

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHANNON STEPHEN,
Petitioner,

CASE NO. 8:20-cv-727-T-33CPT

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

AMENDED RESPONSE TO HABEAS PETITION¹

Respondent, SECRETARY, DEPARTMENT OF CORRECTIONS, responds to the petition for writ of habeas corpus under 28 U.S.C. § 2254.

Petitioner is in the custody of the Department of Corrections serving sentences for state court convictions. Ex. 1. A jury found Petitioner guilty of two counts of DUI manslaughter and one count of leaving the scene of a crash involving death. Ex. 14. The trial court sentenced Petitioner to 15 years on each DUI manslaughter count and 5 years on the leaving the scene count. Ex. 19. All sentences were run consecutively for a total of 35 years. Ex. 19. Petitioner appealed. Ex. 21. The state appellate court affirmed the convictions and sentences but remanded for a ministerial correction on costs. Ex. 26; Ex. 28. Petitioner attacked his convictions and sentences on post-conviction in state court. Petitioner then filed a federal habeas petition and attacked the state court judgment in this case. D.E. 4-1. The Court ordered the Secretary to respond. D.E. 4.

¹ The Secretary supplements his response to ground six of the petition. A party may amend a pleading once as a matter of course within 21 days after serving it. Fed. R. Civ. P. 15(a)(1)(A). Fed. R. Civ. P. 15 applies to federal habeas proceedings. *Mayle v. Felix*, 545 U.S. 644, 654 (2005). Pleadings include answers or responses. Fed. R. Civ. P. 7(a). The Secretary filed his response yesterday. D.E. 12.

PROCEDURAL HISTORY

Petitioner was charged with two counts of DUI manslaughter and leaving the scene of a crash involving death. Ex. 6. The case arises from the death of Sarah Gleason and Joseph Swiech in a deadly car crash in Pasco County in 2006. Ex. 3.

Petitioner exercised his right to a jury trial. At trial, Robert Bartlett testified that he and the victims had been drinking at a bar and were walking home. Ex. 58:446-47. The three were walking off of the road. Ex. 58:450, 456. While walking home, Bartlett called a friend to pick them up. Ex. 58:450. Immediately after he made the call, a truck hit them. Ex. 58:451-52. The truck drove away with Swiech underneath and did not stop. Ex. 58:452-53. Gleason and Swiech died. Ex. 58:463. The cause of death was blunt trauma. Ex. 58:566.

Rick Scott and Jim Ramsey, friends of Bartlett, testified that they saw a pickup truck with damage to the front on their way to pick him up. Ex. 58:578, 580-82; Ex. 59:690-91. A man exited the driver's side of the truck and ran to a traffic signal box on the side of the road. Ex. 58:582-84; Ex. 59:692-93. When Scott and Ramsey heard sirens approach, the man hid behind the box and made a telephone call. Ex. 58:584; Ex. 59:692-93. Ramsey saw the man get back into the truck and identified him as Petitioner. Ex. 59:693-94, 713-14.

Scott and Ramsey kept driving and saw the victims lying on the road injured. Ex. 58:585-86; Ex. 59:694-95. Scott and Ramsey returned to the area where the damaged truck was and saw that the truck had moved. Ex. 58:586-87; Ex. 59:695-96. The truck was parked behind a bar. Ex. 58:587; Ex. 59:696. Scott and Ramsey parked behind the truck to block it in. Ex. 58:587; Ex. 59:696. Scott saw Petitioner in the truck. Ex.

58:587-88. Scott and Ramsey both confirmed that Petitioner was the same man whom they saw earlier. Ex. 58:587, 621; Ex. 59:696-97. Scott pulled Petitioner out of the truck and they waited for police to arrive. Ex. 58:592; Ex. 62:710. Petitioner was very intoxicated. Ex. 58:596.

Police took Petitioner into custody. A highway patrol trooper administered a field sobriety test to Petitioner. Ex. 59:650-51; Ex. 61:1097. The trooper concluded that Petitioner was intoxicated. Ex. 61:1103. After waiving his constitutional rights, Petitioner admitted that he had been driving. Ex. 61:1103, 1124. The trooper administered a breath test. Ex. 61:1108. Results showed that Petitioner had a 0.157 and 0.162 blood alcohol content. Ex. 61:1114. Police also administered a blood test. Ex. 59:647-50, 656. Results showed that Petitioner had a 0.238 and 0.240 BAC – three times the legal limit. Ex. 59:664.

Swiech, one of the victims, had a 0.154 BAC and marijuana in his system. Ex. 58:568-69. Gleason, the other victim, also had a 0.095 BAC and marijuana and cocaine in her system. Ex. 58:569-70.

James Wallace and Marvin Dalzell testified that they went to a bar that night with Petitioner. Ex. 59:719; Ex. 61:1019-20. Petitioner drove separately and met them at the bar. Ex. 59:722. Petitioner became intoxicated at the bar. Ex. 59:724; Ex. 61:1021. Wallace decided that it was time to go home. Ex. 59:725. Petitioner did not want to go home, was poking jabs at Wallace and Dalzell, and almost fell on top of a pool table. Ex. 59:725-27; Ex. 61:1023. When they left, Petitioner started urinating outside. Ex. 59:727; Ex. 61:1024. Wallace, Dalzell, and Petitioner went over to Wallace's car and Wallace and Dalzell tried to convince Petitioner to come with them. Ex. 59:727-28; Ex. 61:1026.

Petitioner went to his truck, got in, almost backed over Wallace and Dalzell, tapped a car that was behind him, and drove away. Ex. 59:729-31; Ex. 61:1026-27. Wallace went home, called his wife who was working, and left her a voicemail that he was at home for the night. Ex. 59:732-34.

Dalzell went home with Wallace, got into his car which was parked at Wallace's home, and drove to his own home. Ex. 61:1029-30. On the way home, Dalzell saw Petitioner's truck on the side of the road with damage to the front. Ex. 61:1031. Dalzell called 911 and called Wallace to tell him what happened. Ex. 61:1031-35. Wallace called his wife back and told her what happened. Ex. 59:736. Wallace then came to the scene. Ex. 59:736-37; Ex. 61:1035. Wallace did not speak with police at the scene because he did not want to "rat" out his friend. Ex. 59:737; Ex. 60:829-30. Dalzell did not speak with police at the scene either. Ex. 61:1071, 1072. During the 911 call, Dalzell reported the crash and said that the driver looked drunk but did not identify Petitioner as the driver or say that he had been with Petitioner earlier that night. Ex. 61:1066.

A records custodian and an employee with a mobile telephone company testified about incoming and outgoing calls on Wallace's telephone that night and the location of particular cell site towers used. Ex. 60:868-74, 877; *see also* Ex. 59:733. The employee opined that, on the day of the crash, if someone made a telephone call from the location of the crash, it would have connected with a cell site tower 208. Ex. 60:971; *see also* Ex. 58:578-80. If someone made a telephone call from the location where Wallace lived, it would have connected with a cell site tower 121. Ex. 60:971; *see also* Ex. 59:732. Cell site tower 208 and cell site tower 121 were 4.42 miles apart. Ex. 60:956. Records for Wallace's telephone showed that he made telephone calls at 1:09 A.M. to 1:33 A.M. –

around the time of the crash – which connected to cell site tower 121 – near his home. Ex. 60:972; *see also* Ex. 58:577-78; Ex. 59:733.

An accident reconstructionist reviewed the truck's crash data recorder. Ex. 61:1162, 1167-68, 1177-78. The expert concluded that the car was traveling 47 miles an hour when it hit the victims. Ex. 61:1179-80. The driver did not apply the brakes. Ex. 61:1180. The expert further concluded that the victims were off the road when the car hit them. Ex. 61:1187-88.

The defense presented a case-in-chief. A sergeant with highway patrol testified that she investigated whether items in the truck involved in the crash were stolen when the truck was towed. Ex. 62:1246. Those items included a GPS device. Ex. 62:1246. The sergeant believed that people who worked for the tow truck company stole the device. Ex. 62:1247, 1250. But the sergeant was unable to make any arrests. Ex. 62:1250.

