No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DIRK WILLIAMS,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Case 18-11660 Date Filed: 08/06/2018

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11660-F

DIRK WILLIAMS,

Petitioner-Appellant,

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Dirk Williams, a Florida prisoner serving a nine-year sentence for sexual battery of a physically helpless person, appeals the denial of his 28 U.S.C. § 2254 petition. He seeks a certificate of appealability ("COA") on the issue of whether his trial counsel was ineffective for failing to present the testimony of a

toxicologist to demonstrate that the victim's blood alcohol content ("BAC") was not sufficiently high to render her physically helpless.

At Williams's trial, the state outlined its theory that the victim, who "wasn't drunk" and did not have drugs in her system, was unconscious and unable to consent to sexual activity. The victim, her friend, and several law enforcement officers testified that she was "unresponsive," disoriented, and "out of it," before and after the incident. Williams maintained that the victim consented to sexual intercourse. The jury returned a guilty verdict.

The state post-conviction court denied Williams's claim that his counsel was ineffective, concluding that it was "rank speculation on the part of [Williams] to suggest that a toxicologist would have testified that a blood alcohol level of 0[.]38 would not have rendered the victim physically helpless." The court stated that

it was "common knowledge that a blood alcohol level of [.]08 raises a presumption of impairment under the DUI laws of the State of Florida," and the argument that "a blood alcohol content of almost five times that amount" would not sustain a jury's finding of physical helplessness was "so contrary to common sense as to be inherently incredible."

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right" 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 413,484 (2000) (quotation omitted).

If a state court adjudicated a claim on the merits, a federal court may grant habeas relief only if

the state court's decision (1) was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court;" or (2) "was based on an unreasonable determination of the facts;" 28 U.S.C. § 2254(d)(1), (2). The state court's factual findings are unreasonable when they are "clearly erroneous," or when the evidence was too powerful to conclude anything but what the petitioner claims is true. *Landers v. Warden*, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015) (internal quotations and citation omitted); *Wiggins v. Smith,* 539 U.S. 510, 528-29 (2003)). If it is determined that the state court decision is unreasonable, the reviewing court is "unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *Daniel v. Comm'r, Alabama Dep't of Corr.*, 812 F.3d. 1148, 1260 (11th Cir. 20l6) (internal quotations and citation omitted).

To establish a successful claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668. 687 (1984). Deficient performance means that counsel's representation fell below an objective standard of reasonableness, and no competent counsel would have taken the action that counsel did take. *Id.*; *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003).

Here, the state habeas court's decision was based on an unreasonable determination of fact, because the BAC figure used in the state court's analysis (0.38) clearly contradicted the BAC indicated in the stipulated reports admitted at trial (0.036). *See* 28 U.S.C. § 2254(d)(2); *Landers*, 176 F.3d at 1294. However, even applying *de novo* review, reasonable jurists would not debate that the district court properly

rejected Williams's claim. As reflected by the state's opening statement, the prosecution's theory of the case was that the victim was physically helpless, though such helplessness was not necessarily a result of her alcohol consumption.

Thus, it was not deficient for Williams's counsel to decline to call a toxicologist to testify that the amount of alcohol in the victim's system would not have been sufficient to render her physically helpless, as such testimony would not have contradicted the prosecution's theory.

Because reasonable jurists would not debate the district court's denial of Williams's claim, his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11660-F

DIRK WILLIAMS,

Petition-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

Dirk Williams has filed a motion for reconsideration of this Court's order dated August 6, 2018, denying his motion for a certificate of appealability in his appeal of the district court's denial

of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Upon review, Williams's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIRK WILLIAMS,

Petitioner,

v. Case No: 6:11-cv-1809-Orl-28KRS

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Petition is DENIED and this case is DISMISED with prejudice.

Date: March 22, 2018

ELIZABETH M. WARREN,
CLERK

s/J.T., Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIRK WILLIAMS,

Petitioner,

v. Case No: 6:11-cv-1809-0rl-28KRS

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ORDER

This case is before the Court on remand from the Eleventh Circuit Court of Appeals for consideration of Petitioner Dirk Williams' Petition for Writ of Habeas Corpus ("Petition," Doc. l) filed by counsel pursuant to

28 U.S.C. § 2254.[1] Upon remand, Respondents filed a Response to Petition ("Response," Doc. 33) in compliance with this Court's instructions. Petitioner filed a Reply and an Affidavit in Support of Petition ("Reply," and "Affidavit," Doc. Nos. 40, 41).

