Docket No. 23-10936

IN THE

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

SHANNON STEPHEN, Petitioner/Appellant, v. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent/Appellee.	28 U.S.C. § 2254 Appeal Middle District of Florida Lower Case No. 8:20-cv-727-VMC-CPT

AMENDED RENEWED APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following certificate of interested persons and corporate disclosure statement is provided pursuant to Federal Rule of Appellate Procedure 26.1:

Foote, Ken; Former Trial Counsel to Mr. Stephen

Hernandez Covington, Virginia M.; U.S. District Court Judge

Moody, Ashley B.; Attorney General, State of Florida

O'Neill, Kelly Elizabeth; Former Assistant Attorney General

Roebuck Horbelt, Sonya; Assistant Attorney General

Stephen, Shannon; Petitioner

Tanoos, Jonathan; Former Assistant Attorney General

Tuite, Christopher P.; U.S. Magistrate Judge

Ufferman, Michael; Counsel for Mr. Stephen

I hereby certify that no publicly traded company or corporation has an interest in the outcome of this appeal.

The Petitioner/Appellant, SHANNON STEPHEN, by and through undersigned counsel and pursuant to 28 U.S.C. § 2253 and Eleventh Circuit Rule 22-1, moves the Court to issue a certificate of appealability ("COA") authorizing the appeal of the denial of his petition for writ of habeas corpus. For the reasons expressed below, Mr. Stephen submits that he has made a substantial showing of the denial of his Sixth Amendment right to the effective assistance of counsel.

A. Statement of the Case and Statement of the Facts.

1. Statement of the Case.

Mr. Stephen was charged with two counts of DUI manslaughter and one count of leaving the scene of a crash involving death. (Doc 14-1 - Pg 43).[1] The offenses allegedly occurred on March 26, 2006.

At trial, the State's theory was that Mr. 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, Mr. Stephen was semi-conscious in the passenger seat of the vehicle (due to his intoxication) and that someone else was driving the vehicle.

[1] References to the documents filed in the district court will be made by the designation "Doc," short for document, followed by a citation to the appropriate document number, followed by the designation "Pg," short for page, followed by a citation to the appropriate page number (if necessary).

The trial began on May 24, 2010, and concluded on May 29, 2010.[2] At the conclusion of the trial, the jury found Mr. Stephen guilty as charged for all three counts. (Doc 14-6 - Pg 1122).

Mr. Stephen was sentenced on July 14, 2010. The state trial court sentenced Mr. Stephen to a total sentence of thirty-five years' imprisonment. (Doc 14-7 - Pg 156; Doc 14-1 - Pgs 86-93).[3] On direct appeal, the Florida Second District Court of Appeal affirmed the convictions and sentence, but reversed the cost portion of the 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, Mr. Stephen filed a Florida Rule of Criminal Procedure 3.850 motion raising several claims of ineffective assistance of counsel. 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 Mr. Stephen's state postconviction motion. *See Stephen v. State*, 288

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[2] Mr. Stephen was originally tried in 2008, but the trial ended with a hung jury/mistrial. (Doc 23 - Pg 20).

[3] The state trial court sentenced Mr. 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.

So. 3d 16 (Fla. 2d DCA 2019).

Mr. Stephen subsequently filed a petition pursuant to 28 U.S.C. § 2254. (Doc 1). In his § 2254 petition, Mr. Stephen argued the same claims that he previously presented in his state postconviction motion. On February 24, 2023, the district court issued an order denying Mr. Stephen's § 2254 petition. (Doc 23).[4]

2. Statement of the facts.

a. A bullet point summary of the facts.

- Mr. Stephen checks out of the bar, as established by 12:48:44 a.m. bar receipt.
- Walter Schubart is outside the bar on his cellphone at 12:48 a.m. when Mr. Stephen, James Wallace, and Marvin Dalzell leave the bar.
- Schubart saw Mr. Stephen's friends assisting him to walk and place him in the passenger side of a pickup truck, with one of the men running around to the driver's side to drive off.
- Schubart saw the three men drive away and saw someone other than Mr. Stephen driving.
- Schubart saw the truck leave the parking lot and turn north (towards one of the friends' homes nearby).
- 911 caller Valerie Herbert saw the truck traveling SW of the bar on Old Hwy 54, driving erratically and called 911 at 1:06 a.m.
    - She saw the truck turn north towards Denny's.
    - The truck then passed by Denny's.
- Assumption:
    - Marine Parkway only a block up the road, truck turns right (east).
    - Next turn is Grand, truck turns right (south).
- Several blocks down the victims are hit on Grand between Dahlia and Pasadena.
    - The truck does not stop (hit and run).

[4] A separate judgment denying the § 2254 petition was issued on February 27, 2023. (Doc 24).