The lead homicide investigator testified that he did not learn about any statements or admissions by Petitioner during his investigation of the homicide. Ex. 62:1267. The investigator normally would include an admission by a suspect in his own final report if the statement was made directly to him. Ex. 62:1260. The investigator would also include an admission by a suspect in his own final report if the statement was included in another officer's report. Ex. 62:1261. The investigator may not have included the admission if another officer only told him about the statement. Ex. 62:1287.

Wallace's wife testified that she did receive a voicemail from Wallace that night. Ex. 62:1307. Wallace told her that he had arrived home. Ex. 62:1307. The defense impeached her with prior inconsistent statements from a deposition and a prior hearing.

Wallace's wife had previously testified that Wallace had called and said that something really important happened – not that he had arrived at home. Ex. 62:1311-12, 1318-19.

A freelance photographer testified that he went to the scene after hearing about the crash on a police scanner. Ex. 62:1356. The photographer saw a van next to a truck and saw two or three men arguing. Ex. 62:1360-61, 1363. The men were pushing and shoving each other. Ex. 62:1371-73. The photographer thought that the men were a couple of drunks fighting after leaving the bar close by. Ex. 62:1373. The photographer drove to where the victims were and then returned back to the van and the truck. Ex. 62:1373-77. The truck had moved next to a club. Ex. 62:1377. The photographer saw another van. Ex. 62:1377. The photographer spoke with Petitioner and videotaped him. Ex. 62:1391, 1393. Petitioner was incoherent, said that he was driving, and then said that he was not driving. Ex. 62:1393.

A patron at the bar testified that he saw Petitioner that night. Ex. 62:1411. Petitioner was drinking and buying shots for people at the bar including the patron's girlfriend. Ex. 62:1412-13; Ex. 63:1417. The patron was outside the bar when Petitioner and his friends left. Ex. 63:1419-20. Petitioner looked drunk. Ex. 63:1421. The patron saw Petitioner's friends help Petitioner get into the passenger side of Petitioner's truck. Ex. 63:1422, 1445. One of the friends got into the driver's side of the truck and the three drove off. Ex. 63:1422.

In the State's case-in-rebuttal, the patron's girlfriend testified. The girlfriend was with the patron at the bar that night. Ex. 63:1514. The next day, the patron and his girlfriend spoke on the telephone about what happened. Ex. 63:1514. The patron told

the girlfriend that Petitioner had got into a fight with some friends, got his keys, left alone in his own car, and had run over and killed two people. Ex. 63:1515.

The jury found Petitioner guilty as charged. Ex. 14. The trial court sentenced Petitioner to 35 years. Ex. 19. Petitioner appealed. Ex. 21.

On direct appeal, Petitioner raised the following issues:

- (1) The trial court erred by denying Petitioner's motion to suppress the car involved in the crash because of tampering;
- (2) The trial court incorrectly imposed a fine.

Ex. 23. The trial court affirmed the convictions and sentences without comment but remanded the case for a ministerial correction of the fine imposed. Ex. 26. The trial court rendered an order amending the judgment. Ex. 28.

After the appeal, Petitioner filed a motion to mitigate his sentence. Ex. 29. The trial court denied the motion. Ex. 31.

Petitioner also filed a motion for post-conviction relief. Ex. 35. In the operative second amended motion, Petitioner raised the following claims:

- (1) Trial counsel was ineffective for failing to present an accident reconstruction expert at trial;
- (2) Trial counsel was ineffective for failing to present a cellphone tower expert at trial;
- (3) Trial counsel was ineffective for failing to present a toxicologist at trial;
- (4) Trial counsel was ineffective for failing to introduce Petitioner's bar receipt into evidence at trial;
- (5) Trial counsel was ineffective for failing to get a protective order for text messages on the cellphone belonging to Wallace's wife;
- (6) Cumulative error.

Ex. 35. The trial court denied claim (4) and claim (5) as refuted by the record. Ex. 36. The trial court ordered the State to respond to claim (1), claim (2), and claim (3). Ex. 36. The trial court reserved ruling on claim (6). Ex. 36.

After the State filed a response, Petitioner filed a reply. In his reply, Petitioner amended and supplemented claim (2):

(2)(a) Trial counsel was ineffective for failing to call Heather Diaz and Steven Smoot at trial because they would have testified that the cell site data could have supported the defense's theory of the case.

Ex. 39. The trial court denied claim (1), claim (2), and claim (3) as refuted by the record.

Ex. 40. The trial court dismissed the amended claim (2) in the reply as untimely and not newly discovered evidence. Ex. 40. Petitioner appealed. Ex. 41.

On appeal, Petitioner raised all claims in his motion. Ex. 43. The state appellate court affirmed without a written opinion. Ex. 44.

Petitioner then filed a petition for writ of habeas court under 28 U.S.C. § 2254 attacking the state court judgment. Petitioner presents seven grounds which include all issues raised on state post-conviction and the suppression issue raised on direct appeal. D.E. 4-1.

TIMELINESS

The petition is timely. A one-year statute of limitations applies to federal habeas petitions attacking state court judgments. 28 U.S.C. § 2244(d)(1). The limitations period starts to run when direct appeal concludes or the time to seek direct appeal expires. 28 U.S.C. § 2244(d)(1)(A).

Petitioner appealed his convictions and sentences. Ex. 21. On **October 29, 2014**, the state appellate court affirmed the convictions and sentences without comment but

remanded for ministerial correction of the fine imposed. Ex. 26. The ministerial correction did not affect the finality of the convictions and sentences and did not restart the limitations period. *Chamblee v. Florida*, 905 F.3d 1192, 1197-98 (11th Cir. 2018).

The state supreme court did not have jurisdiction to review the state appellate court's decision because it did not elaborate on any issue other than the fine. Ex. 26; Fla. Const., art. V, §3(b)(3) (“ . . . [m]ay review any decision of a district court of appeal that . . . **expressly and directly** conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” (emphasis added)). This was a clear constitutional bar to higher state court review. *Pugh v. Smith*, 465 F.3d 1295, 1299 (11th Cir. 2006).

Petitioner could only have sought further review in the U.S. Supreme Court. Petitioner had 90 days to do so. U.S. Sup. Ct. R. 13(1). Petitioner did not do so. The limitations period started to run when the time to seek that review expired – or **January 27, 2015**.

Properly filed applications for post-conviction or collateral review in state court toll the limitations period. 28 U.S.C. § 2244(d)(2). If the state court denies the post-conviction motion and the petitioner appeals, tolling continues until mandate issues on appeal. *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000). If the petitioner does not appeal, tolling continues until the time to appeal expires. *Cramer v. Sec’y, Dep’t Corrs.*, 461 F.3d 1380, 1383-84 (11th Cir. 2006).

After direct appeal, on **February 2, 2015**, Petitioner properly filed a motion to mitigate his sentence under Fla. R. Crim. P. 3.800(c). Ex. 29. The motion tolled the limitations period. *Rogers v. Sec’y, Dep’t Corrs.*, 855 F.3d 1274, 1275 (11th Cir. 2017).

At that point, **6 days** had run on the limitations period. On **March 10, 2015**, the trial court denied the motion. Ex. 31. Petitioner did not have a right to appeal the order. *Spaulding v. State*, 93 So. 3d 473, 474 (Fla. 2d DCA 2012). The limitations period started to run again on the date that the trial court denied the motion.

On **November 24, 2015**, Petitioner properly filed a motion for post-conviction relief. Ex. 32. The motion tolled the limitations period. At that point, another **259 days** had run on the limitations period. The trial court denied the motion. Ex. 36; Ex. 40. Petitioner appealed. Ex. 41. The state appellate court affirmed. Ex. 44. Mandate issued on **January 28, 2020**. Ex. 47. The limitations period started to run again on that date. *Nyland*, 216 F.3d at 1267.

On **March 27, 2020**, Petitioner filed the federal habeas petition. Because **41 days** remained on the one-year limitations period, the petition was timely filed.

FACIAL SUFFICIENCY

The petition is facially insufficient. A federal habeas petition must be signed and verified under penalty of perjury by the petitioner or a person authorized to sign it for the petition under 28 U.S.C. § 2244. Rule 2(c)(5), Rules Governing § 2254 Cases. The petition is not signed and verified by Petitioner. The petition is signed by Petitioner's counsel. D.E. 4-1:45.

