At trial, the evidence showed that the year before his murder, Turner leased storage space to Deardorff. *Id.* at 1211. When Deardorff stopped making rental payments, Turner pursued legal action resulting in a default judgment for overdue rent. *Id.* The same year, in preparation for overseas travel, Turner executed a will. *Id.* When it was found after Turner's murder, it contained "an addendum in Turner's handwriting that stated: 'Reaffirmed 7/27/99 just in case Don Deardorff is really crazy.'" *Id.* (citing C. 845). The State presented testimony about the will, explaining how Turner's family and law enforcement began to suspect that Deardorff was involved in Turner's disappearance. *Id.* at 1215-16.

Copious evidence at trial supported Deardorff's guilt. When he was apprehended, Deardorff had a box with \$19,000 in cash—roughly the amount stolen from Turner's account—and paperwork relating to internet purchases made using Turner's name and credit cards. *Id.* at 1213. At the station, Deardorff told the officers “the gig [or jig] is up,” and asked to explain, he replied, “[T]ake the death penalty off the table and I’ll tell you.” *Id.* at 1213-14 & n.2. In Deardorff's storage unit, officers “found numerous items that came from Turner's house, including a roll of duct tape, the ends of which matched the tape used to bind Turner's hands and feet and to secure the pillowcase over his head, a pair of binoculars Turner frequently used at his house, and two cameras that a neighbor had recently loaned to Turner.” *Id.* at 1214.

In jail awaiting trial, Deardorff told another inmate the general location of Turner's body, and that inmate's account was later corroborated when law enforcement located Turner's body in a place near where Deardorff used to live and hunt. DE20:51; DE15-17 at 18, 22.¹ Deardorff was also recorded on the telephone telling his mother that he knew the location of the body. DE-20:36 n.26 (quoting DE15-41:159). Deardorff's accomplice Millard Peacock testified—saying it was all Deardorff's idea and that Deardorff shot Turner, *Deardorff*, 6 So. 3d at 1213—and Peacock had twice passed a polygraph test administered by the FBI, DE15-13:148-51. That's why Deardorff had the money.

In sum, while Deardorff and Peacock both participated in Ted Turner's murder, it was Deardorff who had a personal animus against Turner and Deardorff

1. “DE” refers to the docket entry in the district court.

who reaped most of the fruits of the crime. The district court determined there was “abundant evidence heard by the jury,” DE20:37, and “ample evidence at trial connecting Deardorff to the crime,” DE20:51. The jury ultimately convicted Deardorff of, *inter alia*, three counts of capital murder. *Id.* at 1210.

During the penalty phase, trial counsel presented mitigation evidence through the testimony of Deardorff’s mother and Deardorff. His mother testified that Deardorff’s enlistment with the Navy “changed his personality,” that Deardorff had become “a little bit harder, not showing his emotions so much as he normally did.” *Id.* at 1228-29. She also testified that she believed Deardorff was innocent despite her jailhouse telephone conversations wherein Deardorff admitted having information about the location of Turner’s body. Doc. 20 at 59-60. Deardorff testified that he was innocent of Turner’s murder and explained “his desertion from the Navy,” as well as “some perceived conflicts in the evidence presented at the guilt phase.” *Deardorff*, 6 So. 3d at 1229. Thereafter, the jury recommended that Deardorff be sentenced to death by a vote of ten to two. *Id.* at 1210. The trial court followed the jury’s recommendation and sentenced Deardorff to death. DE15-1:35-37. His conviction and sentence were affirmed by the Alabama Court of Criminal Appeals (ACCA). *Deardorff*, 6 So. 3d at 1234. The Alabama Supreme Court denied certiorari on October 31, 2008. *Deardorff*, 6 So. 3d at 1245. This Court denied certiorari review on April 20, 2009. DE15-27:109.

C. State postconviction (Rule 32)

Deardorff timely filed a postconviction Rule 32 petition and amendment thereof. DE15-28:26-161; DE15-29:47-202; DE15-30:3-8. The trial court held an

evidentiary hearing on several claims, including Deardorff's claim that trial counsel provided ineffective assistance by failing to object to the admission of the addendum to Turner's will. DE15-70:76. During the evidentiary hearing, Deardorff presented testimony from his trial attorneys (Wayne Doerr and Vince Bellucci), which was summarized in the trial court's final order. DE15-65:63-65. The circuit court denied postconviction relief, finding that Deardorff did not establish that trial counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). DE15-65:33-68. The ACCA affirmed the circuit court's decision, DE15-78:66-136, and the Alabama Supreme Court subsequently denied Deardorff's petition for writ of certiorari, DE15-78:201.