Petitioner asserts five grounds for relief. For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

A jury convicted Petitioner of sexual battery of a physically helpless person. (Doc. 9-2 at 390.) The state court sentenced Petitioner to a nine-year term of imprisonment and found him to be a sexual predator. (Doc. Nos. 9-1 at 28-29; 9-3 at 19.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (Doc, 9-3 at 94.)

Petitioner filed a motion for post-conviction

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1 The Court dismissed the case as untimely, but the Eleventh Circuit determined that the Petition was timely filed and remanded the case. *See* Doc. 26.

relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which he amended after the state court struck some claims with leave to amend. (*Id.* at 199-217.) The state court denied the amended motion. (*Id.* at 219-46.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 241.)

II. LEGAL STANDARDS

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dept of Corr.*, 432 F.3d 1292, 1308 (1 lth Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state

> court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id*.

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness

by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard For Ineffective Assistance Of Counsel

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[2] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at

2 In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court of the United States clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. Strickland encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir.

1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Ground One

Petitioner asserts counsel rendered ineffective assistance by failing to call a toxicologist to testify to refute that the victim was physically helpless due to alcohol intoxication. (Doc. 1 at 6.) Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 9-3 at 221-22.) The state court determined *inter alta* that it was speculative that a toxicologist "would have testified that a blood alcohol level of .038 would not have rendered the victim physically helpless." (*Id*. at 221.)

Petitioner has not established that the state

court's denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. To support this ground, Petitioner filed an affidavit of a toxicologist who attests that in his professional opinion, at the time of the offense, approximately five hours before the victim's blood was drawn, her blood alcohol level would have been .111 % and this blood alcohol level would not have rendered her physically helpless. (Doc. 41-1 at 4.) This evidence, however, was not presented to the state court. Consequently, this Court cannot consider it. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits ... It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.").

Furthermore, even if the Court considered the

affidavit, Petitioner has not demonstrated a reasonable probability exists that the outcome of the proceeding would have been different had a toxicologist been called to testify. April Probst ("Probst"), Brendan Curl ("Curl"), and Petitioner all testified that immediately prior to the offense, the victim needed assistance getting from the bathroom floor to the bedroom, although Curl and Petitioner disagreed with Probst about the level of assistance required. (Doc. 9-2 at 129-30, 242, 258, 281-82.)

The jury further heard evidence establishing the amount of alcohol the victim had consumed, her blood alcohol level approximately five hours after the incident, and that the victim did not feel as if she was intoxicated before leaving the bar. (Doc. 9-2 at 165-78, 197, 206.) The prosecutor also told the jury it was not clear what caused the victim's condition on the night of the incident. *See id.* at 23 ("But you're going to hear

testimony, and I believe it's been stipulated to, that they did a blood draw on [the victim]. She wasn't drunk. They did a toxicology on her. You're going to hear ... there were no drugs in her system .... But there's not going to be scientific ... 'evidence' to show you, to explain why she was feeling the way she was feeling."). Nevertheless, two witnesses, including one law enforcement officer, testified that either at the time of the sexual battery or within a few minutes after it occurred, the victim was incoherent, had to be shaken awake, and could not remain awake. (*Id.* at 27-29, 35, 141-44.) Additionally, two other officers testified that when they arrived at the scene approximately an hour and a half after the incident, the victim was asleep, had to be wakened, was very slow to respond, and was disoriented and incoherent. (*Id.* at 39-40, 70, 73-74.) Therefore, ample evidence established that the victim was physically helpless at

the time of the offense. Even if a toxicologist had testified that the victim was not rendered physically helpless by her alcohol consumption, this testimony would not have refuted the evidence presented demonstrating that the victim was physically helpless at the time of the offense. Accordingly, ground one is denied pursuant to § 2254(d).

B. Ground Two

Petitioner contends that his right to due process was violated by the trial court's limitation of his cross-examination of the victim. (Doc. 1 at 6-7.) In support of this ground, Petitioner argues that the trial court erred by prohibiting him from questioning the victim about whether she thought she was pregnant at the time of the offense. (*Id.* at 7.) According to Petitioner, this evidence was relevant to explain why the victim was sick and her motive for testifying that the sex was nonconsensual, namely that she did not

want her boyfriend to know that she consented to having sex with Petitioner. (*Id*).