Under section 2244, a petition may be signed by “someone acting in [the petitioner’s] behalf”. 28 U.S.C. § 2244. This codified the practice of “next friend” petitions. *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978). And while an attorney can certainly be a “next friend”, the “next friend” has the burden to provide some reason or explanation why the petitioner did not sign and verify the petition. *Weber*, 570 F.2d

at 513-14; *see also Minerva v. Singletary*, 4 F.3d 938, 939 (11th Cir. 1993) (requiring a showing that the petitioner is suffering from mental disease, disorder, or defect that substantially affects his capacity to make intelligent decisions); *see also Ford v. Haley*, 195 F.3d 603, 624 (11th Cir. 1999); *Evans v. Bennett*, 467 F. Supp. 1108 (S.D. Ala. 1979).

Petitioner's counsel does not provide any reason why Petitioner did not sign and verify the petition. Petitioner himself should declare under penalty of perjury that the facts in the petition are true and correct before the case proceeds any further. If the case goes to an evidentiary hearing, the Secretary should be able to use the petition to cross-examine Petitioner.

MERITS AND EXHAUSTION

I. GROUND ONE

In ground one, Petitioner claims that trial counsel was ineffective for failing to present an accident reconstruction expert as a witness at trial. D.E. 4-1:16-25. Petitioner alleges that his defense at trial was that Wallace was driving the car at the time of the crash. D.E. 4-1:16. The only way that Petitioner could have presented the defense was by having an accident reconstruction expert explain the timeframes involved, the routes driven by all parties, and the cellphone data from each party. D.E. 4-1:16-17. On post-conviction, Petitioner had retained two experts who conducted that analysis. D.E. 4-1:18. Petitioner claims that, but for trial counsel's failure to present testimony by those experts, the outcome at trial would have been different. D.E. 4-1:18.

Before raising a federal claim on federal habeas, a petitioner must have exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). The petitioner must have fairly presented the federal claim to the state court and given the state court an

opportunity to correct any federal constitutional violation. *Raleigh v. Sec’y, Fla. Dep’t Corrs.*, 827 F.3d 938, 956-57 (11th Cir. 2016).

The petitioner must have done more than just present all the relevant facts. The petitioner must have alerted the state court to the federal nature of the claim by citing the federal source of law or by simply labeling the claim federal. *Lucas v. Sec’y, Dep’t Corrs.*, 682 F.3d 1342, 1351-52 (11th Cir. 2012). The petitioner must also have given the state court one full opportunity to resolve the claim by invoking one complete round of the state’s established appellate review process. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010).

Petitioner exhausted ground one. In his post-conviction motion, Petitioner raised the ineffective assistance of counsel claim based on the accident reconstruction expert and cited the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). Ex. 35:5-7 (ground one). In his brief on appeal, Petitioner did the same. Ex. 43:5 n.2, 6-14 (issue (a)). The state appellate court affirmed without a written opinion. Ex. 44. The state supreme court did not have jurisdiction to review the unelaborated decision. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Petitioner fairly presented the federal claim to the state court and invoked one complete round of the state’s established appellate review process. *Lucas*, 682 F.3d at 1351-52; *Mason*, 605 F.3d at 1119.

Ground one should still be denied on the merits. On federal habeas, if the state court adjudicated the claim on the merits, the petitioner must show that the adjudication was (1) contrary to or an unreasonable application of clearly established federal law as interpreted by the U.S. Supreme Court or (2) was based on an unreasonable determination of facts in light of the state court record. 28 U.S.C. § 2254(d).

The federal court looks to the highest state court to adjudicate the claim. *Marshall v. Sec’y, Fla. Dep’t Corrs.*, 828 F.3d 1277, 1285 (11th Cir. 2016). If the highest state court affirmed the lower court’s order denying the claim without a written opinion, the federal habeas court looks through the silent decision to the lower court’s order that does provide reasons. *Wilson v. Sellers*, 138 S. Ct. 1188, 1193-94 (2018). The federal habeas court presumes that the higher court adopted those reasons. *Wilson*, 138 S. Ct. at 1192.

The state appellate court silently affirmed the order denying the federal claim in ground one. Ex. 44. This Court looks through that silent decision to the trial court’s order which does provide reasons. Ex. 40:5-7. The trial court denied the claim because Petitioner failed to show prejudice under *Strickland*. Ex. 40:5-7. This was an adjudication on the merits and is owed deference under 28 U.S.C. § 2254(d). *Williams v. Allen*, 598 F.3d 778, 797-98 (11th Cir. 2010).

When reviewing a state court decision for reasonableness under 28 U.S.C. § 2254(d), the federal habeas court does not “flyspeck” or take a magnifying glass to the decision. *Meders v. Warden, Ga. Diag. Prison*, 911 F.3d 1335, 1349-50 (11th Cir. 2019). The federal court does not grade the quality of the decision either. *Id.* The federal court looks to both the bottom line and the reasons. *Id.* at 1349.

This is a highly deferential standard and it is intentionally difficult to meet. *Meders*, 911 F.3d at 1348-49. Error – even clear error – is not enough. *Id.* at 1349. A petitioner must show that the state court’s decision is “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement”. *Id.* at 1349. “[I]f some fairminded jurists could

agree with the state court’s decision, although others might disagree, federal habeas relief must be denied.” *Id.* at 1349.

To prove that counsel was ineffective, a petitioner must show that (1) counsel’s performance was deficient and (2) there is a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. *Strickland*, 460 U.S. at 686, 694. The petitioner must show that counsel’s performance fell below an objective standard of reasonableness. *Id.* at 687-88. Scrutiny of counsel’s performance is highly deferential. *Id.* at 689.

When an ineffective assistance of counsel claim under *Strickland* is reviewed in tandem with 28 U.S.C. § 2254(d) – both which involve highly deferential standards, the review is doubly deferential. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Under this double deference, it is a “rare case” in which an ineffective assistance of counsel claim has merit on federal habeas. *Tharpe v. Warden*, 834 F.3d 1323, 1339 (11th Cir. 2016). This is not that rare case.

In its order, the trial court denied the claim and explained:

. . . The Court finds that [Petitioner] has failed to meet the requirements of *Strickland*; specifically, as it relates to demonstrating that he was prejudiced by counsel’s alleged deficient performance. The Court’s conclusion is based on the fact that the jury was in fact presented with the same evidence [Petitioner] now claims only an expert would have been able to present. Counsel in turn used the testimony elicited, to argue 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.

Ex. 40:5 (citations omitted).

The trial court supported its conclusions with citations to testimony by witnesses at trial. The trial court pointed out that the patron at the bar testified that he saw

Petitioner, Wallace, and Dalzell get into a car together and Petitioner get into the passenger side of the car. Ex. 40:6. Testimony showed what time Petitioner, Wallace, and Dalzell left the bar. Ex. 40:6. The freelance photographer saw two or three men fighting next to a truck and a van. Ex. 40:6.

The trial court concluded that, even though there was no testimony to show that Wallace's first call to his wife occurred at the same time that the victim's friend called 911, an expert was not needed to tie together the above testimony to establish the defense. Ex. 40:6. The defense was able to present evidence that tended to show that Wallace was driving at the time of the crash. Ex. 40:6. The defense was able to present the timeline in closing even without an expert. Ex. 40:6-7. Even though an expert could have provided the jury with "comprehensive diagrams and visuals", the jury heard the evidence and the outcome of trial would not have been different. Ex. 40:7.

The trial court did not unreasonably apply *Strickland*. 28 U.S.C. § 2254(d)(1). Even though the trial court denied the claim based on lack of prejudice only, *Strickland* does not require a court to address both prongs. *Strickland*, 466 U.S. at 697. Because the expert's testimony would have been cumulative to other evidence that was presented at trial, there was no prejudice under *Strickland*. *Parker v. Allen*, 565 F.3d 1258, 1281-83 (11th Cir. 2009).

The trial court also did not unreasonably determine facts. 28 U.S.C. § 2254(d)(2). The trial court's findings are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has the burden to rebut those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner fails to do so.