D. Habeas proceedings

Deardorff filed a federal habeas petition on October 10, 2017, challenging the state-court decisions, including the finding that Deardorff had not shown trial counsel provided ineffective assistance. DE1. The United States District Court for the Southern District of Alabama denied Deardorff's petition on September 30, 2022. DE20. On August 11, 2023, the Eleventh Circuit granted a Certificate of Appealability on the question of whether Deardorff's trial counsel was ineffective for failing to object, on Confrontation Clause grounds, to the admission of testimonial statements contained in the addendum of Turner's will.

The Eleventh Circuit affirmed on July 17, 2024. The court found that there was ample evidence to support the jury's verdict and that "Deardorff simply cannot establish that there was a reasonable probability that, but for counsel's [alleged] failures, the result of the proceedings would have been different." *Deardorff v.*

Warden, No. 23-11589, 2024 WL 3440177, at *8 (11th Cir. July 17, 2024). The present petition for writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

Certiorari is not appropriate. Deardorff's petition presents no genuine conflict between the Eleventh Circuit's decision and this Court's precedents, and his ineffectiveness claim is meritless. Applying the proper standard under *Strickland v. Washington*, 466 U.S. 668 (1984), the Eleventh Circuit correctly concluded that objecting to the will's addendum would not have created a real possibility that Deardorff would have been acquitted of capital murder. Because "ample evidence" tied Deardorff to Turner's murder, objecting to one piece of evidence—admitted for reasons other than guilt—would not have made a difference to the outcome.

Additionally, this case would be a poor vehicle to review the Eleventh Circuit's prejudice determination because the question presented would not be dispositive: Deardorff's *Strickland* claim will ultimately fail on the performance prong too. The district court correctly decided that the Alabama Court of Criminal Appeals had not reached a decision based on an unreasonable application of clearly established law because the Confrontation Clause was not implicated where the will was offered to show investigative background. Further, Deardorff's trial took place well before *Crawford v. Washington*, 541 U.S. 36 (2004), so *even if* counsel would have had a shot at excluding the will post-*Crawford*, it was not unreasonable not to object at the time.

I. The Petition Identifies No Conflict Between The Eleventh Circuit's Decision And Supreme Court Precedent.

The Court should deny certiorari because there is no genuine conflict between the Eleventh Circuit's finding that Deardorff failed to show prejudice and this Court's decision in *Strickland* and its progeny.² See SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). In *Strickland*, this Court set forth a two-pronged standard for determining whether counsel provided ineffective assistance. 466 U.S. at 687. Under the prejudice prong a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When there is a challenge to the conviction, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. A court "must consider the totality of the evidence before the judge or jury." *Id.* Further:

Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to

2. Deardorff also cites *Berghuis v. Thompson*, 560 U.S. 370 (2010), and *Thornell v. Jones*, 602 U.S. 154 (2024), in support of his claim. Both cases are easily distinguished. In both cases, it was clear that the lower court blatantly did not consider certain evidence when determining prejudice. *Thornell*, 602 U.S. at 164 (the circuit court's decision did not seem to consider the "weighty aggravating circumstances" "at all," incorrectly "applied a strange Circuit rule that prohibit[ed] ... assessing the relative strength of expert witness testimony," and "attach[ed] diminished value to [the petitioner's] mental health condition because it saw no link between those conditions and Jones's conduct" at the time of the offense); *Berghuis*, 560 U.S. at 390 (the circuit court erred when it found that "the state court used the incorrect standard for assessing prejudice ... because '[q]uestions of the prosecution's purpose or intent are completely irrelevant in ... analyzing whether an error results in prejudice'). Here, even if it did not mention every single fact, the Eleventh Circuit analyzed Deardorff's claim under the proper standard and determined that, even without the will's addendum, there was ample evidence to support the jury's verdict.

be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, 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.

Id. at 695-96.

