

IN THE  
UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

<p>SHANNON STEPHEN, HARDEE CORRECTIONAL INSTITUTION, DC# R67120,</p> <p>Petitioner,</p> <p>v.</p> <p>SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,</p> <p>Respondent.</p>	<p>Case No.</p>
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**PETITION UNDER 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY PURSUANT TO A STATE COURT JUDGMENT**

1. Name and location of court which entered the judgment of conviction under attack: Florida Sixth Judicial Circuit Court, Pasco County, Florida
2. Date of judgment of conviction: July 28, 2010, amended judgment rendered on February 20, 2015
3. Length of sentence: thirty-five years' imprisonment
4. Nature of offense involved (all counts): two counts of DUI manslaughter and one count of leaving the scene of an accident involving death
5. What was your plea? not guilty
6. Kind of trial: jury
7. Did you testify at the trial? No
8. Did you appeal from the judgment of conviction?

Yes (✓)

No (\_\_\_)

9. If you did appeal, answer the following:

- (a) Name of court: Florida Second District Court of Appeal
- (b) Result: Convictions affirmed, cost portion of sentence/judgment reversed/remanded: Stephen v. State, 150 So. 3d 268 (Fla. 2d DCA 2014)
- (c) Date of result: October 29, 2014

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ()<sup>1</sup>                      No ()

11. If your answer to 10 was “yes,” give the following information:

- (a) (1) Name of court: Florida Sixth Judicial Circuit Court, Pasco County, Florida
- (2) Nature of proceeding Florida Rule of Criminal Procedure 3.800(c) motion<sup>2</sup>
- (3) Grounds raised: Request for a reduction of sentence
- (4) Did you receive an evidentiary hearing on your petition, application or motion? No
- (5) Result: Motion denied
- (6) Date of result: March 10, 2015
- (7) Did you appeal the result? No – a rule 3.800(c) order cannot be appealed
- (b) (1) Name of court: Florida Sixth Judicial Circuit Court, Pasco County, Florida
- (2) Nature of proceeding: Florida Rule of Criminal Procedure 3.850 motion<sup>3</sup>
- (3) Grounds raised: Ineffective assistance of counsel

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<sup>1</sup> Petitioner Stephen has not previously challenged his conviction in federal court.

<sup>2</sup> Petitioner Stephen’s rule 3.800(c) motion was filed on February 2, 2015.

<sup>3</sup> Petitioner Stephen’s original rule 3.850 motion was filed on November 24, 2015.

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result: Motion denied

(6) Date of result: December 12, 2018

(7) Did you appeal the result? Yes

i. Date of result: November 22, 2019 (mandate issued on January 28, 2020)

ii. Court: Florida Second District Court of Appeal

iii. Result: Denial of the motion affirmed: *Stephen v. State*, 288 So. 3d 16 (Fla. 2d DCA 2019)

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. No

(2) Second petition, etc. Yes

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: A rule 3.800(c) order cannot be appealed.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

**A. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

**1. Statement of the case.**

Shannon Stephen was the Defendant in the state court proceedings in the State of Florida (Sixth Judicial Circuit, Pasco County, case number 2006-CF-1591). Mr. Stephen will be referred to as “Petitioner Stephen” in this pleading. The prosecution/State of Florida will be referred to as “the State.”

Petitioner Stephen was charged with two counts of DUI manslaughter and one count of leaving the scene of a crash involving death. (DA1-18).<sup>4</sup> The offenses allegedly occurred on March 26, 2006.

At trial, Petitioner Stephen was represented by Kenneth Foote, Esquire. The State was represented by Assistant State Attorneys Eric Rosario and Bryan Sarabia. The Honorable Shawn Crane presided over the trial.

At trial, the State's theory was that Petitioner Stephen was driving the vehicle in question (a Chevrolet Silverado) at the time that the vehicle hit the two victims (Joe Swiech and Sarah Gleason). The defense's theory was that at the time that the victims were hit, Petitioner Stephen was semi-conscious in the passenger seat of the vehicle (due to his intoxication) and one of his friends (James Wallace) was driving the vehicle. The defense asserted that following the incident, Mr. Wallace and another friend (Marvin Dalzell) pushed Petitioner Stephen into the driver's seat of the vehicle in order to make it look as if Petitioner Stephen was driving the vehicle at the time of the incident.

The trial began on May 24, 2010, and concluded on May 29, 2010.<sup>5</sup> At the conclusion of the trial, the jury found Petitioner Stephen guilty as charged for all three counts. (T9-1725-26; R2-225).

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<sup>4</sup> References to the state court direct appeal record will be made by the designation "DA" followed by the appropriate volume number and page number. References to the supplemental record on appeal will be made by the designation "SR" followed by the appropriate volume number and page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number.

<sup>5</sup> Petitioner Stephen was originally tried in 2008, but the trial ended with a hung jury/mistrial. (SR13-1082).

Petitioner Stephen was sentenced on July 14, 2010. The trial court sentenced Petitioner Stephen to a total sentence of thirty-five years' imprisonment. (DA2-317; SR7-1392).<sup>6</sup> On direct appeal, the Florida Second District Court of Appeal affirmed the convictions and sentence, but reversed the cost portion of sentence/judgment and remanded for the entry of an amended judgment. *See Stephen v. State*, 150 So. 3d 268 (Fla. 2d DCA 2014). The amended judgment was rendered on February 20, 2015.

Thereafter, Petitioner Stephen filed a Florida Rule of Criminal Procedure 3.850 motion. The state postconviction court summarily denied the motion without first holding an evidentiary hearing. On appeal, the Florida Second District Court of Appeal affirmed the denial of Petitioner Stephen's state postconviction motion. *See Stephen v. State*, 288 So. 3d 16 (Fla. 2d DCA 2019) .

**2. Statement of the facts.**

**a. The State's Case in Chief.**

**Robert Bartlett.** Mr. Bartlett stated that he, Joe Swiech, and Sarah Gleason went to The Reef Bar on the evening of March 25, 2006. (T3-446). Mr. Bartlett testified that all three had been drinking and therefore the three decided to walk home from the bar (during the early morning hours of March 26, 2006). (T3-447). Mr. Bartlett stated that the three were walking "off" the road. (T3-449-50). Mr. Bartlett testified that while the three were walking on Grand Boulevard toward State Road 54, he called Rick Scott and asked Mr. Scott to come pick them up and drive them home. (T3-450-51). Mr. Bartlett stated that when he ended his conversation with Mr. Scott, Mr. Swiech and Ms. Gleason were hit by a truck. (T3-451-52). Mr. Bartlett testified that after the truck hit Mr.

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<sup>6</sup> The state trial court sentenced Petitioner Stephen to fifteen years' imprisonment on both of the DUI manslaughter counts and five years' imprisonment on the leaving the scene of a crash involving death count, with the three sentences to be served consecutively.

Swiech and Ms. Gleason, the truck drove away. (T3-452). Mr. Bartlett stated that he proceeded to call 911 (at 1:09 a.m.). (T3-459).<sup>7</sup> Mr. Bartlett testified that Mr. Scott subsequently arrived and when he heard about the incident, he left the scene in order to find the truck that hit Mr. Swiech and Ms. Gleason. (T3-460). Mr. Bartlett stated that later during the morning, he observed the truck stopped at the intersection of Grand Boulevard and State Road 54. (T3-461).

**Valerie Herbert.** Ms. Herbert testified that she and her fiancé were driving home from a bowling alley at approximately 12:55 a.m. on March 26, 2006. (T3-518). Ms. Herbert stated that during the drive home, she noticed a truck on State Road 54 engaging in “erratic” driving. (T3-523). Ms. Herbert testified that she observed one person in the truck that was driving erratically (i.e., a person in the driver’s seat). (T3-526). Ms. Herbert stated that she subsequently called 911 to report the truck. (T3-526).<sup>8</sup>

On cross-examination, Ms. Herbert acknowledged that the windows of the truck were tinted (T3-537) and thus she would not have been able to see if someone was lying down in the passenger seat. (T3-538).

**Roberta Penix.** Ms. Penix, the communications manager for the Pasco County Sheriff’s Office, testified that her call center received a call at 1:06 a.m. on March 26, 2006, in reference to a drunk driver. (T3-544-47). Ms. Penix stated that it was reported that the alleged “drunk driver” was driving a Chevrolet Silverado. (T3-548).

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<sup>7</sup> During Mr. Bartlett’s testimony, the State played the 911 call for the jury. (T3-464-73).

<sup>8</sup> During Ms. Herbert’s testimony, the State played the 911 call for the jury. (T3-531-32).

**Jon Thogmartin.** Dr. Thogmartin, a medical examiner, testified that he conducted autopsies on Joe Swiech and Sarah Gleason on March 26, 2006. (T3-563-65). Dr. Thogmartin stated that both Mr. Swiech and Ms. Gleason died from blunt trauma. (T3-566).