- Robert Bartlett hangs up with Rick Scott and James Ramsey (S&R) discussing where he and the victims are walking.
  - Upon that hang up is when the victims were hit at 1:09 a.m.
- Bartlett calls 911 but accidently dials 411.
- Operator transfers him to 911 but he is forced to wait until 1:20 a.m. to be connected.
- Videographer Brian Farrow hears of the first dispatch resulting from the Herbert 911 call on his police scanner.
- A minute later, he hears another dispatch on the scanner from the Bartlett 911 call.
  - Farrow leaves for L1.[5]
    - Could have left a minute earlier for drunk driver (we don't know).
  - Arrives at L2 on his way to L1.
- Sees a smashed pickup and a red van.
  - Farrow is first to arrive on scene, ahead of S&R and ahead of first responders and police.
- Sees three men *pulling, pushing, fighting (i.e., an altercation)*.
  - The men are trying to place Mr. Stephen behind the wheel to frame him for the hit and run.
- Responding to 911 call(s), he then heads up to L1.
- Sees deceased bodies in road.
- Sees *hysterical/screaming* Bartlett on call with 911.
- Hears approaching sirens (first responder).
  - Sees first responder park/pull over.
- Understands film for sale was back at L2.
- Turned back to travel to L2 (for sale tape).
- At same time S&R have arrived at L2.
- See smashed truck.
- Hear sirens, see man get out of truck, run around it.

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[5] There are three locations in question:
- Location 1 (L1): the crash scene a mile north of the Grand and Hwy 54 intersection.
- Location 2 (L2): NW corner of Grand and State Highway 54.
- Location 3 (L3): SW corner of Grand and State Highway 54.

- Bolt, double time, run while on cellphone.
- Hide behind traffic control box.
  - This is the man Schubart said could not walk w/o assistance.
- Sirens pass so S&R continue up to L1 area to pick up friends.
- Farrow decides to leave L1, heads back to L2 at this time.
  - Farrow and S&R pass like ships in the night.
- S&R arrive at L1.
- Essentially see same things as Farrow.
- See first responder there ahead of them.
- They take more time (than Farrow) to park off street at a building.
  - To assess the condition of their friends.
  - Each victim separately.
- S&R spend more time than Farrow did at L1.
- Farrow arrives back at L2.
  - Truck and van and men are not there.
- Sees them across the intersection at L3
  - Just across/on street side of strip club.
  - He may have seen the driver, STILL or AGAIN trying to
    - Place Mr. Stephen behind the wheel.
    - (note defense counsel failed to clarify Farrow testimony).
- Farrow passes by Dalzell, who is parked behind Mr. Stephen, street side.
- Farrow continues to parking lot entrance, south end of building.
  - Farrow is out of view of the action, when parking.
  - Farrow is out of view as S&R arrive back.
- So S&R at L1.
  - Understand same as Farrow, relationship to smashed truck at L2.
  - S&R decide to rush back to L2.
- Discover smashed truck moved to L3 (as Farrow did).
- S&R pull in front of Mr. Stephen's truck.
  - Block him in with Dalzell behind.
- S&R find Mr. Stephen asleep in driver's seat/cab.
  - Dalzell is there, talking with 911.
  - Dalzell is giving a performative narrative to 911 while watching.
- S&R tap, tap, tap on window because door is locked.
  - Order Mr. Stephen out of truck.
  - Mr. Stephen falls to his knees when told to sit down.

- Farrow is walking out from behind the bar, after S&R already out of their truck.
  - At what exact moment is difficult to say other than:
  - Farrow says he saw them holding Mr. Stephen up.
- Police show up.

b. The testimony presented during the trial.

(1). 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. (Doc 14-5 - Pg 742). 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). (Doc 14-5 - Pg 743). Mr. Bartlett stated that the three were walking "off" the road. (Doc 14-5 - Pgs 745-746). Mr. Bartlett testified that he had previously called Rick Scott and asked Mr. Scott to come pick them up and drive them home, and he said that while the three were walking on Grand Boulevard toward State Road 54, he called Mr. Scott to ascertain his estimated time of arrival and to give Mr. Scott their location. (Doc 14-5 - Pgs 746-747). Mr. Bartlett stated that when he ended his conversation with Mr. Scott, Mr. Swiech and Ms. Gleason were hit by a truck. (Doc 14-5 - Pgs 747-748). Mr. Bartlett testified that after the truck hit Mr. Swiech and Ms. Gleason, the truck drove away. (Doc 14-5 - Pg 748). Mr. Bartlett stated that he

proceeded to call 911 (at 1:09 a.m.). (Doc 14-5 - Pg 755).[6] 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. (Doc 14-5 - Pg 756). Mr. Bartlett stated that later during the morning, he observed the truck stopped at the intersection of Grand Boulevard and State Road 54. (Doc 14-5 - Pg 757).