Even so, trial transcripts cited in the order support the trial court's findings. Ex. 40:5-7. Wallace testified that the three left the bar around 12:45 A.M. or 1:00 A.M. Ex. 59:791. Dalzell testified that the three left the bar around 12:45 A.M. Ex. 61:1040-43, 1420-23. The bar patron testified that he saw Petitioner's two friends place Petitioner into the passenger side of the truck and one of his friends drive off. Ex. 63:1420-23. In closing, the defense argued that it was not a coincidence that Wallace called his wife right at the time of the crash and provided a detailed timeline based on testimony of witnesses and other evidence. Ex. 64:1642-56. Because the findings in the order are supported by the state court record, the trial court did not unreasonably determine facts.

Petitioner challenges the trial court's order for several reasons. Petitioner first argues that prosecutors and the defense routinely present accident experts as witnesses at trial. D.E. 4-1:19. This argument goes to deficient performance – not prejudice. The trial court did not address deficient performance. *Strickland* did not require it to do so. *Strickland*, 466 U.S. at 697. Even so, failure to present expert testimony that is cumulative to other evidence presented at trial is not deficient performance. *Parker*, 565 F.3d at 1281.

Petitioner also argues that presenting testimony from lay witnesses is not the same as presenting testimony from an expert witness. The trial court correctly rejected this argument quoting *Harrington v. Richter*, 562 U.S. 86 (2011). Ex. 40:6 (citing *Anderson v. State*, 220 So. 3d 1133 (Fla. 2017) (quoting *Richter*, 562 U.S. at 111 (“But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.”))). Based on the state court record above, the trial court correctly concluded that the defense was able to

“clearly, concisely, and comprehensively outline the timeline of events” to present its theory that Wallace was driving at the time of the crash and Wallace and Dalzell framed Petitioner. Ex. 40:6-7.

Petitioner also argues that the trial court incorrectly focused on what trial counsel said in closing because the jury is instructed that what attorneys say is not evidence. D.E. 4-1:19-20. But closing argument is an opportunity for the attorneys to review the evidence with the jury and explain inferences which may reasonably drawn from that evidence. *Hildwin v. State*, 84 So. 3d 180, 191 (Fla. 2011). Because trial counsel was able to review the testimony and the records with the jury and present the defense’s theory even without an expert, there was no reasonable probability that the outcome at trial would have been different. *See, e.g., Wright v. Sec’y, Fla. Dep’t Corrs.*, 761 F.3d 1256, 1283-84 (11th Cir. 2014); *Gordon v. Singletary*, 883 F. Supp. 671, 677 (M.D. Fla. 1995).

Petitioner finally argues that, in order to refute the State’s argument in closing that it was impossible for the defense’s theory to be true based on the evidence, it was necessary for the defense to present an expert who could verify that it was possible with the use of diagrams about stop lights and routes. D.E. 4-1:20-21. The state court correctly rejected this argument and concluded that “the use of a visual aid to outline the same facts the jury already heard” would not have changed the outcome of trial. Ex. 40:7. This was also not unreasonable. *Tanzi v. Sec’y, Fla. Dep’t Corrs.*, 772 F.3d 644, 660 (11th Cir. 2014) (explaining that evidence is cumulative even if “it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury” (citation omitted)).

Petitioner claims that he was entitled to an evidentiary hearing. D.E. 4-1:21-22. Because the state court adjudicated Petitioner's claims on the merits, a federal habeas court cannot consider new evidence that was not before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). Petitioner does not claim that the state court unreasonably determined facts and has not presented clear and convincing evidence to rebut the facts on which the adjudication was based. 28 U.S.C. § 2254(e)(1). The record otherwise refutes Petitioner's claim of prejudice. The Court is not required to hold an evidentiary hearing. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

Ground one should be denied.

II. GROUND TWO

In ground two, Petitioner claims that trial counsel was ineffective for failing to present a cellphone tower expert as a witness at trial. D.E. 4-1:25-28. Petitioner alleges that a first trial in the case ended with a hung jury. D.E. 4-1:25. One of the differences in the second trial was the cellphone tower witnesses. D.E. 4-1:25. The witnesses rebutted the defense's theory that Wallace was driving the car during the crash. D.E. 4-1:25. Trial counsel did not present a cellphone tower expert to refute the State's expert. D.E. 4-1:25. Petitioner claims that, if trial counsel had presented a cellphone tower experts Steven Smoot and Heather Diaz at trial, the outcome of trial would have been different. D.E. 4-1:25-28.

Ground two is unexhausted. Petitioner did not fairly present the claim to the state court in a procedurally correct manner. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Cargile v. Sec'y, Dep't Corrs.*, 349 F. App'x 505, 507 (11th Cir. 2009). In the operative post-conviction motion, Petitioner only generally alleged that trial counsel was

ineffective for failing to present a cellphone tower expert. Ex. 35:7-9. Petitioner claimed for the very first time that trial counsel was ineffective for failing to present Smoot and Diaz as experts in an amended reply. Ex. 39. The amended reply was filed after the Court ordered the State to respond. Ex. 36. Leave of court is required to file an amended motion after the entry of that order. Fla. R. Crim. P. 3.850(e). While Petitioner filed for permission to file a reply to the State's response and filed the reply under oath, Petitioner did not move for leave to amend his post-conviction motion. Ex. 39. Petitioner did not fairly present the claim to the state court.

Even so, the claim is procedurally defaulted. If the state court refuses to consider a claim on the merits because the claim was barred by state procedural rules, then a federal habeas court is generally prohibited from reviewing the claim. *Seibert v. Allen*, 455 F.3d 1269, 1271 (11th Cir. 2006). The state procedural ruling provides an adequate and independent ground to deny relief under state law. *Henry v. Warden, Ga. Diag. Prison*, 750 F.3d 1226, 1230 (11th Cir. 2014). The federal habeas court looks to the last state court decision to see if the state court reached the merits. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). If the last state court decision does not address the claim, the federal court looks through to the last reasoned decision. *Ylst*, 501 U.S. at 803. If the last reasoned decision expressly denies the claim on state procedural grounds, the federal court presumes that the later silent decision did not disregard the procedural bar. *Ylst*, 501 U.S. at 803.

The state appellate court silently affirmed the order denying Petitioner's post-conviction motion and dismissing the amended reply. Ex. 44. Looking through that silent decision, the trial court dismissed the claim in the amended reply as untimely. Ex.

40:13-15 (“The Defendant did not file the instant amendment until May 25, 2018, which is well outside the aforementioned two-year time limitation.”). It is presumed that the state appellate court’s silent decision adopted the state procedural bar imposed by the trial court. *Ylst*, 501 U.S. at 803. The bar on untimely post-conviction motions in Florida is an adequate and independent ground to deny relief under state law. *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11th Cir. 1990). The state court also concluded that Petitioner failed to show that newly discovered evidence excused the two-year time limitations under Fla. R. Crim. P. 3.850(b)(1). Ex. 40:14-17. The federal habeas court defers to the state court on this conclusion of state law. *See, e.g., Daniels v. Crews*, 2014 WL 4409877 at *13 (N.D. Fla. Sept. 8, 2014). Petitioner does not challenge it.

Petitioner raises the claim in the amended reply in ground two of his federal habeas petition. D.E. 4-1:27-28 (“Ultimately the record shows that defense counsel had at his disposal the testimony of experts [referring to Smoot and Diaz] who would have refuted the State’s cellphone tower testimony. Defense counsel, however, failed to present these experts.”). Because the state court denied the claim on state procedural grounds, ground two should be denied as procedurally defaulted.

Even if the scope of ground two in the federal habeas petition is the same as the scope of ground two in the operative post-conviction motion without the amended reply, ground two should be denied on the merits. The state appellate court silently affirmed the order denying the federal claim in ground two. Ex. 44. This Court looks through that silent decision to the trial court’s order which does provide reasons. *Wilson*, 138 S. Ct. at 1193-94. The trial court denied the claim because it was refuted by the record. Ex.

40:7-10. This was an adjudication on the merits and is owed deference under 28 U.S.C. § 2254(d). *Williams*, 598 F.3d at 797-98.