Isolating this Court’s language that a reviewing court must consider the totality of the evidence presented and that 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, pet. 9, Deardorff argues that the Eleventh Circuit’s decision conflicts with *Strickland* and its progeny because the court [1] “overlooked and failed to consider crucial facts,” including “abundant facts implicating Peacock as the actual killer” and “the trial court having instructed the jury on felony murder,” and [2] “overemphasized evidence irrelevant to the prejudice inquiry,” pet. 10. He theorizes that, “[a]lthough 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) felony murder was—absent deficient performance—in serious doubt.” Pet. 9.

There is no reason to grant certiorari to review the Eleventh Circuit’s fact-bound and deferential analysis under AEDPA. Whether the unanimous panel opinion “[e]mphasized” some evidence more than other evidence or chose to mention certain facts but not others—these are not the kind of questions this Court typically grants certiorari to answer. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) (“We do not grant certiorari to review evidence and discuss specific facts.”); *see also Salazar-Limon v. Houston*, 581 U.S. 946, 1278 (2017) (Alito, J., concurring in denial

of certiorari) (“[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case”). Especially not under AEDPA. Granting certiorari solely to pick through the record and redecide how to “appreciate” the evidence pointing to Deardorff’s accomplice, pet. 9, would represent a “readiness to attribute error” to the state courts, which this Court is loath to do. *Dunn v. Reeves*, 594 U.S. 731, 733 (2021) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). The panel’s conclusion on prejudice was so strongly supported that it did not need to refer to AEDPA’s deferential standard; this case is a far cry from one where “every fairminded jurist” (*id.* at 740 (cleaned up)) would find a constitutional violation. The certiorari petition never explains how Deardorff’s *Strickland* claim can clear AEDPA’s high hurdle.

Beyond its inherent unsuitability for this Court’s review, Deardorff’s argument fails on its own terms for several reasons. For one, the petition’s portrayal of the Eleventh Circuit’s decision is incomplete and creates the misimpression that the panel applied an incorrect standard. The Eleventh Circuit acknowledged and addressed Deardorff’s argument here—that the prejudice analysis should be sensitive to the defense theory that Peacock pulled the trigger. Articulating the proper standard, the Eleventh Circuit wrote:

“[I]t is not enough to show that the errors had some conceivable effect on the outcome.” *Harrington v. Richter*, 562 U.S. [86,] 104 [2011]. Where “sufficient conventional circumstantial evidence” points to the petitioner’s guilt, a petitioner generally cannot establish prejudice. *See id.* at 113 (noting that “there was ... sufficient conventional circumstantial evidence pointing to [the petitioner’s] guilt” when holding that the petitioner could not establish prejudice); *see also Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002) (explaining that,

when reviewing the prejudice prong of an ineffective assistance of counsel claim, courts must consider the totality of the evidence presented to the jury).

On appeal, [as t]o prejudice specifically, [Deardorff] argues that *Turner's will was the key evidence pointing to him as Turner's killer*, and that the jury's consideration of the will affected the outcome of his trial.

We disagree. Without the will, ... evidence pointed to Deardorff as Turner's killer[.] ... [This] ample evidence supports the jury's guilty verdict which we must consider in the prejudice analysis. *Harrington*, 562 U.S. at 113; *Brownlee*, 306 F.3d at 1060.

Deardorff, 2024 WL 3440177, at *7-8 (citations edited) (emphasis added). Contrary to Deardorff's assertion, the panel explicitly considered Deardorff's prejudice argument and specifically weighed the trial evidence "pointing to [Deardorff] as Turner's killer," given the effect (*vel non*) of an objection to the admissibility of Turner's will. *See also id.* at 8 ("Deardorff asserted to the jury that Peacock was the individual responsible for killing Turner, not himself. Deardorff made clear that his defense hinged on discrediting Peacock's statements to police and directing the jury to consider Peacock as Turner's sole killer."); *id.* at 23 ("Deardorff's strategy during [his trial was to shift blame to Peacock....").

Reading the opinion as a whole, it is not plausible that the Eleventh Circuit ignored Deardorff's defense strategy and held that Deardorff needed to show a probability that without the will, the jury would have acquitted him of each and every count. (*Contra* pet. at 9-10.) Indeed, the panel identified five pieces of evidence pointing to Deardorff, not Peacock, as the killer:

Without the will, 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, automobile parts paper, 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.

Deardorff, 2024 WL 3440177, at *8. If the panel had misunderstood Deardorff's burden as his petition suggests, it could have identified much more evidence showing his guilt of *some crime* against Turner, as opposed to these specific pieces of evidence that go to Deardorff's motive, Deardorff's receipt of the fruits of the crime, and Deardorff's spontaneous admission to the police.