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. (Doc 14-5 - Pg 814). Ms. Herbert stated that during the drive home, she noticed a truck on State Road 54 engaging in "erratic" driving. (Doc 14-5 - Pg 819). Ms. Herbert testified that she observed one person in the truck that was driving erratically (i.e., a person in the driver's seat). (Doc 14-5 - Pg 822). Ms. Herbert stated that she subsequently called 911 to report the truck. (Doc 14-5 - Pg 822).[7]

On cross-examination, Ms. Herbert acknowledged that the windows of the truck were tinted (Doc 14-5 - Pg 833) and thus she would not have been able to see if someone was lying down in the passenger seat. (Doc 14-5 - Pg 834).

Roberta Penix. Ms. Penix, the communications manager for the Pasco County

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[6] During Mr. Bartlett's testimony, the State played the 911 call for the jury. (Doc 14-5 - Pgs 760-769).

[7] During Ms. Herbert's testimony, the State played the 911 call for the jury. (Doc 14-5 - Pgs 827-828).

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. (Doc 14-5 - Pgs 840-843). Ms. Penix stated that it was reported that the alleged "drunk driver" was driving a Chevrolet Silverado. (Doc 14-5 - Pg 844).

Jon Thogmartin. Dr. Thogmartin, a medical examiner, testified that he conducted autopsies on Joe Swiech and Sarah Gleason on March 26, 2006. (Doc 14-5 - Pgs 859-861). Dr. Thogmartin stated that both Mr. Swiech and Ms. Gleason died from blunt trauma. (Doc 14-5 - Pg 862).

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. (Doc 14-5 - Pgs 873-874). 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 (Doc 14-5 - Pg 876). 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 while making a call on his cellphone. (Doc 14-5 - Pgs 878-880). 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. (Doc 14-5 - Pg

882). 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. (Doc 14-5 - Pg 883). Mr. Scott stated that he and Mr. Ramsey drove next to the truck and they "blocked it off." (Doc 14-5 - Pg 883). Mr. Scott testified that they observed Mr. Stephen in the truck and they "got him to come out" of the truck and they waited for the police to arrive. (Doc 14-5 - Pgs 885, 888). Mr. Scott stated that the police subsequently arrived and took Mr. Stephen into custody. (Doc 14-5 - Pg 888).

Adam Morris. Mr. Morris, a trooper with the Florida Highway Patrol, testified that he came into contact with Mr. Stephen during the early morning hours of March 26, 2009. (Doc 14-6 - Pgs 32-33). Trooper Morris stated that Paramedic Joseph Lopardo subsequently took a blood draw from Mr. Stephen. (Doc 14-6 - Pg 36).

Joseph Lopardo. Mr. Lopardo, a paramedic, testified that he drew blood from Mr. Stephen on March 26, 2006. (Doc 14-6 - Pg 42).

Jeffrey Hays. Mr. Hays, a toxicologist with the Pinellas County Forensic Laboratory, testified that he tested the blood that was obtained from Mr. Stephen on March 26, 2006. (Doc 14-6 - Pg 49). 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. (Doc 14-6 - Pg 50).

On cross-examination, Mr. Hays testified that he also tested blood that was obtained from Sarah Gleason on March 26, 2006. (Doc 14-6 - Pg 54). 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. (Doc 14-6 - Pgs 847-848).[8]

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. (Doc 14-6 - Pg 58). Trooper Shaw stated that when he arrived at the scene, he videotaped the scene. (Doc 14-6 - Pg 59).[9]

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. (Doc 14-6 - Pgs 75-76). 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. (Doc 14-6 - Pgs 78-80). Mr. Ramsey stated that he drove down the road and he observed

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[8] Ms. Gleason's toxicology report was admitted into evidence. (Doc 14-6 - Pgs 847-848).

[9] During Trooper Shaw's testimony, the State played the videotape for the jury. (Doc 14-6 - Pg 60).

Joe Swiech and Sarah Gleason lying on the ground injured. (Doc 14-6 - Pgs 80-81). Mr. Ramsey testified that he then drove back to the truck, which had moved through the intersection and was parked close to Club 54 (i.e., L3) (Doc 14-6 - Pgs 81-82). Mr. Ramsey stated that he observed Mr. Stephen in the truck and he "pulled" Mr. Stephen out of the truck and waited for the police to arrive. (Doc 14-6 - Pg 82). Mr. Ramsey testified that the police subsequently arrived and took Mr. Stephen into custody. (Doc 14-6 - Pg 83).