The trial court concluded that Smoot's deposition was not filed with the trial court clerk and could not be relied on to conclude that the record refuted Petitioner's claim. Ex. 40:8. This Court defers to the trial court on that state law issue. Ex. 40:8 (citing *Cruz v. State*, 824 So. 2d 291, 293 (Fla. 4th DCA 2002)). Petitioner does not rebut the trial court's finding with clear and convincing evidence and it is presumed correct. 28 U.S.C. § 2254(e)(1). The trial court docket confirms that the finding is correct. Ex. 2. Petitioner still relies on Smoot's deposition in support of his claim on federal habeas. D.E. 4-1:26-27. Petitioner cannot do so because the trial court adjudicated the claim on merits without considering the deposition. Ex. 40:8-10. A federal habeas court cannot consider new evidence that was not properly before the state court. *Pinholster*, 563 U.S. at 181-82; *see also Landers v. Warden, Att'y Gen. of Ala.*, 776 F.3d 1288, 1295 (11th Cir. 2015) (applying rule to claims under 28 U.S.C. § 2254(d)(2)).

The trial court also concluded that Diaz's deposition by itself refuted Petitioner's claim. Ex. 40:8-9. The trial court found that Diaz did not provide any testimony that would have refuted the State's theory that Wallace was not driver during the crash. Ex. 40:8. Diaz only opined on the validity of the cellphone tower report. Ex. 40:8. Diaz opined that the report did not contain all of the information that she would have expected to be present on the report and she was unable to authenticate the information in the report. Ex. 40:9. The trial court cited pages from Diaz's deposition in support of these findings. Ex. 40:8.

Petitioner attempts to rebut the trial court's findings with other excerpts of Diaz's deposition. D.E. 4-1:26-27. Petitioner alleges that Diaz also opined that (1) a cellphone may not connect with the closet tower but rather with the tower that has the strongest signal; (2) the cellphone data in the report did not accurately provide location; (3) the report was missing significant "test methods" for "digital evidence" and could not be authenticated; (4) the report could have been manually fabricated; (5) the report could not accurately reflect the location of a cellphone; (6) the cellphone company provides a disclaimer that stored data is not a complete backup and is not used to track call activity and information may be incomplete. D.E. 4-1:26-27.

Diaz did come to these conclusions in her deposition. Ex. 37:Ex. 2:23-24, 40-42, 59, 63. But the conclusions largely supported the trial court's findings. Diaz did not opine that, based on the cellphone data, Wallace could not have been in the car at the crash. Rather, Diaz only generally opined on the validity of the report and concluded that she was unable to authenticate information in the report. Ex. 40:8-9. Opinions in (3), (4), and (6) were relevant only to authentication of the data. Without more, Petitioner fails to rebut the findings in the order with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

As to the remaining opinions in (1), (2), and (5), the trial court concluded that trial counsel elicited the opinions from the State's expert witnesses on cross-examination. Ex. 40:9. The trial court pointed out that one State expert conceded that (1) he could not give an exact location of a cellphone; (2) the report was not the best tool for geographic location; (3) he could not testify to the exact location of a cellphone from the records; (4) he could not testify even about a general direction from the records. Ex. 40:9. The other

State expert conceded that (1) the report was not the best record to use for geographically locating someone and (2) using GPS is the best way to locate a cellphone. Ex. 40:9-10. These concessions by the State's experts were cumulative to Diaz's opinions. Ex. 40:10; *supra.* at 22. The trial court concluded that trial counsel could not have performed deficiently and Petitioner could not have been prejudiced. Ex. 40:9-10.

By coming to this conclusion, the trial court did not unreasonably apply *Strickland*. 28 U.S.C. § 2254(d)(1); *see also Harrington*, 562 U.S. at 111 (“In many instances cross-examination will be sufficient to expose defects in an expert's presentation.”); *Adams v. Wainwright*, 804 F.2d 1526, 1536 (11th Cir. 1986), *vacated on other grounds*, *Duggers v. Adams*, 489 U.S. 401 (1989). Trial counsel rigorously cross-examined the State's experts. The trial court reasonably concluded that, even if trial counsel had presented testimony by Diaz to testify about the same reasons to doubt the data and the conclusions drawn from the data, the outcome at trial would not have been different. *Strickland*, 466 U.S. at 694.

The trial court also did not unreasonably determine facts. 28 U.S.C. § 2254(d)(2). Trial transcripts confirm that the State's experts did in fact make those concessions on cross-examination at trial. Ex. 60:917, 929-30, 934-37, 981-82.

Petitioner again claims that he is entitled to an evidentiary hearing. D.E. 4-1:28. Because the state court adjudicated Petitioner's claims on the merits, a federal habeas court cannot consider new evidence that was not before the state court. The record otherwise refutes the claim. The Court is not required to hold an evidentiary hearing. *Supra.* at 18.

Ground two should be denied.

III. GROUND THREE

In ground three, Petitioner claims that trial counsel was ineffective for failing to present a toxicologist as a witness at trial. D.E. 4-1:29-31. Petitioner alleges that evidence at trial showed that the car involved in the crash was driven for one mile after the crash. D.E. 4-1:29. Liquid leaked from the car onto the pavement of the road leaving a path of the car. D.E. 4-1:29. The path of the liquid was a straight line. D.E. 4-1:29. A toxicologist would have testified that, in Petitioner's intoxicated state, he could not have driven in a straight path. D.E. 4-1:29. This would have further proven that Wallace – not Petitioner – was driving at the time of the crash. D.E. 4-1:29. Petitioner claims that, with the toxicologist's testimony, there is a reasonable probability that the outcome at trial would have been different. D.E. 4-1:29.

Petitioner exhausted ground three. In his post-conviction motion, Petitioner raised the ineffective assistance of counsel claim based on the toxicologist and cited the Sixth Amendment and *Strickland*. Ex. 35:9-10 (ground three). In his brief on appeal, Petitioner did the same. Ex. 43:5 n.2, 21-26 (issue (c)). The state appellate court affirmed without a written opinion. Ex. 44. The state supreme court did not have jurisdiction to review the unelaborated decision. *Jenkins*, 385 So. 2d at 1359. Petitioner fairly presented the federal claim to the state court and invoked one complete round of the state's established appellate review process. *Lucas*, 682 F.3d at 1351-52; *Mason*, 605 F.3d at 1119.

Ground three should still be denied on the merits. The state appellate court silently affirmed the order denying the federal claim in ground three. Ex. 44. This Court looks through that silent decision to the trial court's order which does provide reasons. *Wilson*, 138 S. Ct. at 1193-94. The trial court denied the claim because Petitioner failed to show

prejudice and the testimony of a toxicologist was too speculative. Ex. 40:12-13. This was an adjudication on the merits and is owed deference under 28 U.S.C. § 2254(d). *Williams*, 598 F.3d at 797-98.

In its order, the trial court denied the claim and explained:

. . . As the State points out, by way of the testimony from defense witness, Corporal Styers, the jury heard, in some form, the same evidence [Petitioner] now claims, only a toxicologist, could present to the jury. It is clear that counsel elicited testimony that was in support of the very claim that [Petitioner] now alleges an expert toxicologist would have testified about during the trial. And, as the State points out, counsel for [Petitioner] relied on this testimony in arguing, during closing arguments, that the straight line of leaked liquid, supported the defense theory that Mr. Wallace was actually the individual driving the vehicle when the accident occurred. Additionally, as the State points out, what [Petitioner] proposes this expert would have been able to testify to and about, is entirely speculative and based on rather attenuated assertions. Furthermore, as the State points out, [Petitioner's] theory about someone sober or less intoxicated than [Petitioner] had to be driving given the evidence of a straight line of leaked liquid is contradicted by other testimony given during the trial from Valerie Herbert. Ms. Herbert testified about the erratic manner in which this driver was driving, so much so that she called 911 to report the driver's behavior. Regardless of whether the driver was [Petitioner], or as he claims, Mr. Wallace, Ms. Herbert's testimony about the manner in which this individual was driving, does not reconcile with [Petitioner's] speculative claim about how the leaked liquid ended up in a straight line.

Ex. 40:12-13 (citations omitted). The trial court's ruling was not unreasonable.