**Rick Scott.** Mr. Scott stated that he was with James Ramsey during the early morning hours of March 26, 2006, and he explained that he received a phone call from Robert Bartlett wherein Mr. Bartlett asked Mr. Scott to pick up him, Joe Swiech, and Sarah Gleason. (T3-577-78). Mr. Scott stated that as he and Mr. Ramsey were driving to pick up Mr. Bartlett, Mr. Swiech, and Ms. Gleason, they noticed a Chevrolet pick-up truck with damage to its front end (T3-580). Mr. Scott testified that he then heard a siren and he observed a man exit the driver's side of the vehicle, and Mr. Scott said that he saw the man run behind a "big metal box" next to an intersection and make a call on his cellphone. (T3-582-84). Mr. Scott stated that they proceeded to drive down the road and he then observed Mr. Swiech and Ms. Gleason lying injured on the ground. (T3-586). Mr. Scott testified that he and Mr. Ramsey then drove back to where they had seen the truck and he said that the truck had moved "through the intersection" and he saw the truck next to a bar. (T3-587). Mr. Scott stated that he and Mr. Ramsey drove next to the truck and they "blocked it off." (T3-587). Mr. Scott testified that they observed Petitioner Stephen in the truck and they "got him to come out" of the truck and they waited for the police to arrive. (T3-589, 592). Mr. Scott stated that the police subsequently arrived and took Petitioner Stephen into custody. (T3-592).

**Adam Morris.** Mr. Morris, a trooper with the Florida Highway Patrol, testified that he came into contact with Petitioner Stephen during the early morning hours of March 26, 2009. (T4-646-47). Trooper Morris stated that Paramedic Joseph Lopardo subsequently took a blood draw from Petitioner Stephen. (T4-650).

**Joseph Lopardo.** Mr. Lopardo, a paramedic, testified that he drew blood from Petitioner Stephen on March 26, 2006. (T4-656).

**Jeffrey Hays.** Mr. Hays, a toxicologist with the Pinellas County Forensic Laboratory, testified that he tested the blood that was obtained from Petitioner Stephen on March 26, 2006. (T4-663). Mr. Hays stated that the two results obtained from the test indicated that the blood had (1) .238 grams of alcohol per deciliter and (2) .240 grams of alcohol per deciliter. (T4-664).

On cross-examination, Mr. Hays testified that he also tested blood that was obtained from Sarah Gleason on March 26, 2006. (T4-668). Ms. Gleason's toxicology report demonstrated that Ms. Gleason had cocaine and marijuana in her system and she was above the legal blood-alcohol limit. (T8-1453-54).<sup>9</sup>

**Eric Shaw.** Mr. Shaw, a trooper with the Florida Highway Patrol, testified that he responded to the scene of the accident on March 26, 2006. (T4-672). Trooper Shaw stated that when he arrived at the scene, he videotaped the scene. (T4-673).<sup>10</sup>

**James Ramsey.** Mr. Ramsey stated that on March 26, 2006, at approximately 1 a.m., he and Rick Scott were driving near the traffic light at Grand Boulevard and State Road 54 and he noticed a pick-up truck with damage to its front end. (T4-689-90). Mr. Ramsey testified that he then observed a man exit the vehicle, and Mr. Ramsey explained that he then heard a siren and he saw the man run behind the "signal box" on the corner of the intersection and make a call on his cellphone. (T4-692-94). Mr. Ramsey stated that he drove down the road and he observed Joe Swiech and Sarah

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<sup>9</sup> Ms. Gleason's toxicology report was admitted into evidence. (T8-1453-54).

<sup>10</sup> During Trooper Shaw's testimony, the State played the videotape for the jury. (T4-674).

Gleason lying on the ground injured. (T4-694-95). Mr. Ramsey testified that he then drove back to the truck, which had moved through the intersection and was parked close to Club 54. (T4-695-96). Mr. Ramsey stated that he observed Petitioner Stephen in the truck and he “pulled” Petitioner Stephen out of the truck and waited for the police to arrive. (T4-696). Mr. Ramsey testified that the police subsequently arrived and took Petitioner Stephen into custody. (T4-697).

**James Wallace.** Mr. Wallace stated that he, Marvin Dalzell, and Petitioner Stephen went to Sevens Bar on March 25, 2006. (T4-719).<sup>11</sup> Mr. Wallace testified that he drove Mr. Dalzell to the bar in his GMC Sierra truck and Petitioner Stephen drove separately and met them at the bar. (T4-721-22). Mr. Wallace stated that Petitioner Stephen became intoxicated while they were at the bar. (T4-724). Mr. Wallace testified that the three left the bar at approximately 1 a.m. (T4-726). Mr. Wallace stated that he and Mr. Dalzell attempted to convince Petitioner Stephen to go home with them (in Mr. Wallace’s truck), but Mr. Wallace claimed that Petitioner Stephen walked to his truck and drove away. (T4-727-30). Mr. Wallace testified that he then drove home and when he arrived home, he said that he called his wife at 1:09 a.m. and left her the message “I’m home for the night.” (T4-732-33).

On cross-examination, Mr. Wallace acknowledged that he was separated from his wife in March of 2006. (T4-784-85). Mr. Wallace stated that the reason that he had separated from his wife was because he did not agree with her decision to work as a bartender. (T4-785). Mr. Wallace testified that he believed that Mrs. Wallace was working at a hospital on the night of March 25, 2006 (but she was actually working at a bar). (T4-785).

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<sup>11</sup> Frank Figliozzi also went to Sevens Bar with the group, but he left the bar earlier than the other three. (T4-719, 726-27).

**Dan Jensen.** Mr. Jensen, a records custodian for Sprint Nextel, testified regarding the “call data report” for James Wallace’s cellphone number between the hours of 1 a.m. and 5:40 a.m. on March 26, 2006 (i.e., incoming and outgoing calls and cell towers utilized). (T5-846-89).

**Youssef Mohamed.** Mr. Mohamed, an employee with Sprint, testified that he “maintain[s] the cell sites for Sprint” in Pasco County. (T5-943-44). Mr. Mohamed testified about particular cell towers in Pasco County and the distance between those cell towers. (T5-949-74).

**Marvin Dalzell.**<sup>12</sup> Mr. Dalzell stated that he, James Wallace, and Petitioner Stephen went to Sevens Bar on March 25, 2006. (T6-1019). Mr. Dalzell testified that he drove in his van to Mr. Wallace’s house and then he rode with Mr. Wallace in Mr. Wallace’s truck to the bar (and Petitioner Stephen met them at the bar). (T6-1019). Mr. Dalzell stated that Petitioner Stephen became intoxicated while they were at the bar. (T6-1021). Mr. Dalzell testified that the three left the bar at approximately 1 a.m. (T6-1023). Mr. Dalzell stated that he and Mr. Wallace attempted to convince Petitioner Stephen to go home with them (in Mr. Wallace’s truck), but Mr. Dalzell claimed that Petitioner Stephen walked to his truck and drove away. (T6-1026). Mr. Dalzell testified that he rode back with Mr. Wallace to Mr. Wallace’s house, at which time he got into his van and drove home. (T6-1029). Mr. Dalzell stated that on his way home, he observed Petitioner Stephen’s truck “setting in the right-hand lane of 54 on Grand” and he observed that the front of the truck was damaged. (T6-1030-31). Mr. Dalzell testified that he proceeded to call 911. (T6-1031). Mr. Dalzell stated that he also called Mr. Wallace to tell him about Petitioner Stephen’s truck and he said that Mr. Wallace subsequently arrived at the scene. (T6-1032-36).<sup>13</sup>

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<sup>12</sup> Throughout the record, Mr. Dalzell is referred to as “Joe.” (T6-1036).

<sup>13</sup> Mr. Dalzell claimed that after seeing Petitioner Stephen’s vehicle, the first call he made (before calling 911) was to Mr. Wallace to tell Mr. Wallace that he had a “wonderful time” that

On cross-examination, Mr. Dalzell's 911 call was played for the jury (T6-1059-64) and Mr. Dalzell was questioned as to why he did not inform the 911 operator that he had been with Petitioner Stephen earlier in the evening. (T6-1066). In fact, Mr. Dalzell admitted that even after Mr. Wallace arrived at the scene, at no time did he or Mr. Wallace inform law enforcement officials that they had been with Petitioner Stephen earlier in the evening. (T6-1071).

**Frank Figliozzi.** Mr. Figliozzi testified that he was with James Wallace, Marvin Dalzell, and Petitioner Stephen at Sevens Bar on the evening of March 25, 2006. (T6-1078-80). Mr. Figliozzi stated that he left the bar at approximately 11 p.m. (T6-1079).

**Ronald Evans.** Mr. Evans, a trooper with the Florida Highway Patrol, testified that he administered field sobriety exercises to Petitioner Stephen on March 26, 2006. (T6-1097). Based on Petitioner Stephen's performance on the exercises, Trooper Evans opined that Petitioner Stephen was intoxicated and Trooper Evans therefore arrested Petitioner Stephen. (T6-1103). Trooper Evans stated that he subsequently obtained breath samples from Petitioner Stephen (using the Intoxilyzer machine). (T6-1110). Trooper Evans testified that the two breath samples indicated that Petitioner Stephen's blood-alcohol level was .157 and .162. (T6-1114).