James Wallace. Mr. Wallace stated that he, Marvin Dalzell, and Mr. Stephen went to Sevens Bar on March 25, 2006. (Doc 14-6 - Pg 105).[10] Mr. Wallace testified that he drove Mr. Dalzell to the bar in his GMC Sierra truck and Mr. Stephen drove separately and met them at the bar. (Doc 14-6 - Pgs 107-108). Mr. Wallace stated that Mr. Stephen became intoxicated while they were at the bar. (Doc 14-6 - Pg 110). Mr. Wallace testified that the three left the bar at approximately 1 a.m. (Doc 14-6 - Pg 112). Mr. Wallace stated that he and Mr. Dalzell attempted to convince Mr. Stephen to go home with them (in Mr. Wallace's truck), but Mr. Wallace claimed that Mr. Stephen walked to his truck and drove away. (Doc 14-6 - Pgs 113-116). Mr. Wallace testified that he then drove home and when he arrived home, he said that he

[10] Frank Figliozzi also went to Sevens Bar with the group, but he left the bar earlier than the other three. (Doc 14-6 - Pgs 105, 112-113).

called his wife at 1:09 a.m. and left her the message "I'm home for the night." (Doc 14-6 - Pgs 118-119).

On cross-examination, Mr. Wallace acknowledged that he was separated from his wife in March of 2006. (Doc 14-6 - Pgs 170-171). 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. (Doc 14-6 - Pg 171). 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). (Doc 14-6 - Pg 171).

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). (Doc 14-6 - Pgs 233-276).

Youssouf Mohamed. Mr. Mohamed, an employee with Sprint, testified that he "maintain[s] the cell sites for Sprint" in Pasco County. (Doc 14-6 - Pgs 330-331). Mr. Mohamed testified about particular cell towers in Pasco County and the distance between those cell towers. (Doc 14-6 - Pgs 336-361).

Marvin Dalzell.[11] Mr. Dalzell stated that he, James Wallace, and Mr. Stephen

[11] Throughout the record, Mr. Dalzell is referred to as "Joe." (Doc 14-6 - Pg 425).

went to Sevens Bar on March 25, 2006. (Doc 14-6 - Pg 408). 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 Mr. Stephen met them at the bar). (Doc 14-6 - Pg 408). Mr. Dalzell stated that Mr. Stephen became intoxicated while they were at the bar. (Doc 14-6 - Pg 410). Mr. Dalzell testified that the three left the bar at approximately 1 a.m. (Doc 14-6 - Pg 412). Mr. Dalzell stated that he and Mr. Wallace attempted to convince Mr. Stephen to go home with them (in Mr. Wallace's truck), but Mr. Dalzell claimed that Mr. Stephen walked to his truck and drove away. (Doc 14-6 - Pg 415). 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. (Doc 14-6 -Pg 418). Mr. Dalzell stated that on his way home, he observed Mr. Stephen's truck "setting in the right-hand lane of 54 on Grand" and he observed that the front of the truck was damaged. (Doc 14-6 - Pgs 419-420). Mr. Dalzell testified that he proceeded to call 911. (Doc 14-6 - Pg 420). Mr. Dalzell stated that he also called Mr. Wallace to tell him about Mr. Stephen's truck and he said that Mr. Wallace subsequently arrived at the scene. (Doc 14-6 - Pgs 421-425).[12]

On cross-examination, Mr. Dalzell's 911 call was played for the jury (Doc 14-6

[12] Mr. Dalzell claimed that after seeing Mr. 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 evening. (Doc 14-6 - Pgs 436-437).

- Pgs 448-453) and Mr. Dalzell was questioned as to why he did not inform the 911 operator that he had been with Mr. Stephen earlier in the evening. (Doc 14-6 - Pg 455). 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 Mr. Stephen earlier in the evening. (Doc 14-6 - Pg 460).

Frank Figliozzi. Mr. Figliozzi testified that he was with James Wallace, Marvin Dalzell, and Mr. Stephen at Sevens Bar on the evening of March 25, 2006. (Doc 14-6 - Pgs 467-469). Mr. Figliozzi stated that he left the bar at approximately 11 p.m. (Doc 14-6 - Pg 468).

Ronald Evans. Mr. Evans, a trooper with the Florida Highway Patrol, testified that he administered field sobriety exercises to Mr. Stephen on March 26, 2006. (Doc 14-6 - Pg 486). Based on Mr. Stephen's performance on the exercises, Trooper Evans opined that Mr. Stephen was intoxicated and Trooper Evans therefore arrested Mr. Stephen. (Doc 14-6 - Pg 492). Trooper Evans stated that he subsequently obtained breath samples from Mr. Stephen (using the Intoxilyzer machine). (Doc 14-6 - Pg 499). Trooper Evans testified that the two breath samples indicated that Mr. Stephen's blood-alcohol level was .157 and .162. (Doc 14-6 - Pg 503).

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

14-6 - Pg 549).

