No. 13-10900-DD

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KELVIN REED,

Petitioner-Appellee.

v.

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

Respondents-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division
Case No. 6:11-cv-827-RBD-DAB, Hon. Roy B. Dalton, Jr.

APPELLEE'S ADDITIONAL BRIEF

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Kelvin Reed

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Ashton, Jeffrey L. – Ninth Circuit State Attorney;

2. Baker, Hon. David A. – United States Magistrate Judge;

3. Bondi, Pamela Jo – Florida Attorney General – Respondent-Appellant;

4. Burns, Thomas A. – Petitioner-Appellee's federal habeas appellate counsel;

5. Burns, P.A. – Petitioner-Appellee's federal habeas appellate counsel;

6. Casey, Jeffrey R. – Florida Assistant State Attorney General;

7. Corrente, Carmen F. – Florida Assistant State Attorney General;

8. Crews, Michael D. – Secretary of the Florida Department of Corrections – Respondent-Appellant;

9. Dalton, Jr., Hon. Roy B. – United States District Judge;

10. Evander, Hon. Kerry I. – District Judge for the Florida Fifth District Court of Appeal;

11. Golik, Tomislav D. – Petitioner-Appellee's direct appeal counsel;

12. Joshi, Rajan – Petitioner-Appellee's post-conviction trial counsel;

13. Lawson, Hon. C. Alan – District Judge for the Florida Fifth District Court of Appeal;

14. Levering, Rose M. – Petitioner-Appellee's post-conviction appellate counsel;

15. Luka, Thomas B. – Petitioner-Appellee's trial and sentencing counsel;

16. McCollum, Bill – Former Florida Attorney General;

17. McDonald, Hon. Roger J. – Florida Circuit Court Judge (oversaw post-conviction evidentiary hearing);

18. O'Kane, Hon. Julie H. – Florida Circuit Court Judge (oversaw trials);

19. Orfinger, Hon. Richard B. – District Judge for the Florida Fifth District Court of Appeal;

20. Palmer, Hon. William D. – District Judge for the Florida Fifth District Court of Appeal;

21. Purdy, James S. – Petitioner-Appellee's post-conviction appellate counsel;

22. Reed, Kelvin – Petitioner-Appellee;

23. Sharp, Hon. Winifred J. – Former District Judge for the Florida Fifth District Court of Appeal;

24. Wooten, Hon. Wayne – Former Florida Assistant State Attorney.

February 5, 2014

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellee Kelvin Reed requests oral argument. This appeal involves the grant of a federal habeas petition. The extensive record on appeal contains transcripts of two three-day trials, direct appeal briefs and opinion, a state habeas petition and opinion, post-conviction motions practice and a transcript of an evidentiary hearing, and post-conviction appellate briefs and opinion. Oral argument will assist the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a direct appeal from a final order (Doc. 14) granting a petition for writ of habeas corpus (Doc. 1). The District Court had subject-matter jurisdiction. *See* 28 U.S.C. § 2241(a). This Court has appellate jurisdiction. *See* 28 U.S.C. §§ 1291 & 2253(a).

STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude Kelvin Reed's trial lawyer, Thomas Luka, provided ineffective assistance of counsel when he made the tactical decision not to call an alibi witness, Jarvess Coleman, without first performing any pretrial investigation of him?

2. Did the District Court correctly conclude Luka's unreasonable tactical decision prejudiced Reed?

STATEMENT OF THE CASE

Course Of Proceedings

By information, the State of Florida charged Kelvin Reed with two counts of DUI manslaughter in violation of Fla. Stat. § 316.193, two counts of vehicular homicide in violation of Fla. Stat. §§ 782.071 & 316.062, two counts of leaving the scene of an accident with death in violation of Fla. Stat. §§ 316.062 & 316.027(1)(b), and two counts of driv-

ing while license suspended causing serious bodily injury or death in violation of Fla. Stat. § 322.34(6). Doc. 8-1 at 86-93.

At his first trial, the jury acquitted Reed of the two DUI manslaughter counts, and the jury hung as the remaining counts, resulting in a partial mistrial. Doc. 8-3 at 385. At the same time, the State also entered a *nolle prosequi* for the two leaving-the-scene-of-an-accident counts. Doc. 8-1 at 175.

At the second trial, the jury found Reed guilty of the two vehicular-homicide counts and the two suspended-license counts. Docs. 8-1 at 213-16, 8-2 at 460-61. The Circuit Court sentenced Reed for the two vehicular-homicide counts to 35 years' imprisonment (i.e., 17.5-year consecutive sentences for each count). Doc. 8-1 at 234-35. Reed was not sentenced for the remaining counts. *See* Doc. 8-1 at 234-35. On direct appeal, the Fifth District Court of Appeal affirmed. Doc. 8-4 at 245-48.

Reed then filed a state habeas petition in the Fifth District. Doc 8-4 at 54-70. It was denied. Doc. 8-4 at 84.

Next, pursuant to Florida Rule of Criminal Procedure 3.850, Reed filed a motion for post-conviction relief and an addendum thereto. Doc. 8-4 at 122-70. In ground 2, Reed claimed his trial counsel was ineffec-

tive "by failing to investigate, locate or conduct a basic interview into a named, disinterested, eye witness whose testimony was critical-to defendant's defense": namely, alibi witness Jarvess Coleman. Doc. 8-4 at 150-53, 162-63. The Circuit Court (through a different judge who had not overseen the trial) entered an order denying all grounds except ground 2, as to which it set an evidentiary hearing. Doc. 8-4 at 239-44. Following the evidentiary hearing (Doc. 8-4 at 326-404), the Circuit Court entered an order denying ground 2 as well (Doc. 8-4 at 293-96). On appeal, the Fifth District affirmed this order. Doc. 8-4 at 435-36.