**Anthony Palese.** Mr. Palese, a corporal with the Florida Highway Patrol, testified that the Intoxilyzer that was used to obtain breath test samples in Petitioner Stephen's case was properly working at the time of the test (March 26, 2006). (T6-1160).

**John Murdoch.** Mr. Murdoch, an accident reconstructionist, opined that based on his review of the information obtained from the Chevrolet Silverado's "crash data recorder," the vehicle was traveling forty-seven miles per hour at the time the two victims were hit and the driver did not apply  

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evening. (T6-1047-48).

the brakes of the vehicle. (T6-1180). Mr. Murdoch further opined, based on this review of the evidence in this case, that the victims were “off the roadway” when they were hit by the vehicle. (T6-1188).

At the conclusion of Mr. Murdoch’s testimony, the State rested. (T6-1192).

**b. Petitioner Stephen’s Case in Chief.**

**Heather Glenny.** Ms. Glenny, a sergeant with the Florida Highway Patrol, testified that after the Chevrolet Silverado was towed from the scene on March 26, 2006, she conducted an investigation into items that were subsequently stolen from the vehicle (i.e., a GPS device that was in the vehicle). (T7-1246-47). Sergeant Glenny stated that the suspects who law enforcement officials believed stole the GPS device worked for the towing company that towed the vehicle from the scene (Tatum’s Towing). (T7-1250).

**Michael Styers.** Mr. Styers, a corporal with the Florida Highway Patrol, testified that he was the lead homicide investigator for the accident that occurred on March 26, 2006. (T7-1255). Corporal Styers stated that to his knowledge, Petitioner Stephen did not make any statements to law enforcement officials (i.e., Petitioner Stephen never said that he was driving the vehicle at the time the victims were hit). (T7-1267).

**Kara Wallace.** Mrs. Wallace, James Wallace’s wife, stated that she was separated from her husband on March 26, 2006. (T7-1295-96). Mrs. Wallace testified that during the early morning hours of March 26, 2006, she received some voicemail messages from Mr. Wallace. (T7-1303). Mrs. Wallace claimed that during the first voicemail message, Mr. Wallace stated that he had arrived home (T7-1307), but she admitted that during her previous deposition, she testified that during the

first message that Mr. Wallace left on her voicemail on March 26, 2006, Mr. Wallace said “something happened, this is really important” (not “I’m home”). (T7-1311).<sup>14</sup>

**Brian Farrow.** Mr. Farrow, a freelance photographer who videotapes accident scenes and sells the tapes to news organizations, testified that he responded to the scene of the accident on March 26, 2006, after hearing chatter about the accident on his police scanner. (T7-1355). Mr. Farrow stated that when he arrived at the site where the Chevrolet Silverado had stopped, he observed a van next to the Chevrolet Silverado and he explained that it “almost seemed like that there was some type of maybe like an altercation or something going on.” (T7-1360-61). Mr. Farrow testified that he observed “two or three people and they were arguing.” (T7-1363). Mr. Farrow added that they were “shoving and pushing each other” and “one guy had another guy’s arm and they were like, you know, pulling and arguing with the guy.” (T7-1371-73). Mr. Farrow stated that he subsequently drove to the location of the victims and, after seeing the victims, he returned to the site of the Chevrolet Silverado. (T7-1373-77). Mr. Farrow testified that when he returned, the Chevrolet Silverado had moved next to Club 54. (T7-1377).

On cross-examination, Mr. Farrow stated that when he arrived back at Club 54, he talked to (and videotaped) Petitioner Stephen. (T7-1391-93). Mr. Farrow testified that Petitioner Stephen was incoherent, stating that he was driving at one point but later denying that he was driving. (T7-1393).

**Walter Schubart.** Mr. Schubart stated that he saw Petitioner Stephen at Sevens Bar on the evening of March 25, 2006. (T7-1409). Mr. Schubart opined that Petitioner Stephen was “drunk.”

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<sup>14</sup> Mr. Wallace testified that he left the first voicemail message for Mrs. Wallace (wherein, according to Mrs. Wallace’s deposition, Mr. Wallace said “something happened, this is really important”) at 1:09 a.m. on March 26, 2006 (T4-732-33) – *the exact time* that Robert Bartlett called 911 to report that the victims had been hit. (T3-459).

(T8-1421). Mr. Schubart was outside the bar when Petitioner Stephen and his friends left the bar.

(T8-1420). Mr. Schubart testified that he observed Petitioner Stephen's friends help Petitioner Stephen get into the *passenger* side of Petitioner Stephen's vehicle:

He proceeded to a newer truck where his two gentleman friends walked over to the passenger side with him. One hopped in, the other one helped Shannon in the truck, the last one ran around the back of the truck into the driver's seat and then they drove off.

(T8-1422).

At the conclusion of Mr. Schubart's testimony, the defense rested. (T8-1513).

**c. The State's Rebuttal.**

**Lisa Taranto.** Ms. Taranto stated that on the evening of March 25, 2006, she was at Sevens Bar with her then-boyfriend Walter Schubart. (T8-1514). Ms. Taranto claimed that at some point after that night, Mr. Schubart told her that Petitioner Stephen left the bar on March 26, 2006, driving in his own vehicle. (T8-1515).<sup>15</sup>

At the conclusion of Ms. Taranto's testimony, the State rested. (T8-1517).

**d. Verdict.**

The parties gave their closing arguments (T8-1579-1613, T9-1617-81) and the trial court instructed the jury. (T9-1689-1717). The jury found Petitioner Stephen guilty as charged for all three counts. (T9-1725-26; DA2-225).

**B. STANDARD OF REVIEW.**

Petitioner Stephen's request for federal habeas corpus relief is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat.

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<sup>15</sup> Mr. Schubart denied that he ever told Ms. Taranto that Petitioner Stephen drove away from the bar. (T8-1426-29, 1437).

1214 (1996) (hereafter “AEDPA”). Under the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court clarified the nature of habeas review as set out in § 2254(d)(1). Writing for a majority of the Court, Justice O’Connor explained:

Under the “contrary to” clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

*Williams*, 529 U.S. at 412-13.

As to findings of fact under 28 U.S.C. § 2254(d)(2), federal courts determine whether the state court’s finding was based on “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” A state court’s determination of the facts shall be “presumed to be correct,” and the habeas petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). *See Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1323 (11th Cir. 2000). However, the statutory presumption of correctness applies only to findings of fact made by the state court, not mixed determinations of law and fact. *See Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir. 1994).

In *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003), the Supreme Court stated:

AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

In other words, the “reasonableness” standard does not apply to determinations of factual issues. Petitioner Stephen is not required to prove that the state court’s factual findings were unreasonable, only that they were rebutted by clear and convincing evidence. “A federal court can disagree with a state court’s credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.” *Id.* at 340.

In Petitioner Stephen’s case, the state courts’ rulings resulted in an unreasonable application of Petitioner Stephen’s constitutional rights and clearly established federal law. Moreover, the state courts’ rulings and orders were based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings.

### **C. ARGUMENT AND CITATIONS TO AUTHORITY**

#### **Ground 1. Defense counsel rendered ineffective assistance of counsel by failing to present an accident reconstruction expert as a defense witness at trial.**

In his state postconviction motion, Petitioner Stephen alleged that defense counsel was ineffective for failing to present an accident reconstruction expert as a defense witness at trial. Petitioner Stephen explained that his theory of defense was that James Wallace was driving his vehicle at the time of the accident (and Petitioner Stephen was subsequently framed by Mr. Wallace and Marvin Dalzell). In order to properly present this theory of defense, the jury was required to understand and comprehend the timeframes involved, the routes driven by all parties, and the cellphone data from each of the parties. The only way to effectively present all of this information

was through an accident reconstruction expert. However, at trial, defense counsel did *not* present an accident reconstruction expert as a defense witness at trial (i.e., defense counsel did not present any witness or expert who introduced comprehensive diagrams and visuals, maps, data regarding the timing of the routes in question, or testimony/evidence tying all of this evidence together).

In his state postconviction motion, Petitioner Stephen asserted that had an accident reconstruction expert been presented at trial, the expert would have confirmed – through comprehensive diagrams and visuals – the accuracy of Petitioner Stephen’s theory: i.e., the time that the three men left the bar;<sup>16</sup> that a witness (Walter Schubart) confirmed all three men getting in Petitioner Stephen’s vehicle and that Petitioner Stephen was helped into the *passenger* side of the vehicle; the route driven by Mr. Wallace which coincided with Mr. Wallace’s attempt to check on the whereabouts of his wife (Kara Wallace); the initial “something happened, this is really important” message left by Mr. Wallace on Mrs. Wallace’s cellphone was left at the exact time (1:09 a.m. on March 26, 2006) that Robert Bartlett called 911 to report that the victims had been hit; and that after the accident, Brian Farrow observed “two or three” men involved in an “altercation” next to a truck (Petitioner Stephen’s vehicle) and a van (Mr. Dalzell’s vehicle). Moreover, an accident reconstruction expert would have been able to present a map detailing the path driven by Mr. Wallace in Petitioner Stephen’s vehicle and the path driven by Mr. Dalzell in his vehicle and would have been able to explain the *timing* of each route (with information regarding stop lights and testimony regarding test routes that were driven at the time of day in question with answers as to how long the test routes took) – which would have further strengthened Petitioner Stephen’s theory of defense.