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 the brakes of the vehicle. (Doc 14-6 - Pg 569). 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. (Doc 14-6 - Pg 577).

At the conclusion of Mr. Murdoch's testimony, the State rested. (Doc 14-6 - Pg 581).

(2). Mr. 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). (Doc 14-6 - Pgs 637-638). 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). (Doc 14-6 - Pg 641).

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. (Doc 14-6 - Pg 646). Corporal Styers stated that to his knowledge, Mr. Stephen did not make any statements to law enforcement officials (i.e., Mr. Stephen never said that he was driving the vehicle at the time the victims were hit). (Doc 14-6 - Pg 658).

Kara Wallace. Mrs. Wallace, James Wallace's estranged wife, stated that she was separated from her husband on March 26, 2006. (Doc 14-6 - Pgs 686-687). Mrs. Wallace testified that during the early morning hours of March 26, 2006, she received some voicemail messages from Mr. Wallace. (Doc 14-6 - Pg 694). Mrs. Wallace claimed that during the first voicemail message, Mr. Wallace stated that he had arrived home (Doc 14-6 - Pg 698), 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"). (Doc 14-6 - Pg 702).[13]

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

[13] 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 (Doc 14-6 - Pgs 118-119) – *the exact time* that Robert Bartlett called 911 to report that the victims had been hit. (Doc 14-5 - Pg 755).

his police scanner (and he was the first person to arrive at the scene of the accident). (Doc 14-6 - Pg 746). 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." (Doc 14-6 - Pgs 751-752). Mr. Farrow testified that he observed "two or three people and they were arguing." (Doc 14-6 - Pg 754). 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." (Doc 14-6 - Pgs 762-764). 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. (Doc 14-6 - Pgs 764-768). Mr. Farrow testified that when he returned, the Chevrolet Silverado had moved next to Club 54. (Doc 14-6 - Pg 768).

On cross-examination, Mr. Farrow stated that when he arrived back at Club 54, he talked to (and videotaped) Mr. Stephen. (Doc 14-6 - Pgs 782-784). Mr. Farrow testified that Mr. Stephen was incoherent, stating that he was driving at one point but later denying that he was driving. (Doc 14-6 - Pg 784).

Walter Schubart. Mr. Schubart stated that he saw Mr. Stephen at Sevens Bar on the evening of March 25, 2006. (Doc 14-6 - Pg 800). Mr. Schubart opined that Mr. Stephen was "drunk." (Doc 14-6 - Pg 815). Mr. Schubart was outside the bar

when Mr. Stephen and his friends left the bar. (Doc 14-6 - Pg 814).[14] Mr. Schubart testified that he observed Mr. Stephen's friends help Mr. Stephen get into the *passenger* side of Mr. 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.

(Doc 14-6 - Pg 816).

At the conclusion of Mr. Schubart's testimony, the defense rested. (Doc 14-6 - Pg 907).

(3). 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. (Doc 14-6 - Pg 908). Ms. Taranto claimed that at some point after that night, Mr. Schubart told her that Mr. Stephen left the bar on March 26, 2006, driving in his own vehicle. (Doc 14-6 - Pg 909).[15]

At the conclusion of Ms. Taranto's testimony, the State rested. (Doc 14-6 - Pg

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[14] Mr. Schubart's phone records corroborate that he was outside the bar on his cellphone when Mr. Stephen and his two friends exited the bar (i.e., 12:48 a.m. bar receipt and 12:48 a.m. call).

[15] Mr. Schubart denied that he ever told Ms. Taranto that Mr. Stephen drove away from the bar on his own. (Doc 14-6 - Pgs 820-823, 831).

911).

(4). Verdict.

The parties gave their closing arguments (Doc 14-6 - Pgs 973-1007, 1014-1078) and the trial court instructed the jury. (Doc 14-6 - Pgs 1086-1114). The jury found Mr. Stephen guilty as charged for all three counts. (Doc 14-6 - Pgs 1122-1123; Doc 14-1 - Pgs 69-71).

B. Standard for issuance of a COA.

28 U.S.C. § 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ." 28 U.S.C. § 2253(c)(2) further provides that "[a] [COA] may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Finally, 28 U.S.C. § 2253(c)(3) provides that "[t]he [COA] under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

The provisions of 28 U.S.C. § 2253(c)(1) were included in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the statute governing appeals in habeas corpus and postconviction relief proceedings. In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Supreme Court observed that a COA will issue only if the requirements of § 2253 have been satisfied. "§ 2253(c)

permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Supreme Court in *Miller-El* recognized that a determination as to whether a COA should be issued "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The Supreme Court looked to the district court's application of AEDPA to Mr. Miller-El's constitutional claims and asked whether that resolution was debatable amongst jurists of reason. The Supreme Court explained:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some

> instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

Id. at 336-37. The Supreme Court proceeded to stress that the issuance of a COA must not be a matter of course. The Supreme Court clearly defined the test for issuing a COA as follows:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 338. As explained below, Mr. Stephen submits that reasonable jurists would find the district court's assessment of his § 2254 claims to be at least debatable or wrong.