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 9-3 at 94.) In considering a claim based on a state court evidentiary ruling, the Eleventh Circuit Court of Appeals has explained:

> We review state court evidentiary rulings on a petition for habeas corpus to determine only whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial. Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a crucial, critical, highly significant factor in the [defendant's] conviction.

Jacobs v. Singletary, 952 F.2d 1282, 1296 (11th Cir. 1992) (internal quotation marks and citations omitted). Additionally, in cases involving review of a state criminal judgment pursuant to 28 U.S.C. § 2254, "an error is harmless unless it 'had substantial and

injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 116, 127 (2007) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)). "If there is 'more than a reasonable possibility that the error contributed to the conviction or sentence,' then the error is not harmless." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1234 (11th Cir. 2014) (quoting Mansfield v. Sec'y, Fla. Dep't of Corr., 679 F.3d 1301, 1313 (11th Cir. 2012)).

The Confrontation Clause of the Constitution guarantees the defendant an opportunity to cross-examine the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986). "'[T]he exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Sec'y, Fla. Dep't of Corr. v. Baker*, 406 F. App'x 416, 423 (11th Cir. 2010) (quoting *Van Arsdall*, 475 U.S. at 678-79). "'The

partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)).

> "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'"

Van Arsdall, 475 U.S. at 680 (quoting Davis, 415 U.S. at 318). Conversely, no violation occurs if "'(1) the jury, through the cross-examination permitted, was exposed to facts sufficient for it to draw inferences relating to the reliability of the witness; and, (2) the cross-examination conducted by defense counsel enabled him to make a record from which he could argue why the witness might have been biased.'"

United States v. Calle, 822 F.2d 1016, 1020 (11th Cir. 1987) (quoting *United States v. Summers*, 598 F.2d 450, 461 (5th Cir. 1979)). To determine the impact of a Confrontation Clause violation, courts should consider "'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, ... and, of course, the overall strength of the prosecution's case.'" *Mason v. Allen*, 605 F .3d 1114, 1123–24 (11th Cir. 2010) (quoting *Van Arsdall*, 475 U.S. at 684).

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. The defense was allowed to question the victim regarding whether she had a boyfriend at the time of the offense and the seriousness of the relationship. (Doc. 9-2 at 195.) The victim

admitted that she was seeing someone at the time of the offense. (*Id*). Therefore, the jury heard evidence from which it could infer that the victim had a motive to testify that the sex with Petitioner was not consensual.

Furthermore, any error in not allowing the defense to question the victim about whether she suspected she was pregnant at the time of the offense was harmless. Witnesses other than the victim testified that she was asleep/passed out and incoherent at the time of the offense and shortly after it occurred. Therefore, Petitioner's inability to further cast doubt on the victim's credibility did not have a substantial and injurious effect or influence on the jury's verdict. Accordingly, ground two is denied pursuant to § 2254(d).

C. Ground Three

Petitioner asserts that the state court's denial of

his motion for a new trial deprived him of a fair trial. (Doc. 1 at 7-8.) Specifically, Petitioner contends he should have been granted a new trial because after the case was submitted to the jury, the parties learned that Probst, the witness who observed Petitioner having sex with the victim, had previously been a victim of a sexual battery. (Doc. 40 at 9-10.) According to Petitioner, this finding led him to discover statements made by Probst on the internet, which further would have impeached her credibility. (Doc. 2 at 16-20.)

In denying Petitioner's motion for new trial, the trial court detem1ined that Petitioner had not shown that the newly discovered evidence probably would have resulted in an acquittal. (Doc. 9-3 at 74.) Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (*Id*. at 94.)

The state court's denial of this ground is not

contrary to, or an unreasonable application of, clearly established federal law. Initially, the Court notes that there is no indication that either party was aware that Probst was a victim of sexual battery until after the case went to the jury. In other words, the State did not fail to disclose any evidence to Petitioner.

Although Petitioner maintains that the trial court's denial of his motion for new trial deprived him of his right to confront Probst, Petitioner was in fact permitted to cross-examine her and was not prohibited during the trial from asking her if she had been the victim of a sexual offense or about any statements she may have posted on the internet.

More importantly, there was ample evidence corroborating Probst's testimony regarding the victim's condition at the time of the offense. Probst, Curl, and Petitioner all agreed that immediately prior to the incident, the victim had been sick and needed

assistance getting from the bathroom floor to the bedroom. (Doc. 9-2 at 129-30, 242, 258, 281-82.) Furthermore, Probst and Petitioner testified that the victim did not want Petitioner to move her to the bedroom from the bathroom. (*Id.* at 127-28, 281.)