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<sup>16</sup> The defense accident reconstruction expert would have been able to utilize the bar receipt to establish the time that the three men left the bar. The importance of the bar receipt is thoroughly discussed in Ground 4 of this petition.

Absent such an expert, all of these aspects were not tied together in a way that a jury could see and understand the accuracy of Petitioner Stephen's theory. Stated another way, without an expert tying these pieces together, there was no way that Petitioner Stephen's theory of defense could be properly presented to the jury.

In his state postconviction motion, Petitioner Stephen explained that he has retained two reconstruction experts (Donald J. Fournier, Jr., P.E., a forensic engineer, and John Buchanan, a law enforcement officer). After being retained, Mr. Fournier and Mr. Buchanan properly conducted the analysis set forth in the previous paragraph. Petitioner Stephen submits that had Mr. Fournier's analysis and Mr. Buchanan's analysis been presented to the jury, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.

In its order summarily denying this claim, the state postconviction court concluded that defense counsel at trial "elicited testimony from various witnesses" and "argue[d] to the jury[] the timeline which supported the defense theory, such that there is no reasonable probability that the outcome of the trial would have been different if an accident reconstruction expert had in fact testified."<sup>17</sup> (R-381).<sup>18</sup> Petitioner Stephen has several responses to the state postconviction court's conclusion, as set forth below.

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<sup>17</sup> In essence, the state postconviction court concluded that defense counsel made a "strategic" decision that an accident reconstruction expert was unnecessary in this case. "A trial court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy *without first holding an evidentiary hearing.*" *Button v. State*, 941 So. 2d 531, 533 (Fla. 4th DCA 2006) (emphasis added) (citation omitted). *See also Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000) ("Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of *Strickland* [*v. Washington*, 446 U.S. 668, 687 (1984)].").

<sup>18</sup> References to the state court postconviction record on appeal will be made by the designation "R" followed by the appropriate page number.

First, Petitioner Stephen notes in DUI manslaughter cases, the prosecution and the defense routinely present accident reconstruction experts as witnesses at trial. Notably, in the instant case, *the State presented its own accident reconstruction expert at trial* (John Murdoch), but defense counsel failed to present an accident reconstruction expert. (R-365). An accident reconstruction expert was needed to properly present Petitioner Stephen’s theory of defense in this case.

Second, “elicit[ing] testimony from various witnesses” is *not* the same as affirmatively presenting testimony from an expert witness who would opine that the timeline of events matches the defense’s theory regarding the routes taken by Mr. Wallace and Mr. Dalzell. In *Leonard v. State*, 930 So. 2d 749, 751-752 (Fla. 2d DCA 2006), the state appellate court specifically rejected the reasoning employed by the state postconviction court in the instant case:

[T]he fact that Leonard was able to introduce some evidence in support of his theory of defense *does not negate his claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.*

(Emphasis added). As in *Leonard*, in the instant case, “the fact that [defense counsel] was able to introduce some evidence in support of [Petitioner Stephen’s] theory of defense [by “eliciting testimony from various witnesses”] does not negate [Petitioner Stephen’s] claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.” *Id.*

Third, the state postconviction court’s conclusion focuses on what defense counsel told the jury during his closing argument. But during the trial (and just before closing argument), the state trial court instructed the jury that “what the attorneys say is *not* evidence.” (R-366 – citing page 1579 of the trial transcript) (emphasis added). See *Almeida v. State*, 748 So. 2d 922, 927 (Fla. 1999) (finding closing argument error harmless, in part, because the trial court instructed the jury that “what

the lawyers say is neither evidence nor law”). “The law presumes that the jury has followed all of the trial court’s instructions . . . .” *Garzon v. State*, 939 So. 2d 278, 285 (Fla. 4th DCA 2006). In light of the state trial court’s jury instruction – and absent “evidence” from an accident reconstruction expert that the defense’s theory about the routes taken by the various actors was feasible – it must be presumed that the jury rejected defense counsel’s argument because it was not supported by sufficient evidence.

Fourth – and perhaps most importantly – the feasibility of the defense’s theory (i.e., that Mr. Wallace was driving Petitioner Stephen’s vehicle and Mr. Dalzell followed behind in his vehicle) was dependant upon establishing the *timing* of the routes taken by these men – specifically that Mr. Wallace and Mr. Dalzell left the bar with Petitioner Stephen in Petitioner Stephen’s truck, they went to Mr. Wallace’s house so that Mr. Dalzell could get in his van and then subsequently meet Mr. Wallace – who was driving Petitioner Stephen’s vehicle with Petitioner Stephen in the front passenger seat – at breakfast (Denny’s, which was a location known to both Mr. Wallace and Mr. Dalzell), and, on the way to breakfast, Mr. Wallace, while driving a route that allowed him to check the whereabouts of his wife, struck the victims. At trial, the State argued that it was impossible – from a timing standpoint – for Petitioner Stephen’s theory to be true (i.e., “Mr. Foote, you got it all discombobulated[, y]ou got the timelines all wrong.”).<sup>19</sup> Thus, in order to refute the State’s assertion,

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<sup>19</sup> The state postconviction court’s conclusion that defense counsel effectively presented the timeline to support Petitioner Stephen’s defense during his closing argument is certainly in conflict with the prosecutor’s rebuttal closing argument at trial that defense counsel’s closing argument was “discombobulated” and that he “got the timelines all wrong.” A review of the portions of the closing argument attached to the state postconviction court’s order supports the prosecutor’s conclusion – defense counsel’s closing argument was rambling and difficult to follow (i.e., it was, in fact, “discombobulated”). However, defense counsel’s closing argument would have been effective if it had been based on the evidentiary presentation of a defense accident reconstruction expert.

it was necessary for defense counsel to present a witness (i.e., an accident reconstruction expert) to verify that the timing of the defense's theory matched the other evidence in the case – and specifically the time of night that the victims were struck by the vehicle. As explained in Petitioner Stephen's state postconviction pleadings, an accident reconstruction expert would have been able to explain the timing of the route(s) proposed by the State and the route(s) proposed by the defense – with information/diagrams regarding stop lights and testimony regarding test routes that were driven at the time of day in question – and, based on this analysis, the expert would have confirmed that the route(s) proposed by the defense could be driven within the relevant timeframe – thereby refuting the State's assertion that the defense's theory was impossible. Absent this testimony, defense counsel could not effectively present the defense's theory of events (or respond to the State's contention that the theory was not viable).

In support of his argument, Petitioner Stephen relies on *Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014). In *Wood*, the defendant argued that his attorney was ineffective for failing to present an accident reconstruction expert during his DUI manslaughter trial. The postconviction court, however, summarily denied this claim without first holding an evidentiary hearing. On appeal, the state appellate court reversed the postconviction court's order and remanded the claim for an evidentiary hearing:

On appeal, Appellant asserts that the trial court erred in summarily denying Ground One of his postconviction motion, as the record did not conclusively refute his claim that his trial counsel was ineffective for failing to retain and present an independent accident reconstruction expert. We express no opinion as to the merits of Appellant's claim, but find that Appellant has alleged a facially sufficient claim under Ground One. We agree with Appellant that the record before us does not conclusively refute this claim. Accordingly, we reverse and remand for an evidentiary hearing on this issue. *See Brantley v. State*, 912 So. 2d 342, 343 (Fla. 3d DCA 2005) (reversing summary denial of a rule 3.850 motion and remanding for an evidentiary

hearing because “we are obligated to reverse ‘unless the record shows conclusively that the appellant is entitled to no relief . . . .’” (emphasis omitted).

*Wood*, 143 So. 3d at 494.

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). “The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel’s performance was deficient and that the defendant was prejudiced by the deficiency.” *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland*, 466 U.S. at 687).