The trial court did not unreasonably apply *Strickland*. 28 U.S.C. § 2254(d)(1). Even though the trial court denied the claim based on lack of prejudice only, *Strickland* does not require a court to address both prongs. *Strickland*, 466 U.S. at 697. Because the toxicologist's testimony would have been cumulative to other evidence that was presented at trial, there was no prejudice under *Strickland*. *Parker*, 565 F.3d at 1281-83. And because Petitioner did not confirm that some expert reviewed the evidence and

would have testified consistently with his allegations, the claim was too speculative to allege prejudice. *Sullivan v. DeLoach*, 459 F.3d 1097, 1109 (11th Cir. 2006); *Morris v. Sec’y, Dep’t Corrs.*, 2010 WL 5330505 at *10 (M.D. Fla. Dec. 21, 2010).

The trial court also did not unreasonably determine facts. 28 U.S.C. § 2254(d)(2). Petitioner claims that the trial court unreasonably determined that the testimony by Corporal Styers was “in some form, the same evidence [Petitioner] now claims, only a toxicologist, could present to the jury”. D.E. 4-1:29-30. Petitioner alleges that Styers did not testify about Petitioner’s intoxication level or the impact of the intoxication level on his ability to drive in a straight line. D.E. 4-1:30. But Styers did testify that he observed the fluid trail and confirmed that the trail was straight. Ex. 62:1267-72. A forensic toxicologist testified at trial that he analyzed Petitioner’s blood when it was drawn after the crash and Petitioner had a 0.238 and 0.240 blood alcohol content – three times the legal limit. Ex. 59:664. A patron at the bar testified that Petitioner’s friends had to help him into the car because he was so drunk. Ex. 59:62:1422, 1445. A highway trooper also testified that Petitioner failed a field sobriety test. Ex. 59:650-51; Ex. 61:1097.

Trial counsel relied on this testimony and reasonable inferences to argue in closing that the straight fluid trail proved that Wallace – not Petitioner – was driving the car during the crash. Ex. 63:1608 (“And he testified, well, the trooper, Trooper Styers, said it was a straight fluid line down there . . .”); Ex. 63:1610-12 (overruling the State’s objection to defense comments based on reasonable inferences that there are certain things that you can and cannot do when your blood alcohol content is three times the legal limit). The trial court did not unreasonably determine that the defense was able to

elicit evidence that a toxicologist would have presented and present that evidence during closing. *See also Tanzi*, 772 F.3d at 660 (broad definition of cumulative on post-conviction).

The trial court did not unreasonably determine that Herbert testified that she saw the same car that was involved in the crash being driven in an erratic manner around the same time of the crash. Trial transcripts confirm that Herbert testified that she saw the same truck, it was driving “completely erratically”, and there was only one person in the car. Ex. 58:523-28.

The trial court also did not unreasonably determine that Petitioner’s claim was speculative. In his post-conviction motion, Petitioner did not allege that an expert reviewed the evidence and confirmed that he would testify in the manner in which Petitioner alleged. Ex. 35:9-10.²

Lastly, Petitioner claims that the fact that Herbert testified that the car was driving erratically did not refute his claim. Petitioner argues that instead it provided a reason why an evidentiary hearing was necessary to resolve the claim. D.E. 4-1:30. But there was no factual dispute that Styers observed that the fluid trail was straight. There was also no factual dispute that Herbert observed the car involved in the crash driving erratically. There were no factual disputes for the trial court to resolve at an evidentiary hearing.

² Although the state supreme court held that the state rules of criminal procedure do not require a defendant to identify a particular expert in support of this type of claim, the court still explained that the claim must allege “facts supporting why an expert should have been called, what the expert could have testified to, and the prejudice resulting from the failure to present such a witness”. *State v. Lucas*, 183 So. 3d 1027, 1033 (Fla. 2016).

The trial court correctly concluded that the toxicologist's testimony would not have been as probative as Petitioner claimed. Even if the fluid trail was straight, Herbert observed an individual driving the car involved in the crash in an erratic manner around the same time of the crash. While the straight fluid trail could tend to prove that the driver drove in a straight line, Herbert's testimony tended to prove that the driver was not driving in a straight line. Herbert's testimony would have significantly undercut the probative value of the toxicologist's conclusions. If a toxicologist had testified in the manner that Petitioner alleged, the outcome at trial still would not have been different. *Strickland*, 466 U.S. at 694.

Petitioner again claims that he is entitled to an evidentiary hearing. D.E. 4-1:31. Because the state court adjudicated Petitioner's claims on the merits, a federal habeas court cannot consider new evidence that was not before the state court. The record otherwise refutes the claim. The Court is not required to hold an evidentiary hearing. *Supra*. at 18.

Ground three should be denied.

IV. GROUND FOUR

In ground four, Petitioner claims that trial counsel was ineffective for failing to introduce a bar receipt into evidence at trial. D.E. 4-1:32-36. Petitioner alleges that trial counsel introduced the bar receipt into evidence at Petitioner's first trial. D.E. 4-1:32. That first trial ended in a hung jury. D.E. 4-1:32. Trial counsel did not do the same in the second trial. D.E. 4-1:32. The bar receipt would have shown what time Petitioner left the bar. D.E. 4-1:32. During deliberation in the second trial, the jury asked for the time on the bar receipt. D.E. 4-1:32. The trial court told the jury that all the evidence

had been provided to it. D.E. 4-1:32. Petitioner claims that, if trial counsel had introduced the bar receipt, there is a reasonable probability that the outcome at trial would have been different. D.E. 4-1:32.

Petitioner exhausted ground four. In his post-conviction motion, Petitioner raised the ineffective assistance of counsel claim based on the bar receipt and cited the Sixth Amendment and *Strickland*. Ex. 35:11-12 (ground four). In his brief on appeal, Petitioner did the same. Ex. 43:5 n.2, 26-31 (issue (d)). The state appellate court affirmed without a written opinion. Ex. 44. The state supreme court did not have jurisdiction to review the unelaborated decision. *Jenkins*, 385 So. 2d at 1359. Petitioner fairly presented the federal claim to the state court and invoked one complete round of the state's established appellate review process. *Lucas*, 682 F.3d at 1351-52; *Mason*, 605 F.3d at 1119.

Ground four should still be denied on the merits. The state appellate court silently affirmed the order denying the federal claim in ground four. Ex. 44. This Court looks through that silent decision to the trial court's order which does provide reasons. *Wilson*, 138 S. Ct. at 1193-94. The trial court denied the claim because the record refuted the claim. Ex. 36:5-9. This was an adjudication on the merits and is owed deference under 28 U.S.C. § 2254(d). *Williams*, 598 F.3d at 797-98.

In its order, the trial court explained that trial counsel did try to introduce the receipt at trial but could not lay a predicate. Ex. 36:6-7. The trial court quoted an excerpt of the trial transcripts which showed that trial counsel showed Wallace the receipt. Ex. 36:6. Wallace testified that he did not remember seeing the receipt and only remembered seeing Petitioner sign the receipt. Ex. 36:6-7. The trial court concluded that trial counsel

could not be ineffective for failing to do something that he tried to do. Ex. 36:7. The trial court further explained that, even though Petitioner in part claimed that trial counsel was ineffective for failing to subpoena an individual who could authenticate the receipt, Petitioner failed to identify the witness whom trial counsel should have been subpoenaed. Ex. 36:7.

The trial court also explained that trial counsel elicited from other witnesses including Wallace and Dalzell the time that the three left the bar. Ex. 36:8. Trial counsel was able to establish the time that the three left the bar even without the receipt. Ex. 36:8. Trial counsel relied on this testimony and other records to establish the defense's timeline in closing. Ex. 36:8-9. Petitioner could not demonstrate prejudice. Ex. 36:8.

The trial court did not unreasonably apply *Strickland*. 28 U.S.C. § 2254(d)(1). Trial counsel could not have been ineffective for failing to introduce evidence that is inadmissible. *Tompkins v. Moore*, 193 F.3d 1327, 1334-35 (11th Cir. 1999). Also, because the testimony of Wallace and Dalzell was cumulative to any timestamp on the bar receipt, there was no prejudice under *Strickland*. *Parker*, 565 F.3d at 1281-83.