Consistent with Probst's testimony that the victim was unconscious and unresponsive when Petitioner had sex with her, a law enforcement officer who arrived within minutes of the incident testified that he had to shake the victim to wake her, it was very difficult to wake her, she was in and out of consciousness, and she was not completely coherent. (Doc. 9-2 at 28-29.) Two other officers, who arrived at the scene of the offense approximately an hour and a half after the incident, also testified that the victim was not conscious when they arrived, she was disoriented, and was not coherent. (*Id.* at 38-41, 70, 73-74.) In light of the evidence presented at trial

corroborating Probst's testimony regarding the victim's condition, any error in denying Petitioner's motion for a new trial to allow him to question Probst about her prior sexual battery and internet statements was harmless. Accordingly, ground three is denied pursuant to § 2254(d).

D. Ground Four

Petitioner asserts counsel rendered ineffective assistance by failing to present the audio and video recording of the victim taken by the police after the offense. (Doc. 1 at 8-9.) According to Petitioner, the recording would have shown that the victim was not physically helpless. (Doc. 2 at 20-21.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 9-3 at 223.) The state court reasoned that Petitioner failed to show prejudice because the recording was taken hours after the offense occurred and would not have refuted

testimony regarding the victim's condition at the time of the offense. (*Id*.)

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, *Strickland*. The recording of the victim was made after the victim was taken to the police station approximately three hours after the offense. (Doc. 9-2 at 74-76, 199.) Moreover, an officer testified that the victim appeared lucid when she gave her statement. (*Id.* at 82.) Consequently, the jury heard evidence from which it could determine that the victim was coherent when she gave her statement to police. In addition, the recording would not have refuted the testimony regarding the victim's demeanor/condition at the time of the offense or immediately after it occurred. Therefore, a reasonable probability does not exist that the outcome of the trial would have been different had counsel played the

recording of the victim. Accordingly, ground four is denied pursuant to § 2254(d).

E. Ground Five

Petitioner contends that the cumulative effect of counsel's errors deprived him of a fair trial. (Doc. 1 at 9.) Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief because all of Petitioner's grounds of ineffective assistance of counsel were without merit. (Doc. 9-3 at 224.)

"The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim." *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564 (11th Cir. 2009). The Supreme Court has held, however, in relation to a claim of ineffective assistance of counsel, that "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the

reliability of the finding of guilt.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659 n. 26 (1984)).

Petitioner has not established counsel rendered ineffective assistance in any of his grounds. Consequently, Petitioner's claim of cumulative error fails. *See also Borden v. Allen*, 646 F.3d 785, 823 (11th Cir. 2011) ("Because Borden has not sufficiently pled facts that would establish prejudice–cumulative or otherwise–we decline to elaborate further on [a cumulative-effect ineffective assistance of counsel claim] for fear of issuing an advisory opinion on a hypothetical issue."). Accordingly, ground five is denied pursuant to § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the petitioner makes

"a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934(11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v.*

Cockrell, 537 U.S. 322, 331 (2003).

Petitioner has not demonstrated that reasonable jurists would find the Court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby ORDERED and. ADJUDGED:

1. The Petition (Doc. 1) is DENIED, and this case is DISMISSED with prejudice.

2. Petitioner is DENIED a Certificate of Appealability.

3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE AND ORDERED in Orlando, Florida on

March 21, 2018.

[signature of John Antoon]
JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

Excerpt of state court trial transcript, page 25

Q Did you smell anything – based on your training and experience, did you smell anything that you thought might have been alcohol?

A I did.

Q Was it a strong emanation or slight emanation?

A It wasn't real strong.

Q Have you ever had the occasion to smell vomit?

A Yes, unfortunately, I have.

Q Did you smell anything along those lines?

A I don't recall smelling that at that point.

Q Did you see anything or was she – I'm not asking you to tell the jury what she said, but was she able to speak with you in any way?

A She talked to me for a couple of seconds and then kind of faded back out. It was very difficult to

keep her engaged in conversation.

Q Was her speech difficult to understand?

A It was very low, very mumbled.

Q Did it appear – strike that. So after you spoke with her, did you go back out and talk with Miss Probst?