Applying the *Strickland* standard to the state court record, defense counsel was ineffective for failing to present an accident reconstruction expert as a defense witness at trial. Counsel’s actions fell below the applicable standard of performance. Absent counsel’s ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel’s ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

The state courts’ rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Stephen’s Sixth Amendment right to the effective assistance of counsel and Confrontation Clause rights. Additionally, the state courts’ rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Petitioner Stephen requests a hearing on this claim. In the context of a federal habeas petition filed pursuant to 28 U.S.C. § 2254(d)(2), federal courts determine whether the state court’s finding was based on “an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” A state court’s determination of the facts shall be “presumed to be correct”

and the habeas petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). *See Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1323, (11th Cir. 2000). However, the statutory presumption of correctness applies only to findings of fact made by the state court, not mixed determinations of law and fact. *See Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir. 1994). More importantly, the presumption of correctness is only applicable for state court findings made after a “full and fair” hearing – a hearing on the merits with both parties present and the findings reduced to writing. *See Alston v. Redman*, 34 F.3d 1237 (3d Cir. 1994). Petitioner Stephen has not received a full, fair, or adequate hearing to resolve his claim– in fact, he has not been afforded *any* hearing. Petitioner Stephen is therefore entitled to an evidentiary hearing on his claim.<sup>20</sup>

28 U.S.C. § 2254 states the following regarding the power of federal courts to order evidentiary hearings in habeas cases:

If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

- (A) the claim relies on
  - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
  - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

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<sup>20</sup> 28 U.S.C. § 2254 states that “a determination of a factual issue made by a State court shall be presumed to be correct” and that “the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” However, in *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998), the Tenth Circuit stated that “this presumption of correctness does not apply. . . if the habeas petitioner did not receive a *full, fair and adequate* hearing in the state court proceeding on the matter sought to be raised in the habeas petition.” (Emphasis added.) *See also Valdez v. Cockrell*, 288 F.3d 702, 703 (5th Cir. 2002) (Dennis, J., dissenting) (stating that the *Miller* court observed, in a post-AEDPA case, that the denial of a full and fair hearing in state court still renders inoperative the statutory presumption of correctness).

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2254(e)(2).

In *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002), the Eleventh Circuit discussed the standard for obtaining an evidentiary hearing:

This provision places a fairly stringent limitation on the power of the federal courts to order evidentiary hearings in habeas cases. Indeed, if a petitioner fails to develop an adequate factual record in the state courts, an evidentiary hearing could only be ordered if one of the two narrow exceptions to the general rule prohibiting such hearings applied.

However, the question of what exactly constitutes a “failure to develop” the factual basis for a claim in state court is one on which we have not spoken. The Supreme Court, however, has addressed this question in a recent opinion, and stated that a petitioner cannot be said to have “failed to develop” relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (*Williams I*). The Court noted that § 2254(e) requires habeas petitioners to be diligent in presenting the factual bases of their federal claims to state courts, and that a failure to do so will result in the denial of an evidentiary hearing in federal court (unless the statute’s other stringent requirements are met). *Id.* However, the Court also pointed out that:

comity is not served by saying a prisoner “has failed to develop the factual basis of a claim” where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by 2254(e)(2).

*Id.*

In the instant case, the record clearly indicates that Breedlove sought an evidentiary hearing on his *Brady* claim at every stage of his state proceedings. The state courts denied him the opportunity to present evidence related to his *Brady* claim; therefore, he was prevented from developing a factual basis for his claim in state court. In light of this fact, § 2254(3)(2) does not preclude an evidentiary hearing in Breedlove’s case.

*Breedlove*, 279 F.3d at 959-60. *See also Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998)

(“We now join every other circuit that has confronted this question and hold that where, as here, a

habeas petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, § 2254(e)(2) does not apply.”).

As in *Breedlove*, the state court denied Petitioner Stephen the opportunity to present evidence related to this claim and therefore Petitioner Stephen was prevented from developing a factual basis for his claim in state court. Hence, Petitioner Stephen is not precluded from an evidentiary hearing in this proceeding and the Court should grant him one.

**Ground 2. Defense counsel rendered ineffective assistance of counsel by failing to present a cellphone tower expert as a defense witness at trial.**

In his state postconviction motion, Petitioner Stephen alleged that defense counsel was ineffective for failing to present a cellphone tower expert as a defense witness at trial. Petitioner Stephen explained the first trial in this case ended in a hung jury/mistrial, and the two main differences between the first trial and the second trial were (1) defense counsel’s failure to introduce during the trial the receipt from the bar (as explained in Ground 4) and (2) cellphone tower witnesses that the State presented during the second trial (Dan Jensen and Youssouf Mohamed). These cellphone tower witnesses relied on a Viador report and attempted to disprove Petitioner Stephen’s assertion that James Wallace was driving the vehicle at the time of the accident by giving theories regarding Mr. Wallace’s location at particular times based on the cellphone tower that Mr. Wallace’s cellphone was hitting (i.e., the State’s witnesses opined that Mr. Wallace’s cellphone was not near the accident site but rather was near Mr. Wallace’s house). However, defense counsel failed to present a cellphone tower expert to refute this testimony. Had defense counsel properly presented a cellphone tower expert to refute the State’s cellphone tower testimony, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.

In the State's response to Petitioner Stephen's state postconviction motion, the State asserted that although defense counsel did not present a cellphone tower expert at trial, defense counsel did retain two experts (Steven Smoot and Heather Diaz) prior to trial and those experts were deposed prior to trial. (R-105). In its order summarily denying this claim, the state postconviction court concluded that neither Mr. Smoot nor Ms. Diaz provided any testimony that would have refuted the State's theory that the cellphone tower records demonstrated that Mr. Wallace was not the individual driving when the accident occurred. (R-384). Respectfully, the state postconviction court's assertion is completely contrary to the statements made by Mr. Smoot and Ms. Diaz during their depositions. For example, during his deposition, Mr. Smoot opined that (1) the 1:09 a.m. call made by Mr. Wallace was "probably closer to the site of the accident" (i.e., was not close to the cellphone tower by Mr. Wallace's house); (2) directional antennas are not always perfect; (3) there was almost a fifty percent chance that the 1:09 a.m. call was placed from a location outside of the range of the cellphone tower by Mr. Wallace's house; (4) it is "not always true" that a cellphone connects to the cellphone tower that is closest in location to the cellphone; and (5) attempts to determine a person's location using cellphone tower triangulation are "very inaccurate." (R-292, 302, 327-328, 340, 348). Similarly, during her deposition, Ms. Diaz opined that: (1) cellphone will connect with a cellphone tower that has the strongest signal – which will not necessarily be the closest tower; (2) the cellphone data being utilized by the State "does not accurately provide location"; (3) the Viador report relied upon by the State is "missing significant what's called test methods for the digital evidence" and thus the report cannot be authenticated; (4) the Viador report relied upon by the State could have been manually fabricated; (5) the Viador report "cannot accurately reflect the location of the cell phone device"; and (6) Sprint has a disclaimer that says "[t]he information is provided from our CDR

archive system, this stored data is not designed as a complete backup, nor is it used to track call activity” and that the information “may not necessarily be complete.” (R-223, 240-242, 259, 263).<sup>21</sup> It is hard to fathom why the state postconviction court thought that the testimony of Mr. Smoot and Ms. Diaz would not have been helpful to Petitioner Stephen. During the second trial, the State introduced witnesses who opined that based on the Viador report, it was their opinion that Mr. Wallace was *not* at the accident scene (as suggested by defense counsel) but rather was at home. *Clearly* it would have been helpful for Petitioner Stephen to discredit the testimony of these State witnesses by presenting defense experts who would have opined that cellphone tower triangulation is “very inaccurate” and the Viador report was incomplete and could not be authenticated (and was possibly even fabricated).

Ultimately the record shows that defense counsel had at his disposal the testimony of experts who would have refuted the State’s cellphone tower testimony. Defense counsel, however, failed to

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<sup>21</sup> The state postconviction court stated that during the trial, defense counsel – on cross-examination – was able to “obtain concessions” from the State’s cellphone tower witnesses. (R-386). As explained in Ground 1, in *Leonard*, 930 So. 2d at 751-752, the state appellate court specifically rejected the reasoning employed by the state postconviction court:

[T]he fact that Leonard was able to introduce some evidence in support of his theory of defense *does not negate his claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.*

(Emphasis added). As in *Leonard*, in the instant case, “the fact that [defense counsel] was able to introduce some evidence in support of [Petitioner Stephen’s] theory of defense [by “obtaining concessions” from the State witnesses] does not negate [Petitioner Stephen’s] claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.” *Id.* Moreover, a comparison of the alleged “concessions” cited by the state postconviction court and the eleven opinions offered by Mr. Smoot and Ms. Diaz during their depositions (listed above) shows that the alleged “concessions” were nowhere near as strong as the eleven opinions offered by Mr. Smoot and Ms. Diaz.

present these experts. Because the state postconviction court refused to hold an evidentiary hearing on this claim, the question of why defense counsel failed to present these experts is unanswered.

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to present a cellphone tower expert as a defense witness at trial. Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Stephen's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Furthermore, the state court denied Petitioner Stephen's claim without affording Petitioner Stephen an evidentiary hearing. For all of the reasons set forth in Ground 1 regarding the failure of a state court to conduct a "full and fair" hearing, Petitioner Stephen submits that he is entitled to a hearing on this issue, as he has not previously been provided a "full and fair" hearing. The Court should hold an evidentiary hearing so that defense counsel can testify and explain why he failed to present Mr. Smoot and Ms. Diaz as witnesses during the trial.<sup>22</sup>

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<sup>22</sup> As stated in footnote 17, a determination as to whether "counsel's decision was tactical or trial strategy [cannot be made] *without first holding an evidentiary hearing.*" *Button*, 941 So. 2d at 533 (emphasis added) (citation omitted). *See also Barnes*, 231 F.3d at 1029 ("Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of *Strickland.*").