Next, although Deardorff takes issue with the Eleventh Circuit's opinion because it did not explicitly list ***all*** the evidence before the judge and jury, he offers no legal authority requiring the court to list in its decision all the evidence presented in state court. Rather, *Strickland* requires the court only to *consider* such evidence in its review. There is nothing within the Eleventh Circuit's opinion to suggest that the court did not consider the totality of the evidence before the judge or jury. Moreover, the court clearly considered Peacock's role in the events leading up to Turner's murder, including "Peacock's confession." *Deardorff*, 2024 WL 3440177, at *8.³

Deardorff has not shown an incorrect application of this Court's case law. Accordingly, there is no compelling reason that the writ should issue.

3. At trial, Peacock testified that he drove Turner's vehicle to the bank to cash Turner's checks (R. 2103-25), and the jury heard that Peacock had repeatedly lied to police (R. 2137-40, 2147-51, 2160, 2202). Peacock denied that he confessed to a third party that he had "killed a man, put the body in a 55-gallon drum and dumped it in the sea[.]" (R. 2175; *cf.* pet. at i, 7.)

II. Deardorff's *Strickland* Claim Fails on Both Prongs.

The *Strickland* standard required that Deardorff show that his counsel's actions or omissions were deficient, and that the deficiency prejudiced him. 466 U.S. at 687. When establishing deficient performance, Deardorff had to overcome the presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *see also Knowles v. Mirzayance*, 556 U.S. 111, 113 (2009) ("And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."); *Premo v. Moore*, 562 U.S. 115, 121-22 (2011) ("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.'" (citation omitted). Under the prejudice prong, Deardorff had to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Id.* at 122. Further, under § 2254(d), review of a state court's application of *Strickland* is subject to "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so. *Id.* (internal citations omitted).

A. **The federal district court correctly determined that the state courts were not unreasonable in finding that Deardorff had not shown counsel's performance was deficient.**

Deardorff cannot show that "every fairminded jurist would agree that every reasonable lawyer would have" objected to the admission of the will on Confrontation Clause grounds, especially at a trial conducted before this Court's decision in

Crawford v. Washington, which substantially altered the standard for identifying violations of the Confrontation Clause. *Reeves*, 594 U.S. at 740 (cleaned up).

At trial, Turner's girlfriend identified Turner's will and testified that she witnessed him signing it on January 22, 1999. *Deardorff*, 6 So. 3d at 1215. Turner's daughter testified that she found the will after his disappearance and noted that, "at the bottom of the will, [Turner wrote] 'that he reaffirmed the will just in case Don Deardorff was crazy.'" *Id.* at 1216 (quoting (R. 1237)). The addendum was, in part, what led Turner's son-in-law to believe that Deardorff was involved in Turner's disappearance. *Id.* at 1217. Turner's son-in-law and daughter notified law enforcement of the addendum. *Id.* An agent with the FBI questioned Turner's family and learned that Turner had a dispute with Deardorff regarding rental property and that Deardorff was referenced in the handwritten addendum. *Id.* On direct appeal, the ACCA reviewed the record, applied state evidence law, and determined that the testimony regarding the will was not offered for the truth of the matter asserted; accordingly, it was "by definition not hearsay" and was properly admitted. *Id.* at 1217-18.

The state courts also reviewed admission of this evidence during postconviction proceedings to determine whether counsel provided ineffective assistance because counsel did not object on confrontation grounds. DE15-30:171. The ACCA found, as it did on direct appeal, that "the notation on the will was not offered for the truth of the matter asserted"; and thus, "it did not offend the Confrontation Clause." DE15-78:108-15. It agreed that, based on the facts presented at trial, testimony about the

addendum to Turner's will "was given in context of the investigation of the case and the reasons for the actions the police took." (*Id.* at 49 (citing *Deardorff*, 6 So. 3d at 1215-18).)