A I did.

the morning. You talk to them, shake them, try to wake them up. They're slow to get up. My kids would normally get up the first or second time, you know? All right. You've got to go to school. But the more you talked to her, she still didn't wake up. She was still asleep, passed out from drugs, alcohol, whatever the occasion may be. She wasn't waking up like you normally would. There was a problem.

Q Did she appear to be coherent?

A No, she was very groggy when she began waking up.

Q Does she appear to be disoriented?

A Yes.

Q Was she able to sit up in your presence?

A Eventually she did, after she started responding a little bit because she wasn't fully clothed. She just had a shirt on. I exited the room so that

Detective Waggoner could help her get dressed and get her clothes back on.

Q In your experience, have you had occasion to be around people that have been drinking?

A Yes.

Q You know what the smell of alcohol appears to be on someone's breath –

A Yes.

Q – or emanating from their body in some way?

A Yes.

Q Did you smell alcohol on [the alleged victim]?

A She appeared to be intoxicated. I noticed that she had a paper bracelet on that they have when you go to the local establishments to consume alcohol. My recollection was she was intoxicated.

Excerpt of state court trial transcript, page 69

A Myself and Detective Askins initially went into the room together and we called her name, nudged her shoulder, trying to wake her, and she was real slow to wake. It took her – I didn't time it, but I know it took a minute or two to get her awake.

Q Approximately what time is this?

A That was after I arrived, so I arrived after 5:30. I would say 5:45, 5:50.

Q Were you able to wake her up?

A Yes. She initially – she finally did wake up.

Q And when she woke up, were you able to talk to her?

A I was. Detective Askins left the room at that time because at that time I had been made aware that she was only dressed in a sleeveless blouse and then covered in a blanket. So he left so that she could

get dressed.

Q Was she able to get dressed?

A She did. She put on her pants and I believe a sweatshirt over top of the blouse that she had worn.

Q Was she coherent?

A She was what I would determine as out of it. Somebody who appeared – who had been – had a lot to drink the night before and it took them a while to come around.

Q Did you smell any alcohol upon her?

A Yes, I did.

Q Was it strong?

Excerpt of state court trial transcript, page 351

Mr. Reiss told you there were certain mysteries in regards to this case, and I believe I said that in opening statement, that there was a 0.03 alcohol content in [the alleged victim's] blood. Drugs found in the system? No drugs found in the water. Okay, well, let's think about this. Keep in mind that [the alleged victim's] last taste of alcohol was 2:00 a.m. She wasn't at the Sexual Assault Treatment Center until 8:00 and then the blood was drawn. So we're talking five or six – at least four hours.

Now, use your common sense. Anybody that has gone out drinking, alcohol dissipates, it leaves the body after period of time that blood alcohol level. Was it reasonable to think that the blood alcohol level was higher at 4:00 a.m. or 3:45, whatever time frame up to put on this, 3:00 or 4:00, as it was at 8:00? And I submit to you, sure, it was. Was it because [the alleged

victim] was intoxicated? Yes. Now, you can split hairs about whether she was intoxicated or wasted, but the fact remains that she was intoxicated. That is one reasonable explanation for why the report that you will see has a blood alcohol level of 0.03.

Any drugs in her? No. Well, there's no evidence that she did any. Why wouldn't she be fine? Is this evidence that she had food poisoning? It's possible.

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIRK WILLIAMS,

Petitioner,

v. Case No. 6:11-cv-1809-Orl 28KRS

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

AFFIDAVIT OF LAWRENCE W. MASTEN, PhD, DABT

STATE OF FLORIDA

COUNTY OF PINELLAS

I, LAWRENCE W. MASTEN, having been duly sworn, hereby affirm and state the following as true and correct:

1. My name is Lawrence W. Masten, and I hold a Ph.D. in toxicology from the University of Michigan and a B.S. in biochemistry from Michigan State University. I am a board-certified toxicologist. Since 1980, I have been a Diplomate of the American Board of Toxicology. I established and taught graduate toxicology courses and undergraduate forensic toxicology courses at the University of Mississippi for six years ending in 1980. As a result of the toxicology graduate program, eleven doctoral degrees were awarded in PhD in toxicology.

Since that time, I have worked as a toxicologist in the pharmaceutical and chemical industries, and periodically, I have consulted on legal cases involving drugs and/or alcohol. I have been recognized as an expert in the field of toxicologist by various state and federal courts. At this time, I specialize in DUI, BUI, DUI manslaughter, wrongful death, worker's

compensation, and products liability for alcohol and drug related cases.