**Ground 3. Defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial.**

In his state postconviction motion, Petitioner Stephen alleged that defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial. Petitioner Stephen explained that his vehicle was driven for approximately one mile after the accident. Liquid from the vehicle leaked on the pavement, leaving visual evidence of the path that the vehicle took following the accident. The liquid path is in a straight line. Given Petitioner Stephen's intoxication level, there is no way that he could have driven the vehicle in a straight path – which further proves that James Wallace was driving Petitioner Stephen's vehicle at the time of the accident and then drove the vehicle after the accident to the intersection where he was picked up by Marvin Dalzell in Mr. Dalzell's van (after Mr. Wallace pushed Petitioner Stephen to the driver's side of the vehicle – an altercation observed by Brian Farrow). However, defense counsel failed to present a toxicologist at trial. Had defense counsel presented a toxicologist, the toxicologist would have explained to the jury that given Petitioner Stephen's intoxication level, Petitioner Stephen could *not* have driven the vehicle in a straight line following the accident (and had such an expert been presented, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict).

In its order summarily denying this claim, the state postconviction court stated that “by way of the testimony from defense witness, Corporal Styers, the jury heard, in some form, the same evidence the Defendant now claims, only a toxicologist, could present to the jury. (Exhibit A: Excerpt of Jury Trial Transcript, pp. 1267-1272).” (R-388). A review of pages 1267-1272 of the trial transcript (R-438-443) reveals that Corporal Styers merely told the jury that he observed a liquid trail from the vehicle that was in a relatively straight line. However, Corporal Styers – who is not a

toxicologist – did not give *any testimony* about (1) Petitioner Stephen’s intoxication level or (2) the impact that such an intoxication level would have on a person’s ability to engage in activities, such as driving a vehicle in a straight line. Only a toxicologist (or similarly-qualified expert) could render such an opinion. Thus, contrary to the state postconviction court’s conclusion, the jury did *not* hear “the same evidence” that would be presented by the toxicologist.

In its order denying this claim, the state postconviction court also asserted that there was other evidence presented at trial (i.e., the testimony of Valerie Herbert) that the vehicle in question was being driven in an erratic manner. (R-388). The fact that there is evidence in the record that may be contrary to the assertion that the liquid leaked from the vehicle shows that the vehicle was driven in a straight line is not a basis for denying Petitioner Stephen’s claim; rather, the trial testimony cited by the state postconviction court is another reason that an evidentiary hearing is needed to resolve this claim. An argument similar to the one made by the state postconviction court was considered and rejected by the state appellate court in *Coley v. State*, 74 So. 3d 184 (Fla. 2d DCA 2011). In *Coley*, the defendant filed a rule 3.850 motion based on newly discovered evidence/testimony. The postconviction court denied the claim because the new “testimony was incredible based on its inconsistencies with the trial testimony of other eye witnesses.” *Coley*, 74 So. 3d at 185. The state appellate court reversed the postconviction court’s order, stating:

Gay’s testimony would have supported Coley’s assertion at trial that the State’s witnesses identified the wrong person. Nothing in the attached portions of the trial record would conclusively refute Gay’s assertion that he was present but hidden at the time of the shooting. Furthermore, *while Gay’s credibility may be called into question based on conflict with testimony adduced at trial, such conflict is necessarily an evidentiary matter that must be weighed after a hearing and is not proper grounds for denial at the summary stage of the proceeding. See McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002) (holding that trial court erred in rejecting

newly discovered testimony without evidentiary hearing when affidavit was not inherently incredible or obviously immaterial to defendant's claim).

*Id.* (emphasis added). *See also Rodriguez v. State*, 909 So. 2d 955, 956 (Fla. 3d DCA 2005) (“In point five of the defendant’s sworn Second Motion defendant claims ineffective assistance of trial counsel. He claims that his attorney failed to call several witnesses at trial. He names several witnesses who he claims would testify that they dropped him off near the site of the burglarized vehicle. He maintains they would testify that he never entered the vehicle. This testimony would support the testimony of the defense witness who testified at trial, *and contradict that of the police officer who testified at trial*. As the present record does not conclusively refute the defendant’s claim, we remand for an evidentiary hearing.”) (emphasis added) (citation omitted).

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to present a toxicologist as a defense witness at trial. Counsel’s failure fell below the applicable standard of performance. Absent counsel’s ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel’s ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

The state courts’ rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Stephen’s Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts’ rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Furthermore, the state court denied Petitioner Stephen’s claim without affording Petitioner Stephen an evidentiary hearing. For all of the reasons set forth in Ground 1 regarding the failure of a state court to conduct a “full and fair” hearing, Petitioner Stephen submits that he is entitled to a hearing on this issue, as he has not previously been provided a “full and fair” hearing.

**Ground 4. Defense counsel rendered ineffective assistance of counsel by failing to admit the bar receipt into evidence.**

In his state postconviction motion, Petitioner Stephen alleged that defense counsel was ineffective for failing to admit the bar receipt into evidence (because defense counsel failed to subpoena a witness who could properly authenticate the receipt). As explained in Ground 2 above, the first trial in this case ended in a hung jury/mistrial. One of the main differences between the first trial and the second trial was defense counsel's failure to introduce during the trial the receipt from the bar. The bar receipt shows the time that Petitioner Stephen left the bar (and confirms Petitioner Stephen's timeline and is therefore consistent with Petitioner Stephen's theory that James Wallace was driving Petitioner Stephen's vehicle at the time of the accident). Notably, during the jury's deliberation, the jury asked "what was the time registered on the bar tab" (R-11 – citing page 1721 of the trial transcript), but because defense counsel failed to introduce the bar receipt, the trial court was required to answer the jury's question by saying "all of the evidence that has been entered in this trial is back with you." (R-11 – citing page 1722 of the trial transcript). Had defense counsel properly admitted the bar receipt into evidence (as he did during the first trial), and had the jury been able to view the time on the receipt to see that it was consistent with Petitioner Stephen's theory of events, then there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.

Undersigned counsel notes that a substantial portion of the state postconviction court's order *supports* Petitioner Stephen's claim. In the order, the state postconviction court acknowledged that defense "[c]ounsel attempted to lay the proper predicate to enter the bar receipt into evidence, but failed to do so because Mr. Wallace was unable to properly authenticate the bar receipt." (R-24). As argued in Petitioner Stephen's state postconviction motion – and as confirmed by the state

postconviction court's order – defense counsel *failed* to subpoena a witness who could properly authenticate the receipt.

The state postconviction court concluded in its order that Petitioner Stephen was not prejudiced by defense counsel's failure to introduce the bar receipt into evidence, asserting that (1) defense counsel cross-examined State witnesses in an effort to show what time Petitioner Stephen left the bar and (2) defense counsel – during closing arguments – argued the “timeline of events.” (R-25-26).

Regarding defense counsel's alleged cross-examination of State witnesses, the state postconviction court stated:

However, the record reflects that counsel for the Defendant was able to elicit testimony from other witnesses concerning the time that the Defendant left the bar. Specifically, during the cross-examination of Mr. Wallace, counsel for the Defendant asked Mr. Wallace whether they left the bar “*around quarter to 1:00 or so,*” to which Mr. Wallace responded “Yes.” (Exhibit B. Excerpt of 2nd Jury Trial Transcript, pg. 791). Counsel went on to question Mr. Wallace about the events that occurred from the time he, the Defendant, and another friend (Marvin Dalzell) left the bar, about the timeframe associated with certain incoming and outgoing phone calls with Mr. Wallace's cell phone, as well as about the time that he claimed he found out about the accident. *Id.* at 820-29. Additionally, during the cross-examination and recross examination of another witness, Mr. Dalzell, counsel *asked questions* of this witness to establish the exact time that he (Mr. Dalzell), Mr. Wallace, and the Defendant left the bar. *Id.* at 1040-43; 1074-77. It is clear that counsel *posed these questions* to both of these witnesses *in an effort* [to] pin down a timeline that would have supported the defense's theory that Mr. Wallace, and not the Defendant, was the one who was driving the vehicle when the accident occurred. Indeed, by eliciting testimony from witnesses concerning the time that the Defendant and his friends left the bar, counsel was able to do exactly what the Defendant claims this bar receipt would have done, which is to establish a timeline to support the defense's theory that Mr. Wallace, and not the Defendant, was driving the vehicle at the time of the accident.

(R-25) (emphasis added). However, a review of the portions of the trial transcript attached to the state postconviction court's order establishes that defense counsel was *not successful* – through cross-examination – in establishing the exact time that Petitioner Stephen left the bar. On page 791

of the trial transcripts, Mr. Wallace said that the group left the bar “around quarter to 1:00 or so.” (R-44). The state postconviction court cited pages 820-829 of the trial transcript, but those pages have nothing to do with the time that the group left the bar. (R-48-57). On page 1041 of the trial transcript, Mr. Dalzell “[g]uesstimated” that the group left the bar at “around 11:45, 12:00” (R-62); on page 1042 of the trial transcript, he again said the group left the bar around midnight (R-63); and then on page 1074 of the trial transcript, he said that the group left the bar at 12:45. (R-65). While defense counsel may have attempted to “pin down” the time that the group left the bar by asking these questions of the witnesses, defense counsel was only able to establish an approximate time – whereas the bar receipt would have established the *exact* time.