On habeas review, Deardorff claimed that the admission of the addendum violated the Confrontation Clause pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), because it was testimonial hearsay and was used as substantive evidence of his guilt. DE20:31. He argued that the state courts erred when it dismissed his claim that counsel should have objected to the admission of the addendum as meritless. (*Id.* at 28.) The district court found:

A Last Will and Testament is not an out-of-court statement which one would reasonably consider to be used later at a criminal prosecution, nor is a codicil reaffirming a will. The codicil at issue here lacks details likening it to an affidavit, deposition, declaration, or the functional equivalent of in-court testimony. The record further confirms, based on the direct examination of witnesses regarding the codicil, that Mr. Turner's will was not initially entered into evidence for its truth but as an explanation of how and why Deardorff became a person of interest in the investigation of Mr. Turner's disappearance. This "course of investigation" rationale, as reasoned by the ACCA, is consistent with the Confrontation Clause, which "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

...

The record confirms the ACCA's decision that the introduction of the evidence did not violate the Confrontation Clause, as it was nontestimonial and not asserted for the truth but, instead, to explain why Deardorff became a suspect. Accordingly, any objection by counsel to its admittance would have been overruled, and counsel's performance cannot be deemed deficient for failure to make futile objections.

DE20:32 (citations omitted).

The district court properly rejected Deardorff's *Strickland* claim. "The *Strickland* standard is a general one, so the range of reasonable applications is

substantial.” *Premo*, 562 U.S. at 123. When, as it does here, “§ 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied [the] *Strickland* deferential standard.” *Premo*, 562 U.S. at 123. In this case, the state courts reasonably concluded that counsel did not render ineffective assistance with respect to the victim’s will.

Defense counsel could have reasonably decided not to object because the addendum, reaffirming the will “in case Don Deardorff is really crazy,” was not admitted for the truth of the matter asserted (*i.e.*, that Deardorff was “crazy”). Rather, it was admitted to show how Deardorff became a suspect and the steps police took during their investigation. Turner’s will and addendum did not implicate Deardorff as the perpetrator of any crime, let alone his murderer. At most, the addendum, reaffirming the will “in case Don Deardorff is really crazy,” demonstrated Turner’s mental state months before he was murdered.

As such, the Confrontation Clause was not implicated, especially under the more forgiving rule of *Ohio v. Roberts*, the governing standard at the time of Deardorff’s trial. 448 U.S. 56 (1980). Had counsel objected, the prosecution would have had to show merely some “indicia of reliability” or “guarantees of trustworthiness,” *id.* at 66, and the will would have been easily authenticated by Turner’s girlfriend, who witnessed its signing, and his family members who could recognize his handwriting. Even today, Deardorff has little to question the will’s reliability, so it’s no surprise that counsel did not object at the time. Alternatively, the will could have survived objection on confrontation grounds if it fit within a

“firmly rooted hearsay exception,” *id.*, such as the present-state-of-mind exception or the exception for forfeiture-by-wrongdoing, *see, e.g., United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (“Rouco waived his right to cross-examine Benitez by killing him” in a heat-of-the-moment shootout with police.).

In his briefing and argument below, Deardorff relied heavily on *Crawford* and its progeny, but counsel had no reason to object based on a not-yet-articulated constitutional standard. *See, e.g., Rambaran v. Sec’y, Dep’t of Corr.*, 821 F.3d 1325, 1334 (11th Cir. 2016) (“We have held many times that reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.” (cleaned up) (collecting authorities)). Even under *Crawford*, Deardorff would need to show that the out-of-court statement was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” 541 U.S. at 51-52. But as the district court found, Turner’s will and the addendum were not out-of-court statements that Turner could have reasonably anticipated would be used in a criminal prosecution. DE20:103. On top of all that, the state appellate court later held that the will was not hearsay. Its view of state law is highly probative as to whether an objection at trial would have succeeded and thus whether every reasonable counsel would have made the objection.

Consequently, counsel did not perform unreasonably by failing to make a futile objection in light of the circumstances of the trial (the use of the will to show investigative background), the governing constitutional law at the time, and the state

law permitting the will's use in the way it was used. Thus, the district court properly concluded that it was reasonable for the state court to find that counsel did not provide ineffective assistance when counsel failed to object. Even if this Court were to grant certiorari to evaluate the Eleventh Circuit's prejudice analysis, Deardorff's *Strickland* claim would ultimately fail on the performance prong.