C. Mr. Stephen's § 2254 claims.

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, Mr. Stephen alleged that defense counsel was ineffective for failing to present an accident reconstruction expert as a defense

witness at trial. Mr. Stephen explained that his theory of defense was that he was *not* driving at the time of the accident and that he was subsequently framed by James Wallace and Marvin Dalzell). In short, that the men planned to meet at Denny's after the bar for breakfast, and apparently, the actual driver accidently drove by the restaurant to a turn-back route where this terrible hit and run accident occurred. In order to properly present this theory of defense, the jury was required to understand and comprehend the timeframe involved and the route driven. 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 route in question, or testimony/evidence tying all of this evidence together), and defense counsel was ineffective for failing to do so.[16]

In his state postconviction motion, Mr. Stephen asserted that had an accident

[16] 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). Mr. Stephen has established both that defense counsel's performance was deficient due to the failure to present an accident reconstruction expert and that he was prejudiced by defense counsel's deficiency.

reconstruction expert been presented at trial, the expert would have confirmed – through comprehensive diagrams and visuals – the accuracy of Mr. Stephen's theory: i.e., the time that the three men left the bar;[17] that a witness (Walter Schubart) confirmed all three men getting in Mr. Stephen's vehicle and that Mr. Stephen was helped into the *passenger* side of the vehicle; and that Brian Farrow observed "two or three" men involved in an "altercation" next to a truck (Mr. 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. Stephen's vehicle and would have been able to explain the *timing* of this route (with information regarding stop lights and testimony regarding a test route that was driven at the time of day in question with answers as to how long the test route took) – which would have further strengthened Mr. Stephen's theory of defense. 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 Mr. Stephen's theory. Stated another way, without an expert tying these pieces together, there was no way that Mr. Stephen's theory of defense could be properly presented to the jury.

In his state postconviction motion, Mr. Stephen explained that he has retained

[17] 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 throughly discussed in claim 3 of this pleading.

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. Mr. 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."[18] (Doc 14-4 - Pg 18). The district court adopted the state court's reasoning when denying Mr. Stephen's § 2254 petition. (Doc 23 - Pgs 10-18). Mr. Stephen has several responses to this conclusion, as set forth below.

First, Mr. Stephen notes in DUI manslaughter cases, the prosecution and the defense routinely present accident reconstruction experts as witnesses at trial.

[18] 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).

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. (Doc 14-4 - Pg 3). An accident reconstruction expert was needed to properly present Mr. 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 [Mr. Stephen's] theory of defense [by "eliciting testimony from various witnesses"] does not negate [Mr. 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." (Doc 14-6 - Pg 973) (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 feasability of the defense's theory (i.e., that Mr. Stephen was not driving, but rather was framed) was dependant upon establishing the *timing* of the route in question. At trial, the State argued that it was impossible – from a timing standpoint – for Mr. Stephen's theory to be true (i.e., "Mr. Foote, you got it all discombobulated[, y]ou got the timelines all wrong.") (Doc 14-6 - Pg 1060).[19] Thus, in order to refute the State's assertion, it was necessary for defense

[19] The state postconviction court's conclusion that defense counsel effectively presented the timeline to support Mr. 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 closing arguments supports the prosecutor's

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 Mr. Stephen's state postconviction pleadings, an accident reconstruction expert would have been able to explain the timing of the route proposed by the State and the route proposed by the defense – with information/diagrams regarding stop lights and testimony regarding the test route that was driven at the time of day in question – and, based on this analysis, the expert would have confirmed that the route 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).[20]

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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.

[20] The first trial in this case ended in a hung jury/mistrial, and 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 – i.e., the bar receipt shows the time that Mr. Stephen left the bar (and confirms Mr. Stephen's timeline and is therefore consistent with Mr. Stephen's theory that he was not driving the truck at the time of the accident). Notably, during the jury's deliberation, *the jury asked "what was the time registered on the bar tab"* (Doc 14-6 - Pg 1118), but because defense counsel failed to introduce the bar receipt, the trial court was required to answer the

Regarding the prejudice prong of an ineffective assistance of counsel claim, the Supreme Court clarified in *Strickland* that a petitioner need not demonstrate it is "more likely than not, or prove by a preponderance of evidence," that counsel's errors affected the outcome. *Strickland*, 466 U.S. at 693-694. Instead:

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In making this determination:

> a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. *Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture*, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . . *[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged*.