2. Attached to this affidavit is a true and correct copy of my curriculum vitae.

3. I have reviewed the trial transcripts of *State v. Williams*. The transcripts establish that on the evening of June 11, 2005, [the alleged victim] had dinner with some of her friends. [The alleged victim] stated that the meal at dinner was spaghetti and meatballs, and she said that she had a "couple of drinks" at dinner. She said that she did not feel any effects of the alcohol at that time. [The alleged victim] stated that she subsequently went to one or more bars. Between 10 and 10:30, she ordered a drink, but she said that she did not consume the drink because it was "too strong." Later in the evening, she said she ordered one or more "Jack and Cokes," but she again repeated that she did was not intoxicated as a result of

consuming these drinks. Sometime before 2 a.m., [the alleged victim] had her last drink (another "Jack and Coke"). She said that she was not sure if she finished this drink. The encounter between [the alleged victim] and Mr. Williams occurred shortly before 4:10 a.m. on June 12, 2005 (because [the alleged victim's] friend called the police minutes after the encounter, and the police said that they were first called at 4:10 a.m.). [The alleged victim's blood was drawn at approximately 9 a.m. (when she was taken to the Sexual Assault Treatment Center).

4. A report from the Florida Department of Law Enforcement establishes that [the alleged victim's] blood-alcohol concentration ("BAC") at the time her blood was drawn was *only* .036%. The legal limit to drive in Florida is .080%. *See* § 316.193(1)(b), Fla. Stat.

5. It is generally established in the

toxicology/medical community that people eliminate alcohol at an average rate of approximately .015% an hour. Thus, in conducting retrograde extrapolation,[the alleged victim's] approximate BAC at the time of her encounter with Mr. Williams (i.e., approximately five hours before her blood was drawn) was .111%.

6. "Physically helpless" means "that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to act." § 794.011(1)(e), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 11.3.

7. It is my expert opinion that a person with an approximate BAC of .111% would not be "physically helpless." It is also my opinion that for someone to be "physically incapacitated," the person's BAC would need to be above .20%.

8. Based on my review of the trial transcripts, [the alleged victim's] BAC at the time of

her encounter with Mr. Williams could not have been above .20%.

I declare that l have read the above document and that the facts stated therein are true.

Executed on this 5th day or March, 2018.

[signature of Lawrence Masten]
Lawrence Masten, PhD. DABT

Sworn to and subscribed before me by Lawrence W. Masten, PhD, DABT, who is personally known to me or who has produced FL DRIV. LIC. as identification this 5th day of March, 2018.

[signature of Shakeel Saleh]
Notary Public, State of Florida at Large

My commission expires:

03/14/2021

[ink-stamped area containing: (1) image of round seal with words "NOTARY PUBLIC STATE OF FLORIDA", (2) listing: SHAKEEL SALEH, Notary Public- State of Florida, Commission #

GG079575, My. Comm. Expires Mar 14, 2021, Bonded through National Notary Assn.]

[handwritten area containing "CF05-7764"]

Florida Department of
Law Enforcement

Orlando Regional Operations Center

500 W. Robinson Street
Orlando, Florida 32801
(407) 245-0801
Fax (407) 540-3806
http://www.fdle.state.fl.us

Guy M. Tunnell
Commissioner

July 06, 2005

TO: Chief Douglas M. Ball
Winter Park Police Department
500 N Virginia Ave
Winter Park, FL 327S9

FDLE NUMBER: 20050508065
SUBMISSION: 001
AGENCY NUMBER: 057556

ATTN: Det. Wagganer

SUBPOENAS PERTAINING TO THIS CASE
SHOULD REFER TO THE FDLE NUMBER

SUBJECT(S): WILLIAMS, DIRK HOUSTON
VICTIM(S): [ALLEGED VICTIM]
OFFENSE(S): Sexual Assault
Orange County
06/11/2005

[signature of Ruth E. Vacha]
Ruth Elizabeth Vacha
Crime Laboratory Analyst
Toxicology Section

REFERENCE:

This report has reference to item(s) submitted to FDLE on June 21, 2005 by C. Botelho.

EXHIBITS:

02	Item 9	Blood specimen represented as being from KR.

RESULT(S):

02	Item 9	0.036 grams of ethyl alcohol per 100 milliliters was determined in the specimen.
02	Item 9	0.036 grams of ethyl alcohol per 100 milliliters was determined in the specimen.