The trial court also did not unreasonably determine facts. 28 U.S.C. § 2254(d)(2). The trial court concluded that trial counsel tried to lay a predicate for the bar receipt but could not. Trial transcripts confirm that the trial counsel did. Ex. 59:742-45. The trial court also concluded that Petitioner failed to identify a witness who trial counsel could have called to lay a predicate for the bar receipt. Petitioner's post-conviction motion confirms that he did not. Ex. 35:11-12.

The trial court concluded that trial counsel established what time Petitioner and his two friends left the bar through other testimony. Petitioner argues that this

determination is not supported by the state court record. D.E. 4-1:33-34. But trial transcripts do support the finding.

On cross-examination, Wallace testified that the three left the bar around 12:45 A.M. and stood outside in the parking lot for about five minutes. Ex. 59:797. Petitioner then left. Ex. 59:798. Dalzell initially testified that the three left around 11:45 P.M. or 12:00 A.M. Ex. 61:1040-42. On redirect, after reviewing telephone records which showed what time Dalzell called Wallace, Dalzell clarified that the three probably left the bar around 12:45 A.M. Ex. 61:1073. On recross, Dalzell further clarified that the three left the parking lot of the bar around 12:45 A.M. but had been in the parking lot for about 25 or 30 minutes. Ex. 61:1076. During the defense case-in-chief, the patron at the bar testified that he saw Petitioner and his two friends in the parking lot of the bar leaving. Ex. 63:1418-20. The patron looked at telephone records and confirmed that he first received a voicemail at 12:45 A.M. Ex. 63:1419, 1442. The patron stepped outside to listen to the voicemail. Ex. 63:1418-19, 1442. The patron called the caller back at 12:48 A.M. Ex. 63:1442. The patron got another call at 12:51 A.M. Ex. 63:1442. The patron returned the call at 1:00 A.M. Ex. 63:1432, 1442. It was around this time that the patron observed Petitioner outside the bar urinate and then leave with his two friends. Ex. 63:1420-25, 1432-33, 1443, 1446. The trial court did not unreasonably conclude that other testimony established when Petitioner left the bar.

The trial court also concluded that, even without the bar receipt, trial counsel was still able to present the defense's timeline in closing. Petitioner claims that transcripts quoted by the trial court do not show that trial counsel mentioned in closing the time that the group left the bar. D.E. 4-1:34.

While that may be true, other trial transcripts show that trial counsel mentioned the time the group left in closing more than once. Ex. 64:1622 (“Now, we talked to Joe; you remember his testimony on the stand. He believed they left at 11:30, then it was 12:00, then it was 12:30. Then they were in the parking lot for half an hour. If you remember I asked him the questions a couple of times, **okay, all right 12:45. He finally got that.**” (emphasis added)); Ex. 64:1644 (“**At 12:51**, [the patron at the bar] sees [Petitioner] and his friends get into [Petitioner’s] truck in the parking lot . . .” (emphasis added)); Ex. 64:1646 (“But [the patron at the bar] testified that he was inside the bar and the first thing he got was the voicemail, that’s at 12:45, that’s what they’re saying the time that they left. **Jim says that, all of them say that 12:45.**”(emphasis added)).

Lastly, Petitioner could not have shown prejudice. In his state post-conviction motion, Petitioner failed to allege what time the bar receipt showed that Petitioner paid for his tab. Without knowing the time reflected on the receipt, Petitioner could not have claimed that the receipt would have bolstered his defense and the outcome at trial would have been different. **Also, even assuming that the bar receipt had a time-stamp and accurately showed the time that Petitioner paid his tab, Wallace and Dalzell both testified that they and Petitioner spent some time in the parking lot. Wallace testified that they stood outside in the parking lot for about five minutes. Ex. 59:797. Dalzell testified that they stood outside for about 25 or 30 minutes. Ex. 61:1076. Even if trial counsel had introduced the bar receipt and the receipt showed what time Petitioner paid the tab, trial counsel would still have been unable to establish precisely when they left the parking lot.**

Petitioner’s claim of prejudice was conclusory and facially insufficient. Despite the jury’s question about the bar receipt, the outcome at trial would not have been

different. *Strickland*, 466 U.S. at 694. This provided yet another reasonable basis for the state appellate court to reject Petitioner's claim. *Richter*, 562 U.S. at 98.

Petitioner could not supplement the record with the bar receipt for the first time on federal habeas. Because the state court adjudicated the claim on the merits, this Court cannot consider new evidence that was not before the state court. *Pinholster*, 563 U.S. at 181-82; *Landers* 776 F.3d at 1295.

Petitioner again claims that he is entitled to an evidentiary hearing. D.E. 4-1:36. The record otherwise refutes the claim. The Court is not required to hold an evidentiary hearing. *Supra*. at 18.

Ground four should be denied.

V. GROUND FIVE

In ground five, Petitioner claims that trial counsel was **ineffective for failing to get a protective order for Kara Wallace's cellphone.** D.E. 4-1:36-37. Petitioner alleges that the defense moved for a mistrial because Kara Wallace had been using her telephone while he was testifying at trial. D.E. 4-1:36. The trial court denied the motion and advised that the defense had to prove that Kara Wallace was discussing the substance of her testimony while using her telephone. D.E. 4-1:36. **Later, the trial court indicated that it would sign a protective order for the telephone, if the defense presented the court with an order.** D.E. 4-1:36. **Trial counsel never presented the court with the order.** D.E. 4-1:36. **Petitioner claims that trial counsel was ineffective for failing to do so and there is a reasonable probability that the outcome at trial would have been different.** D.E. 4-1:36-37.

Petitioner exhausted ground five. In his operative second amended post-conviction motion, Petitioner raised the ineffective assistance of counsel claim based on the protective order and cited the Sixth Amendment and *Strickland*. Ex. 35:12-13 (ground five). In his brief on appeal, Petitioner did the same. Ex. 43:5 n.2, 32-34 (issue (e)). The state appellate court affirmed without a written opinion. Ex. 44. The state supreme court did not have jurisdiction to review the unelaborated decision. *Jenkins*, 385 So. 2d at 1359. Petitioner fairly presented the federal claim to the state court and invoked one complete round of the state's established appellate review process. *Lucas*, 682 F.3d at 1351-52; *Mason*, 605 F.3d at 1119.

Ground five should still be denied on the merits. The state appellate court silently affirmed the order denying the federal claim in ground five. Ex. 44. This Court looks through that silent decision to the trial court's order which does provide reasons. *Wilson*, 138 S. Ct. at 1193-94. The trial court denied the claim because it was too speculative. Ex. 36:10-11. This was an adjudication on the merits and is owed deference under 28 U.S.C. § 2254(d). *Williams*, 598 F.3d at 797-98.

The trial court explained that, even if trial counsel failed to get the protective order, Petitioner's claim was "mere conjecture" and "based on nothing more than what he speculates would have occurred". Ex. 36:10. Petitioner had no way of knowing what the records would have revealed. Ex. 36:10. Petitioner only speculated that the records would have shown that Kara Wallace was texting about her testimony. Ex. 36:10-11.

The trial court did not unreasonably apply *Strickland*. 28 U.S.C. § 2254(d)(1). *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."); *Aldrich v. Wainwright*,

777 F.2d 630, 636 (11th Cir. 1985) (“Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.”). Petitioner had the burden to allege with specificity both deficient performance and prejudice. *Strickland*, 466 U.S. at 689, 694.

The trial court did not unreasonably determine facts. 28 U.S.C. § 2254(d)(2). Petitioner’s operative post-conviction supports the finding that Petitioner only relied on speculation. Ex. 35:12-13. Petitioner did not allege that he had obtained Kara Wallace’s cellphone records. Petitioner did not allege what those records showed. Petitioner did not attach those records to his motion. Without more, Petitioner failed to allege prejudice. *Strickland*, 466 U.S. at 694.

Like the bar receipt, Petitioner could not supplement the record with cellphone records for the first time on federal habeas. Because the state court adjudicated the claim on the merits, this Court cannot consider new evidence that was not before the state court. *Pinholster*, 563 U.S. at 181-82; *Landers*, 776 F.3d at 1295.