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jury's question by saying "all of the evidence that has been entered in this trial is back with you." (Doc 14-6 - Pg 1119).

Id. at 695-696 (emphasis added). Applying this standard to the instant case, Mr. Stephen has established that the fundamental fairness of his trial has been called into question due to counsel's ineffectiveness, and that counsel's ineffectiveness in failing to present an accident reconstruction expert undermines confidence in the outcome. This was a *close* case, as established by the fact that the first trial ended in a mistrial. Clearly the failure to present an accident reconstruction expert had a "pervasive effect" on the "fundamental fairness" Mr. Stephen's trial. *Strickland*, 466 U.S. at 695-696.

Accordingly, for all of the reasons set forth above, defense counsel was ineffective for failing to present an accident reconstruction expert at trial. Based on the record and facts of this case, the state courts' denial of Mr. Stephen's ineffective assistance of counsel claim was both contrary to and an unreasonable application of *Strickland* and Mr. 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. Mr. Stephen is therefore entitled to federal habeas relief on this claim. *See Malone v. Walls*, 538 F.3d 744, 761 (7th Cir. 2008) ("Consequently, we must conclude that the state appellate court's determination that Mr. Malone was not prejudiced by his counsel's failure to call Villanueva was not a reasonable one."); *Bell v. Miller*, 500

F.3d 149, 155-156 (2d Cir. 2007) ("[T]here is a 'reasonable probability' that had trial counsel consulted with a medical expert,]the result of the proceeding would have been different.' The prosecution's case against Bell was thin – there was no eyewitness other than Moriah . . . . Impeaching Moriah's memory was therefore all in all for the defense. Armed with the insight and advice of a medical expert, a lawyer could have vastly increased the opportunity to cast doubt on this critical evidence.") (citation omitted).

Neither the district court nor the state postconviction court held an evidentiary hearing on this claim. As explained by the Sixth Circuit Court of Appeals in *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000), without conducting an evidentiary hearing, it is *impossible* to determine whether counsel's failure to present an accident reconstruction expert was reasonable:

> Barnes argues that he was denied effective assistance of counsel by his trial attorney's failure to investigate or call a medical witness to establish Barnes's inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes's medical condition, and why he failed to contact Dr. Waring. *Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound trial strategy*, *see Strickland*, 466 U.S. at 690-691 ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."), or was constitutionally deficient performance. *See id.*

> at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. *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*.

(Emphasis added).

Mr. Stephen submits that he has made "a substantial showing of the denial of a constitutional right" (i.e., his right to the effective assistance of counsel). *See* 28 U.S.C. § 2253(c)(2). The district court's resolution of this claim is "debatable amongst jurists of reason." Mr. Stephen therefore meets the standard for obtaining a COA. Whether Mr. Stephen was prejudiced due to defense counsel's failure to present an accident reconstruction expert at trial is a claim that is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

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

In his state postconviction motion, Mr. Stephen alleged that defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial. Mr. 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 Mr. Stephen's intoxication level, there is no way that he could have driven the vehicle in a straight path. 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 Mr. Stephen's intoxication level, Mr. 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)." (Doc 14-4 - Pg 25).[21] A review of pages 1267-1272 of the trial transcript (Doc 14-4 - Pg 75-80) 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) Mr. Stephen's intoxication level or (2) the impact that such an intoxication level would have on a

[21] The district court adopted the state postconviction court's analysis. (Doc 23 - Pgs 26-30).

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. (Doc 14-4 - Pg 25). 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 Mr. 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).

Accordingly, for the reasons set forth above, defense counsel was ineffective for failing to present a toxicologist at trial. Based on the record and facts of this case, the state courts' denial of Mr. Stephen's ineffective assistance of counsel claim was both contrary to and an unreasonable application of *Strickland* and Mr. 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. Mr. Stephen is therefore entitled to federal habeas relief on this claim. *See Malone*, 538 F.3d at 761 ("Consequently, we must conclude that the state appellate court's determination that Mr. Malone was not prejudiced by his counsel's failure to call Villanueva was not a reasonable one."); *Bell*, 500 F.3d at 155-156 ("[T]here is a 'reasonable probability' that had trial counsel consulted with a medical expert,]the result of the proceeding would have been different.' The prosecution's case against Bell was thin – there was no eyewitness other than Moriah . . . . Impeaching Moriah's memory was therefore all in all for the defense. Armed with the insight and advice of a medical expert, a lawyer could have vastly increased the opportunity to cast doubt on this critical evidence.") (citation omitted).

Neither the district court nor the state postconviction court held an evidentiary hearing on this claim. As explained by the Sixth Circuit Court of Appeals in *Barnes*, without conducting an evidentiary hearing, it is *impossible* to determine whether counsel's failure to present a toxicologist was reasonable. *See Barnes*, 231 F.3d at 1029 ("Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound

trial strategy.").