B. The lower federal courts correctly determined that Deardorff did not establish prejudice.

When examining the prejudice prong, the district court found:

The evidence showed that Deardorff was angry with Turner after being evicted from the rented warehouse and that a single file was missing from Turner's file cabinet—the warehouse rental file. The evidence showed that after Turner was reported missing, Turner's credit cards had been used to order car parts [that] matched vehicles owned by Deardorff. Evidence was put forth that Deardorff was witnessed driving Turner's car after his disappearance. Turner's binoculars and camera bag were found in a storage unit [that] only Deardorff had had access. A roll of duct tape was also found in the storage unit, which forensics matched to the duct tape found at the scene where Turner's body was recovered. The money seized from Deardorff during the vehicle search was matched to Turner's stolen, cashed checks. Evidence reflected that, before investigators knew Turner had been murdered, Deardorff told his mother he knew where Turner's body was but that he was not going to tell the police, that the murder of Turner matched that described Deardorff to other jail inmates, and that the recovery of Mr. Turner's body was in a location with which Deardorff was familiar and had communicated to another inmate. The evidence further reflected that Deardorff threat[en]ed to kill Peacock if Peacock "mentioned anything about him and Mr. Turner's involvement." (Doc. 15-19 at 183.)

Considering the abundant evidence heard by the jury, it cannot be said that the outcome of Deardorff's trial would have been different or that Deardorff was prejudiced by the admission of the codicil or the prosecutor's later use of the evidence in his closing argument.

DE20:35-37 (footnotes and internal citations omitted).⁴

Given Deardorff's failure to show counsel's performance was deficient, the ACCA did not reach the question of prejudice. DE15-78:115 (finding that "counsel could not have raised a legitimate Confrontation Clause argument and will not be held ineffective for failing to do so"); *see also Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").) As a result, the Eleventh Circuit reviewed the district court's prejudice determination *de novo*, *Deardorff*, 2024 WL 3440177, at *7, and correctly determined that counsel's performance did not render Deardorff's trial unfair or the verdict suspect. *See Premo*, 562 U.S. at 122. ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.").

Deardorff was required to show "a reasonable probability that," if counsel had

4. Within his statement of the case Deardorff appears to challenge the veracity of inmate testimony presented at trial, arguing that it was "so untrustworthy [that] the prosecutor refused to vouch for them." (Pet. 4 n.5.) Such an assertion, however, is meritless because prosecutors "vouching" for the credibility of state witnesses is improper. *See United States v. Young*, 470 U.S. 1, 18-19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."); *Ex parte Walker*, 972 So. 2d 737, 745 (Ala. 2007) ("[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.").

successfully objected to the addendum based on confrontation grounds, the jury would have found him not guilty of capital murder. *Harrington*, 562 U.S. at 104. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694). Counsel’s failure to exclude the addendum “must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Id.* (quoting *Strickland*, 466 U.S. at 684). It was not. As shown by the above findings of both the district court and the Eleventh Circuit, there was ample evidence of Deardorff’s guilt without considering the will’s addendum to support the jury’s verdict of guilt. *See supra* §I. Deardorff’s petition does not explain away or minimize the various categories of evidence tending to show his guilt; he just repeats his theory from over two decades ago that Peacock pulled the trigger. Without more, removing just one piece of supporting evidence from the prosecution’s robust case against Deardorff would not have fundamentally altered the jury’s picture of the facts. Even assuming Deardorff’s hypothesis that the jury considered the will for more than investigatory background, what would it show? At best, it might suggest Turner’s mental state—that he had some reason to fear Deardorff—but on that score, it was largely redundant. The jury had already heard that Turner and Deardorff had been feuding over Deardorff’s failure to pay rent, that Turner had sued Deardorff, that Turner had locked up Deardorff’s cars and wanted to seize more of Deardorff’s abandoned property, and, crucially, that Deardorff was “very angry” and sought to “get even” with Turner as a result.

Deardorff had the motive, he had certain instruments of the crime, he reaped

much of the benefits of the crime, and he all-but admitted as much to law enforcement. Deardorff killed Ted Turner, and the jury did not need Turner's handwritten scrawl to see that. Deardorff thus has not shown that there was a genuine likelihood that he would be acquitted or found guilty of the lesser-included offense of felony murder had the addendum been excluded at trial. *Richter*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."). Accordingly, the lower federal courts correctly determined that Deardorff did not establish the prejudice prong under *Strickland*. Therefore, the Court should deny certiorari.

CONCLUSION

Deardorff offers this Court a meritless claim that does not present a genuine conflict between the circuit court's decision and this Court's decision in *Strickland* and its progeny. The lower courts correctly denied relief, and this Court should deny certiorari.

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