Regarding defense counsel’s closing argument, the state postconviction court cited an excerpt of defense counsel’s closing argument (R-25-26), but nowhere in the passage quoted by the state postconviction court did defense counsel even mention the time that the group left the bar. Moreover, as explained above, during the trial (and just before closing argument), the state trial court instructed the jury that “what the attorneys say is *not* evidence.” (R-366 – citing page 1579 of the trial transcript) (emphasis added). *See Almeida v. State*, 748 So. 2d 922, 927 (Fla. 1999) (finding closing argument error harmless, in part, because the trial court instructed the jury that “what the lawyers say is neither evidence nor law”).

Most importantly, in denying this claim, the state postconviction court overlooked Petitioner Stephen’s argument in his state postconviction motion about the jury’s *specific question* during its deliberation. During the jury’s deliberation, the jury asked “*what was the time registered on the bar tab.*” (R-11 – citing page 1721 of the trial transcript). Clearly the jury wanted to know the *exact time* the group left the bar (presumably because defense counsel was unable to establish the exact

time by questioning the witnesses – as pointed out above – and defense counsel failed to take the proper steps to introduce the bar receipt).<sup>23</sup> Because defense counsel failed to introduce the bar receipt, the state trial court was required to answer the jury’s question by saying “all of the evidence that has been entered in this trial is back with you.” (R-11 – citing page 1722 of the trial transcript). Had defense counsel properly admitted the bar receipt into evidence (as he did during the first trial), and had the jury been able to view the time on the receipt to see that it was consistent with Petitioner Stephen’s theory of events, then there is a reasonable probability that the result of the trial would have been something other than a guilty verdict (especially since the bar receipt was introduced into evidence during the first trial and the first trial did *not* result in a guilty verdict).

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to admit the bar receipt into evidence. Counsel’s failure fell below the applicable standard of performance. Absent counsel’s ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel’s ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

The state courts’ rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Stephen’s Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts’ rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

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<sup>23</sup> The “exact” timeframes matter in this case, because the difference of a minute or two can confirm or refute the parties’ conflicting theories of the case. In fact, the state postconviction court’s citation to defense counsel’s closing argument confirms the importance of the exact timing of events. (R-25) (“So this whole case comes down to pretty much one thing. At 1:09 both the State and the Defense agree that that is the time these two young people lost their lives.”) (emphasis added). The jury’s question during deliberations establishes that the jury needed to know the “exact” timeframes of events.

Furthermore, the state court denied Petitioner Stephen's claim without affording Petitioner Stephen an evidentiary hearing. For all of the reasons set forth in Ground 1 regarding the failure of a state court to conduct a "full and fair" hearing, Petitioner Stephen submits that he is entitled to a hearing on this issue, as he has not previously been provided a "full and fair" hearing.

**Ground 5. Defense counsel rendered ineffective assistance of counsel by failing to obtain a protective order for witness Kara Wallace's cellphone texts.**

In his state postconviction motion, Petitioner Stephen alleged that defense counsel rendered ineffective assistance by failing to obtain a protective order for witness Kara Wallace's cellphone texts. Petitioner Stephen explained that during the trial, defense counsel moved for a mistrial because State witness Kara Wallace violated the rule of sequestration by texting – during her testimony (in front of the jury while she was on the witness stand) – with her husband James Wallace, who was also a State witness. The state trial court denied the motion for mistrial and stated that defense counsel had to provide the trial court with proof that Mrs. Wallace was, in fact, discussing the substance of testimony when she was texting with Mr. Wallace.

Following the trial, the matter was again addressed – first during a hearing on June 29, 2010, and then again during a hearing on August 3, 2010. During these hearings, the state trial court indicated that if defense counsel provided the state trial court with a protective order directed towards Mrs. Wallace's cellphone, the state trial court would sign the order (so that the text messages would be preserved, thereby allowing defense counsel to obtain the text messages from Mrs. Wallace's cellphone carrier). However, defense counsel failed to present the protective order to the state trial court (i.e., although defense counsel filed a motion, defense counsel failed to follow through and get a signed protective order). Defense counsel was ineffective for failing to obtain the signed protective

order (and failing to subsequently get access to Mrs. Wallace's cellphone texts). Had defense counsel obtained the protective order (and then the texts), defense counsel would have been able to prove that Mrs. Wallace did, in fact, violate the rule of sequestration by discussing the substance of her testimony in her texts with her husband (i.e., but for defense counsel's ineffectiveness, the state trial court would have granted a post-trial motion for new trial based on new evidence).<sup>24</sup>

Thus, for the reasons set forth above, defense counsel was ineffective for failing to obtain a protective order for Ms. Wallace's cellphone texts. Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Stephen's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Furthermore, the state court denied Petitioner Stephen's claim without affording Petitioner Stephen an evidentiary hearing. For all of the reasons set forth in Ground 1 regarding the failure of a state court to conduct a "full and fair" hearing, Petitioner Stephen submits that he is entitled to a hearing on this issue, as he has not previously been provided a "full and fair" hearing.

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<sup>24</sup> In its order summarily denying this claim, the state postconviction court acknowledged that the record does not establish that defense counsel ever obtained the protective order. (R-27) ("[T]he court would agree that there is no indication in the record whether counsel ever provided the Court with [a protective] order . . .").

**Ground 6. The state trial court erred by denying Petitioner Stephen's motion to suppress.**

On direct appeal, Petitioner Stephen alleged that the state trial court erred by denying his motion to suppress. Prior to trial, Petitioner Stephen filed a motion to suppress his truck and all evidence obtained from the truck. (DA1-115).<sup>25</sup> In the motion, Petitioner Stephen alleged the following:

7. Subsequently, the vehicle was towed from the scene by Tatum's Towing and Recovery, a private for profit company, by a non law enforcement employee.

8. Although, Florida Highway Patrol maintains an evidence lot at Florida Highway Patrol headquarters in Pasco County, the vehicle was transported to the Tatum's Towing Lot as a matter of convenience, located at 8629 Bolton Avenue, Hudson, Pasco County Florida.

9. Said vehicle remained at Tatum's Towing Lot outside of direct control of law enforcement for an undetermined amount of time.

10. While in the care, custody and control of Tatum's Towing, the vehicle was left in an unsecure location, unsupervised by Florida Highway Patrol or any of its officers, which left the vehicle open to tampering, tainting, or planting of evidence.

11. While in the care of Tatum's Towing, said vehicle was tampered with.

12. Specifically, such tampering included the unauthorized and illegal conversion or removal of evidence and personal property, including but not limited to several credit cards, a Magellan Roadmate 360 GPS Satellite Tracking System belonging to Defendant.

13. On a date not known to the Florida Highway Patrol or the Office of the State Attorney, said vehicle arrived at the Florida Highway Patrol evidence yard.

14. On March 30, 2006, after the tampering and the towing of the vehicle to the Florida Highway Patrol evidence lot, the Florida Department of Law Enforcement conducted an investigation on the vehicle at which time they collected a number of items of evidentiary value from within the vehicle, including possible blood, hair, fibers, paint, prints, fabric impressions, photographs and auto parts.

15. The items obtained were collected and submitted to the Florida Department of Law Enforcement (FDLE) for analysis in April 2006 resulting in a report, opinion and testimony of Crime Lab Analysts.

16. Additionally, subsequent to the tampering of the vehicle and the break in the chain of custody, Florida Highway Patrol obtained additional evidence from the

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<sup>25</sup> Petitioner Stephen later filed an amended motion to suppress. (DA2-309).

vehicle, including the crash data retrieval system, which the State of Florida now intends to use in the prosecution of this case.

17. Trooper Frye and State Expert, John Murdoch have both formulated opinions and testimony regarding data retrieved from the Crash Data Retrieval System obtained subsequent to the break in chain of custody and tampering.

18. Furthermore, John Murdoch, the State Expert, did not inspect the vehicle until months after the tampering occurred.

19. On November 9, 2001, Trooper Heather Glennly of the Florida Highway Patrol, at the direction of Lt. Madill, initiated a criminal investigation into the tampering of the vehicle and any evidence contained within, report number FHPC060FF032956.

20. Said criminal investigation focused on two employees of Tatum's Towing, including employees who removed the vehicle from the crime scene.

21. The Florida Highway Patrol officially concluded that the 2001 Chevrolet Silverado 1500 involved in this case was in fact tampered with prior to the photographing or collecting of any evidence by Florida Highway Patrol, such tampering included the unauthorized and illegal conversion or removal of evidence and personal property, including but not limited to several credit cards, a Magellan Roadmate 360 GPS belonging to Defendant, Shannon Stephen.

22. Said actions, tainting the chain of evidence and the preservation of said evidence call into question the legitimacy of any evidence obtained from said vehicle.

23. The introduction of any evidence obtained after the tainting and tampering violate the Defendant's right to due process.