Mr. Stephen submits that he has made "a substantial showing of the denial of a constitutional right" (i.e., his right to the effective assistance of counsel). *See* 28 U.S.C. § 2253(c)(2). The district court's resolution of this claim is "debatable amongst jurists of reason." Mr. Stephen therefore meets the standard for obtaining a COA. Whether defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist at trial is a claim that is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

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

In his state postconviction motion, Mr. 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 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 Mr. Stephen left the bar (and confirms reconstruction of Mr. Stephen's timeline and is therefore consistent with Mr. Stephen's theory that he was not driving the truck at the time of the accident). Notably, during the jury's deliberation, *the jury asked "what was the time registered on the bar tab"* (Doc 14-6 - Pg 1118), 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." (Doc 14-6 - Pg 1119). 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 Mr. 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* Mr. 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." (Doc 14-2 - Pg 63) (emphasis added). As argued in Mr. Stephen's state postconviction motion – and as confirmed by the state postconviction court's order – defense counsel *failed* to subpoena *any witness* (i.e., bartender, credit card company representative, etc.) who could properly authenticate the receipt.

The state postconviction court concluded in its order that Mr. 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 Mr. Stephen left the bar and (2) defense counsel – during closing

arguments – argued the "timeline of events." (Doc 14-2 - Pgs 64-65).[22]

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 cellphone, 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.

(Doc 14-2 - Pg 64) (emphasis added). However, a review of the portions of the trial transcript attached to the state postconviction court's order establishes that defense

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[22] The district court adopted the state postconviction court's analysis. (Doc 23 - Pgs 30-36).

counsel was *not successful* – through cross-examination – in establishing the exact time that Mr. 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." (Doc 14-2 - Pg 83). 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. (Doc 14-2 - Pgs 87-96). On page 1041 of the trial transcript, Mr. Dalzell "[g]uesstimated" that the group left the bar at "around 11:45, 12:00" (Doc 14-2 - Pg 101); on page 1042 of the trial transcript, he again said the group left the bar around midnight (Doc 14-2 - Pg 102); and then on page 1074 of the trial transcript, he said that the group left the bar at 12:45. (Doc 14-2 - Pg 104). 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 – at 12:48 a.m. – that coincides with Mr. Schubart's testimony, who saw men exit the bar (at that exact time) and with corroborating cellphone records.

Regarding defense counsel's closing argument, the state postconviction court cited an excerpt of defense counsel's closing argument (Doc 14-2 - Pgs 64-65), 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." (Doc 14-6 - Pg 973) (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 Mr. 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*." (Doc 14-6 - Pg 1118). 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).[23] 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." (Doc 14-6 - Pg 1119). Had defense counsel properly admitted the bar receipt into evidence (as he did

[23] 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. (Doc 14-2 - Pg 64) ("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.

during the first trial), and had the jury been able to view the time on the receipt to see that it was consistent with Mr. 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).

Accordingly, for the reasons set forth above, defense counsel was ineffective for failing to admit the bar receipt into evidence during the second trial. Based on the record and facts of this case, the state courts' denial of Mr. Stephen's ineffective assistance of counsel claim was both contrary to and an unreasonable application of *Strickland* and Mr. 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. Mr. Stephen is therefore entitled to federal habeas relief on this claim.

Neither the district court nor the state postconviction court held an evidentiary hearing on this claim. As explained by the Sixth Circuit Court of Appeals in *Barnes*, without conducting an evidentiary hearing, it is *impossible* to determine whether counsel's failure to admit the bar receipt into evidence was reasonable. *See Barnes*, 231 F.3d at 1029 ("Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr.

Waring was sound trial strategy.").

Mr. Stephen submits that he has made "a substantial showing of the denial of a constitutional right" (i.e., his right to the effective assistance of counsel). *See* 28 U.S.C. § 2253(c)(2). The district court's resolution of this claim is "debatable amongst jurists of reason." Mr. Stephen therefore meets the standard for obtaining a COA. Whether defense counsel rendered ineffective assistance of counsel by failing to admit the bar receipt into evidence during the second trial is a claim that is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

D. Conclusion.

Mr. Stephen submits that he has satisfied the test set forth in *Miller-El* for the issuance of a COA (i.e., reasonable jurists can debate whether Mr. Stephen's § 2254 ineffective assistance of counsel claims should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further). Accordingly, Mr. Stephen requests the Court to issue a COA in this case.

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/s/ Michael Ufferman
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July 21, 2023

CERTIFICATE OF SERVICE

I certify that a copy of this pleading and the notice of electronic filing was sent by CM/ECF on July 21, 2023, to:

Assistant Attorney General Sonya Roebuck Horbelt

Respectfully submitted,

/s/ Michael Ufferman

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