REMARK(S):

The requested drug test will be the subject of a separate report.

[ink-stamped area containing "RECEIVED JUL 27

2005 SCU"]

[handwritten area containing "Div 20 6/14/05 REC"]

EMS Report: Temp924064.doc- Printed On: Wednesday, July 06, 2005- Page 1 of 1
Committed to
Service & Intergrity & Quality

Excerpt of prosecution's answer in state court postconviction proceeding, pages 8-9

GROUND 8 and 9 TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE A TOXICOLOGIST OR MEDICAL EXPERT

This claim is insufficiently pled. It is rank speculation on the part of the defendant to suggest that a toxicologist or medical expert would have testified that a blood alcohol level of 038 would not have rendered the victim physically helpless to resist. In the experience of the undersigned such a level of blood alcohol would be nearly fatal. That being said When a claim is made of failure to call a witness the defendant must pled with specificity the following facts 1) the identity of the prospective witnesses, 2) the substance of the witnesses' testimony, 3) an explanation as to how the omission of this evidence precluded the outcome of the trial and 4) that the witness was actually available to testify. The present claim is

entirely speculative and insufficient. This claim should be denied with leave to amend, if the defendant can, to include the name of this toxicologist or medical expert and the specific substance of his or her testimony.

Excerpt of order in state court postconviction proceeding, pages 3-4

GROUND 8 AND 9 TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE A TOXICOLOGIST

Because the Defendant fails to identify the prospective witness and the specific substance of his testimony, this claim remains insufficiently pled. *Highsmith v State*, 617 So 2d 825 826 (Fla 1st DCA 1993). In addition, the Court agrees with the State that it as rank speculation on the part of the Defendant to suggest that a toxicologist would have testified that a blood alcohol level of 038 would not have rendered the victim physically helpless. Postconviction relief cannot be based on speculative assertions. *See Maharaj v State*, 778 So 2d 944, 951 (Fla 2000). Furthermore, it is an inherently incredible claim. It is common knowledge that a blood alcohol level of 08 raises a presumption of impairment under

the DUI laws of the State of Florida. That a blood alcohol content of almost five times that amount, essentially almost 40 percent of the victim's blood consisted of alcohol, would not sustain a jury's finding of "physically helpless," is so contrary to common sense as to be inherently incredible. *Evans v State*, 843 So 2d 938 (Fla 3d DCA 2003), *Hlad v State*, 565 So 2d 762 (Fla 5th DCA 1990).

Moreover, ineffective assistance of counsel may not be found in defense counsel's failure to seek to introduce evidence of a meritless defense at the guilt phase of a trial, or in defense counsel's failure to present expert testimony or evidence, where such testimony was not required *Atkins v Dugger*, 541 So 2d 1165 (Fla 1989).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14917-C

DIRK WILLIAMS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Dirk Williams is a Florida prisoner serving a sentence of nine years' imprisonment after a jury convicted him of sexual battery on a physically helpless person. He filed the instant 28 U.S.C. § 2254 petition on November 15, 2011, and raised five claims.

The Secretary of the Florida Department of Corrections (the "Secretary") responded that Williams's petition was untimely. Williams replied that his petition was timely. The district court then found that Williams's petition was timely because the certificate of service on his state post-conviction motion indicated that the motion was submitted on September 30, 2009, and it tolled the limitations period. The court also ordered the Secretary to file a supplemental response addressing the merits of Williams's claims. The Secretary then filed a motion for reconsideration, arguing that the petition was untimely because, despite the fact that Williams signed the motion in September, he admitted that he did not give it to prison authorities until October 7, 2009, the day after the limitations period expired. The district court granted the motion for reconsideration, finding that Williams's petition was untimely.

Williams then filed a motion to alter or amend the judgment, pursuant to Fed.R.Civ.P. 59(e), again arguing that his petition was timely. The district court denied the motion and also denied a certificate of appealability ("COA"). Through counsel, Williams now seeks a COA from this Court. Williams argues that: (1) his Fla.R.Crim.P. 3.850 motion should be deemed filed on September 30, 2009, when the document was completed and signed; or (2) equitable tolling should apply because he was unable to copy the document until October 7, 2009.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas motion in part on procedural grounds, the movant must show that jurists of reason would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and

(2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

Procedural Ruling

The district court determined that Williams's Rule 3.850 motion did not toll the limitations period because it was filed on October 7, 2009, the day after the date on which a state post-conviction motion could be filed for § 2254 tolling purposes. However, based on this Court's precedent concerning the calculation of the limitations period, the district court arguably erred.