24. Furthermore, the actions of the Florida Highway Patrol and its agents violate the Defendant's rights under both the Florida and the United States Constitution.

(DA2-310-11).

Several hearings were held on Petitioner Stephen's motion to suppress. (SR2-461, SR3-636, SR4-797, SR6-1183). During the hearings, it was confirmed that during the time that the vehicle was in the custody of Tatum's Towing, the vehicle was tampered with (i.e., someone took items from the truck, including credit cards and a GPS device). It was further established that law enforcement officials initiated a criminal investigation into the tampering that had occurred. However, despite this unrefuted evidence, the state trial court nevertheless denied Petitioner Stephen's motion to

suppress. (DA1-192).<sup>26</sup> For the reasons expressed below, Petitioner Stephen submits that the state trial court erred by denying the motion to suppress.

In support of his argument, Petitioner Stephen relies on *Murray v. State*, 838 So. 2d 1073 (Fla. 2002). In *Murray*, the Florida Supreme Court stated the following:

In reviewing these claims, we start with the basic legal principle that “[r]elevant physical evidence is admissible unless there is an indication of probable tampering.” *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980); *see also Dodd v. State*, 537 So. 2d 626 (Fla. 3d DCA 1988). In seeking to exclude certain evidence, Murray bears the initial burden of demonstrating the probability of tampering.[FN8] Once this burden has been met, the burden shifts to the proponent of the evidence *to submit evidence that tampering did not occur*.[FN9]

Murray contends that the evidence from the victim’s body should have been excluded because it was tampered with or altered. The police claimed to have recovered only two hairs from the victim’s body, whereas the expert with the FBI who conducted the tests stated that he received and tested several hairs. Murray challenges this apparent discrepancy.

In support of his claim, Murray points to the portion of the record where Detective Chase testified that he collected two hairs from the victim’s body, one from her chest and one from her leg. When asked if he counted the number of hairs collected, Chase responded, “I believe it was two hairs but I can’t be positive as far as that goes. I mean I didn’t have a microscope or anything to look at hairs, but I believe there was two.” Chase testified that he placed the hairs in an envelope and then placed the envelope in the property room of the Jacksonville Sheriff’s Office. That evidence was later sent to the FBI for comparison. Joseph DiZinno, the expert at the FBI, testified that he received debris from the victim’s nightgown and hairs from the victim’s body. When asked by defense counsel how many hairs he examined from the victim’s body, DiZinno responded that he examined “several” Caucasian hairs. However, he stated that the FBI “doesn’t count hairs so . . . there could be as few as five and as many as twenty-one” hairs.

We find that Murray did not overcome his initial burden in demonstrating the probability of evidence tampering relative to the hairs collected from the body. Neither the officer who collected the hairs nor the analyst who received the hairs was sure as to the exact number of hairs at issue. Chase thought he collected only two but stated that he was not positive. DiZinno, on the other hand, acknowledged that

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<sup>26</sup> In denying the motion, the state trial court concluded that there was no evidence that any tampering occurred regarding the specific items/parts from the vehicle that the State intended to rely on at trial (i.e., the “crash data recorder” obtained from the vehicle and the damage that occurred to the front of the vehicle).

because he does not count hairs, he could not give an exact figure as to how many hairs he received. Murray's allegations amount to mere speculation, and hence the trial court did not commit error in admitting the hairs into evidence.

Murray also argues that the test results on hairs recovered from the victim's nightgown should have been excluded because of questions concerning the bag in which the nightgown had been placed. According to the record on appeal, a bag of evidence initially contained a nightgown and a bottle of lotion when it was sealed, but when the bag was received by the FDLE, the lotion bottle was missing. Specifically, Officer Laforte testified that he collected a bottle of hand lotion and a nightgown from the same location and placed them both in the same bag in order to keep them together. The bag containing the nightgown and lotion was given to FDLE for processing. Ms. Warniment, an analyst with the FDLE, received six sealed bags to perform trace evidence recovery on the items, one of which contained a white tube-top garment which was described as a nightgown. Despite the fact that the sealed bag had no indications that it previously had been opened, it did not contain the bottle of lotion. This discrepancy was never explained.

In reviewing the testimony of Officer Laforte and Ms. Warniment, we find that the defendant carried his burden in demonstrating the probability of evidence tampering. Laforte clearly remembered placing both the bottle of lotion and the nightgown in the same bag and specifically did so in order to keep them together. The analyst who received the sealed bag, however, stated unequivocally that although the bag had not been previously opened, it no longer contained the lotion and further she never received the lotion. *We find that based on this obvious discrepancy, the defendant has met his burden of showing the probability of evidence tampering, and hence the burden shifted to the State to explain the discrepancy or to submit evidence that tampering did not occur. As the State failed to meet its burden, the trial court erred in finding the challenged evidence admissible.*

[FN8. *State v. Taplis*, 684 So. 2d 214, 215 (Fla. 5th DCA 1996) (“[T]he burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability). . . .”)]

[FN9. *Taplis v. State*, 703 So. 2d 453, 454 (Fla. 1997) (“[O]nce evidence of tampering is produced, the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur.”). *See also Dodd v. State*, 537 So. 2d 626 (Fla. 3d DCA 1988).]

*Murray*, 838 So. 2d at 1082-83 (emphasis added) (some footnotes omitted).

Pursuant to *Murray*, the state trial court in the instant case erred by denying Petitioner Stephen's motion to suppress. The record is unrefuted that the vehicle was tampered with. Therefore, Petitioner Stephen met his burden of showing the probability of evidence tampering, and

hence the burden shifted to the State *to submit evidence that tampering did not occur*. As the State failed to meet its burden (i.e., the State did not present any evidence refuting the contention that the vehicle had been tampered with), the state trial court erred in allowing the State to introduce any evidence relating to the vehicle.<sup>27</sup>

Accordingly, the state trial court erred by denying Petitioner Stephen's motion to suppress. The state trial court's ruling and the state appellate court's affirmance were contrary to and an unreasonable application of Petitioner Stephen's constitutional due process rights. Moreover, the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the proceeding.

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<sup>27</sup> As argued by defense counsel during the state court proceedings, once it was established that the vehicle was tampered with, the trial court erred by allowing the State to "excise portions" of the vehicle and introduce those portions as evidence:

Our motion to suppress was to suppress this particular Chevrolet. . . . It was listed as an item of evidence by the Florida Highway Patrol on its evidence docket sheet. That is the evidence we move to suppress in our motion.

It's been inferred, although not pled, but inferred by the State's presentation to the Court that they would like to excise portions of that piece of evidence we're moving to suppress.

And we had spoke about this on previous occasions, we brought up a unique point in the law – or a un – I guess, investigated area of the law. But the issue here is somehow – the State's position is that it can now either autopsy or break apart this one single piece of evidence to take out what they believe is relevant to prove their case.

. . . .  
. . . [W]e're asking the Court to find that this piece of evidence, as listed and taken into property by The Florida Highway Patrol, not only was it tampered with, as it was testified, it was a separate criminal investigation regarding that – and in abundance of caution, that vehicle – that piece of evidence has been tampered with and should be suppressed.

(SR4-836-37, 844-45).

**Ground 7. The cumulative effect of the errors in this case deprived Petitioner Stephen of a fair trial.**

In his state postconviction motion, Petitioner Stephen alleged that he is entitled to relief based on the cumulative error in this case. All of the errors committed in Petitioner Stephen's case, considered either individually or together, resulted in Petitioner Stephen being denied a fair trial. "Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel's errors and omissions." *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). *See also Cargle v. Mullin*, 317 F.3d 1196, 1206-1207 (10th Cir. 2003).

13. If any of the grounds listed in 12 were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

The grounds raised in this petition were properly presented in state court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes () No ()

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

a. At preliminary hearing: N/A

b. At arraignment and plea: N/A

c. At trial: Ken Foote, PO Box 2285, New Port Richey, Florida, 32601

d. At sentencing: Mr. Foote

e. On appeal: undersigned counsel

f. In any postconviction proceeding: undersigned counsel

g. On appeal from any adverse ruling in a post-conviction proceeding: undersigned counsel

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16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes () No ()

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes () No ()

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition: Petitioner Stephen's convictions and sentence became final on March 23, 2015 – the final day that he could have appealed following the amended judgment being rendered. The one-year limitations period was tolled on November 24, 2015, when Petitioner Stephen filed his rule 3.850 motion. The limitations period remained tolled until the date that the appellate court issued the postconviction mandate (January 28, 2020).

Wherefore, Petitioner Stephen prays that the Court will grant him the relief to which he is entitled in this proceeding.

**Oath**

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed March 27, 2020:

/s/ Michael Ufferman on behalf of Shannon Stephen.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished

to:

Office of the Attorney General  
Concourse Center 4  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Email: crimaptpa@myfloridalegal.com

by email delivery on March 27, 2020;

Mark S. Inch, Secretary  
Florida Department of Corrections  
501 South Calhoun Street  
Tallahassee, Florida 32399-2500

by U.S. mail delivery on March 27, 2020.

Respectfully submitted,

/s/ Michael Ufferman

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