Petitioner again claims that he is entitled to an evidentiary hearing. D.E. 4-1:37. The record otherwise refutes the claim. The Court is not required to hold an evidentiary hearing. *Supra*. at 18.

Ground five should be denied.

VI. GROUND SIX

In ground six, Petitioner claims that the trial court erred by denying his motion to suppress. D.E. 4-1:38-42. Before trial, Petitioner moved to suppress his truck and all evidence derived from the truck. D.E. 4-1:38. Petitioner alleged that the company that towed the truck for impound tampered with the truck. D.E. 4-1:38. Items such as several

credit cards and a GPS system were removed from the truck. D.E. 4-1:38. After the tow company tampered with the truck, police collected evidence from the truck including a crash data retrieval system. D.E. 4-1:38-39. Petitioner claimed that, by tampering with the truck, the tow company tainted the chain of all evidence collected by police from the truck. D.E. 4-1:39. At a hearing, Petitioner proved tampering and the trial court denied the motion. D.E. 4-1:39-40. Petitioner claims that the trial court erred because the burden had shifted to the State to show that tampering did not occur and the State did not meet its burden. D.E. 4-1:41-42.

Petitioner exhausted ground six. In a pretrial motion, Petitioner moved to suppress the truck and cited the U.S. Constitution. Ex. 8. In his brief on direct appeal, Petitioner did the same. Ex. 23:18, 23. The state appellate court affirmed this issue without comment. Ex. 26. The state supreme court did not have jurisdiction to review the unelaborated decision. *Jenkins*, 385 So. 2d at 1359. Petitioner fairly presented the federal claim to the state court and invoked one complete round of the state's established appellate review process. *Lucas*, 682 F.3d at 1351-52; *Mason*, 605 F.3d at 1119.

But exhaustion of the ground in state court bars review of the Fourth Amendment claim under *Stone v. Powell*, 428 U.S. 465 (1976). If the state court provides a petitioner with a full and fair opportunity to litigate the Fourth Amendment claim, then federal habeas relief is not warranted. *Stone*, 428 U.S. at 494-95. If facts are in dispute, the state court must resolve those disputes with factfinding and provide meaningful appellate review by a higher state court. *Mincey v. Head*, 206 F.3d 1106, 1126 (11th Cir. 2000). If facts are not in dispute, the state appellate court must review the undisputed factual record and give full consideration to the petitioner's claim. *Mincey*, 206 F.3d at 1126. If

the state court gave the petitioner a full and fair opportunity to litigate the claim, then a petitioner is not entitled to relief even if the state court misapplied constitutional law. *Swicegood v. State of Ala.*, 577 F.2d 1322, 1325 (5th Cir. 1978).³

The state court gave Petitioner a full and fair opportunity to litigate his claim. The trial court held four hearings on Petitioner's motion to suppress. Ex. 49; Ex. 50; Ex. 51; Ex. 53. Four witnesses testified and exhibits were introduced into evidence. Ex. 49; Ex. 50; Ex. 51; Ex. 53. The trial court heard argument from the parties. Ex. 53:38-58. The trial court denied the motion at the hearing. Ex. 53:58. The trial court entered a four-page written order with comprehensive findings of fact and conclusions of law. Ex. 13. Petitioner appealed the order. Ex. 21; Ex. 23. The state appellate court reviewed the issue on appeal and affirmed without comment. Ex. 26. The state court fully and fairly considered the claim. *Mincey*, 206 F.3d at 1125-26.

Even though the state appellate court affirmed without a written opinion, it deferred on appeal to the trial court's findings of fact so long as the findings were supported by competent substantial evidence. *State v. Hankerson*, 65 So. 3d 502, 506 (Fla. 2011). Fact finding on appeal is not allowed. *Searcy v. State*, 285 So. 3d 956 (Fla. 4th DCA 2019). Petitioner was afforded a full and fair opportunity to litigate the claim. *Bell v. Sec'y, Fla. Dep't Corrs.*, 2018 WL 1045948 at *3 (M.D. Fla. Feb. 12, 2018).

Even if the bar under *Stone* does not apply, Petitioner does not really raise a federal constitutional claim at all. Petitioner claims that the trial court erred by failing to suppress tampered evidence. The claim presents a question that turns on authentication and chain of custody – not federal constitutional law. *Armstrong v. State*, 73 So. 3d 155,

³ *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

171-72 (Fla. 2011) (“This is a test for determining whether the chain of custody is established.”). This type of claim based on state rules of evidence is not cognizable on federal habeas. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Even so, the trial court concluded that State could establish a chain of custody for the truck. Ex. 13. A federal habeas court defers to the state court on its interpretation of its own state rules of evidence. *Machin v. Wainwright*, 758 F.2d 1431, 1433 (11th Cir. 1985).

Even if the Court could review the claim, the trial court did not unreasonably apply any clearly established federal law as determined by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1). Petitioner argues that the trial court unreasonably applied *Murray v. State*, 838 So. 2d 1073 (Fla. 2002). D.E. 4-1:40-42. *Murray* is not an opinion by the U.S. Supreme Court and does not rely on federal constitutional law. Unreasonable application of a state court decision based on state law does not provide Petitioner relief on federal habeas.

The trial court did not unreasonably determine facts in light of the state court record either. 28 U.S.C. § 2254(d)(2). The trial court found that items including a GPS system were removed from the truck. Ex. 13:1. Items inside the truck in the center console including cigarettes were also moved. Ex. 13:1-2. A trooper moved the items when he looked inside the truck for any items of evidentiary value. Ex. 13:2. But the trial court found that removal and movement of items inside the truck did not alter crash damage to the truck or data stored in the “black box”. Ex. 13:2. These findings are presumed correct and Petitioner does not present clear and convincing evidence to rebut them. 28 U.S.C. § 2254(e)(1).

Lastly, under state law, “[o]nce the party moving to bar the evidence has met its burden, the burden shifts to the nonmoving party to establish a **proper chain of custody** or submit other evidence that tampering did not occur”. *Armstrong*, 73 So. 3d at 171 (emphasis added). The trial court found that “there was some degree of tampering”. Ex. 13:3. But the trial court also concluded that, by showing that removal or movement of the items inside the truck did not change or alter the outside damage to the truck or the “black box”, the State had adequately established a proper chain of custody for that evidence. Ex. 13:3. The trial court’s ruling was not unreasonable.

Ground six should be denied.

VII. GROUND SEVEN

In ground seven, Petitioner claims that he is entitled to relief based on cumulative error. Petitioner failed to exhaust ground seven. Even though Petitioner raised a cumulative error claim in his state post-conviction motion and his brief on appeal, he did not cite any federal constitutional authority. Ex. 35:13-14; Ex. 43:34; *Lucas*, 682 F.3d at 1351-52. Also, his cumulative error claim on federal habeas includes both his ineffective assistance of counsel claims and his Fourth Amendment claim. His cumulative error claim on state post-conviction did not include his Fourth Amendment claim. Ex. 35:13-14; Ex. 43:34. The ground should be denied as procedurally defaulted because it would be futile for Petitioner to return to state court to try to exhaust the claim. *Jimenez v. Fla. Dep’t Corrs.*, 481 F.3d 1337, 1342 (11th Cir. 2007). Any post-conviction motion with the new claim would be denied as successive. Fla. R. Crim. P. 3.850(h).

Even if the claim was exhausted, the claim is not cognizable on federal habeas. *Morris v. Sec'y, Dep't Corrs.*, 677 F.3d 1117, 1132 n.3 (11th Cir. 2012). Also, none of the individual claims have any merit and so there is no error to accumulate.

Ground seven should be denied.

CONCLUSION

The federal habeas petition should be denied. No evidentiary hearing should be granted because the state court record refutes all the claims. *Schriro v. Landrigan*, 550 U.S. 465 (2007). And no certificate of appealability should issue where Petitioner has not made a substantial showing that reasonable jurists could debate whether the petition should have been resolved in a different manner. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on **June 11, 2020** I electronically filed the foregoing – *Amended Response to Petition* – with the Clerk of the Court by using the CM/ECF system.

/s/Jonathan Tanoos

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