The record shows that a Florida court of appeals *per curiam* affirmed Williams's conviction without a written opinion. Williams then filed a motion for rehearing, and the court of appeals denied the motion on July 8, 2008. Williams's conviction became final on October 6, 2008, when the time for filing a petition for a writ of certiorari with the U.S. Supreme Court

expired, which was 90 days after the entry of judgment denying rehearing on direct appeal. *See id.* § 2244(d)(1)(A); *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980) (holding that the Florida Supreme Court lacked jurisdiction to review *per curiam* decisions of the state appellate courts issued without an opinion). The district court held that because the one-year limitations period began running the following day, October 7, 2008, it thereby expired on October 7, 2009. Yet case authority from this Court arguably supports a conclusion that the period ended on October 8, not October 7. *See, e.g., McCloud v. Hooks*, 560 F.3d 1223, 1229 (11th Cir. 2009) (finding that the petitioner's limitations period under AEDPA ended "one year from the day after" the criminal judgment became final); *San Martin v. McNeil,* 633 F.3d 1257, 1266 (11th Cir. 2011) (finding that the petitioner's conviction became final on October 5, 1998, and he had until Wednesday,

October 6, 1999, to file his § 2254 petition).

And on October 7, 2009, Williams properly filed a *pro se* Rule 3.850 motion, which statutorily tolled the limitations period. *See* 28 U.S.C. § 2244(d)(2). The state court denied relief, Williams appealed, and a state appellate court affirmed. Williams filed a motion for rehearing, which was denied, and the mandate was issued on November 17, 2011. Accordingly, the limitations period was tolled until the date the final mandate was issued. *See Nyland v. Moore*, 216 F .3d 1264, 1267 (11th Cir. 2000) (providing that, "[i]n Florida, a state court of appeals' order denying a rehearing on its affirmance of the state trial court's denial of a motion for post-conviction relief is pending until the mandate issues"). Williams filed his § 2254 petition on November 15, 2011, which date occurred before the one-year limitations period expired, if one assumes an October 8 start date for the limitations

period.

Based on the foregoing, reasonable jurists could debate whether the district court was correct in its procedural ruling. Therefore, in accordance with *Slac*k, we now turn to the merits of Williams's motion to determine if reasonable jurists would debate whether his petition stated a valid claim of the denial of a constitutional right. *See Spencer v. United States*, 773 F .3d 113 2, 113 8 (11th Cir. 2014) ("[A] certificate of appealability, whether issued by this Court or a district court, must specify what issue jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue.").

Constitutional Claim

The Supreme Court decision applicable in an ineffective-assistance case is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

See Premo v. Moore, 562 U.S. 115, 121-22, 131 S.Ct. 733, 739, 178 L.Ed.2d 649 (2011). To succeed on an ineffective-assistance claim under *Strickland*, a movant must show that must that his Sixth Amendment right to counsel was violated because (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

In his § 2254 petition, Williams alleged, among other things, that counsel was ineffective for failing to present the testimony of a toxicologist or medical expert at trial to refute the state's contention that the alleged victim was "physically helpless" due to alcohol intoxication. He argued that the state post-conviction court's denial of the claim was based on an unreasonable determination of the facts in light of the evidence contained in the record. Williams argued that the record showed that the parties had stipulated that

the victim's blood alcohol level near the time of the offense was 0.038 grams of alcohol per 100 milliliters of blood, but the state court incorrectly stated that the victim's blood alcohol level was 0.38. The government never contested the merits of this claim, and the district court did not consider the merits of the claim, as it solely relied on its procedural ruling. Because Williams presented at least one facially valid constitutional claim, and the district court did not consider its merits, reasonable jurists could debate whether the motion stated a valid claim of the denial ofa constitutional right. *See Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

Because jurists of reason could debate both the district court's time-bar denial of Williams's § 2254 petition, and whether the motion stated a valid claim of the denial of a constitutional right, a COA is GRANTED on the following issue only:

Whether the district court erred in dismissing as time-barred Williams's 28 U.S.C. § 2254 habeas corpus petition?

[signature of Julie Carnes]
UNITED STATES CIRCUIT JUDGE