Finally, Reed filed the instant federal habeas petition. Doc. 1. The District Court denied all grounds except ground 2, as to which it granted the writ. Doc. 14. The State moved for reconsideration (Doc. 16), which the District Court denied (Doc. 17). This appeal followed. Doc. 19. Reed is currently incarcerated.

Statement Of Facts

A. The Second Trial

1. The Parties Enter Into A Joint Stipulation

Before trial, the parties entered into a joint stipulation of facts. Doc. 8-1 at 152-53. Among other things, the parties agreed that at 2:55

A.M. on July 13, 2004, Michael Harper and Troy Henshaw "were coming home from work at the Village Inn Restaurant." Doc. 8-1 at 152. As they were "were nearing the middle of Rio Grande Avenue they were struck by a blue Pontiac Sunfire" that "was traveling between 77 and 108 miles per hour." Doc. 8-1 at 152. Harper and Henshaw suffered severe injuries and died. Doc. 8-1 at 152. A few hours later at 6:30 A.M., Reed had a "blood alcohol concentration of 14 grams of alcohol per 100 milliliters of blood." Doc. 8-1 at 152-53. At the time, Reed's drivers license "was in suspended or revoked status." Doc. 8-1 at 153.

2. The Parties Give Opening Statements

The issue at trial turned on who was driving the blue Pontiac Sunfire. The State's theory was that Reed was the driver, whereas Reed's theory was that he was home that night and was framed.

a. The State's Opening Statement

The State explained in its opening statement that Reed was driving the blue Pontiac Sunfire during the hit-and-run accident. Doc. 8-2 at 35. Previously, Willie Richards, a convicted felon, had rented the blue Pontiac Sunfire in exchange for cocaine. Doc. 8-2 at 38. On the night in question, Richards was working at the downtown Orlando club Tabu

during a concert. Doc. 8-2 at 38. Richards got drunk and drove a short distance away to Washington Street, but decided he did not want to drive anymore. Doc. 8-2 at 38. At that point, Richards apparently met Reed, who offered to drive him and another person home. Doc. 8-2 at 38-39. During this drive, Reed drove at a very high rate of speed. Doc. 8-2 at 38-39. After Reed dropped off the other passenger, Richards was the passenger and witnessed the accident occur. Doc. 8-2 at 36-37. After the accident, Reed parked the car a short distance away and wiped down his side for fingerprints. Doc. 8-2 at 39.

Richards and Reed then showed up at Jessica Patterson's home. Doc. 8-2 at 35. Patterson knew Richards because he was dating her roommate; Patterson did not know Reed. Doc. 8-2 at 35-36. Patterson thought Richards and Reed were acting strange. Doc. 8-2 at 35-36. Nevertheless, Patterson gave Richards and Reed a ride back home. Doc. 8-2 at 36. During that ride, Patterson, Richards, and Reed drove past the crash scene, and Patterson overheard Reed say "they dead" or "[t]hose dudes dead." Doc. 8-2 at 36. Patterson also heard Reed say he wanted to "blow[] something up." Doc. 8-2 at 36. After Patterson dropped Reed off, she called the police and led them to Reed's house. Doc. 8-2 at 36.

When the police questioned Patterson, they asked if Reed had left anything in her car; she indicated he left a hat. Doc. 8-2 at 40. The State explained a DNA expert would testify about the statistical likelihood that Reed had worn that hat. Doc. 8-2 at 40. Finally, the State explained that when Reed was arrested, he stated he had been on Washington Street that evening. Doc. 8-2 at 40.

b. Reed's Opening Statement

Reed explained that even the State admitted the blue Pontiac Sunfire was in Richards's possession, except apparently for the brief time when Reed supposedly was driving it. Doc. 8-2 at 41. But there was no physical evidence to connect Reed to the blue Pontiac Sunfire. Doc. 8-2 at 41. And Richards had a motive to lie, because he was a two-time convicted felon hoping to avoid a third strike. Doc. 8-2 at 41. As for Patterson, she told multiple stories to the police. Doc. 8-2 at 41.

3. The Circuit Court Reads The Joint Stipulation Into The Record

The Circuit Court read the joint stipulation into the record. Doc. 8-2 at 43-45.

4. Richards Testifies

Richards was a two-time convicted felon. Doc. 8-2 at 71. On July 12, 2004, Richards was working as a sound technician for the Juvenile concert at the Tabu nightclub in downtown Orlando. Doc. 8-2 at 46. While working, Richards consumed some Long Island Iced Teas and a few shots of Hennessy. Doc. 8-2 at 47, 72.

Richards left Tabu "round about 2:45 [or] 3 o'clock"[1] and drove the blue Pontiac Sunfire two blocks away to his "cousin's house on Washington Street." Doc. 8-2 at 47. Richards did not own the blue Pontiac Sunfire; he had rented it for the previous week in exchange for $40 of crack cocaine.[2] Doc. 8-2 at 47-48, 68-69. Because he was drunk and tired, Reed wanted to "lay down" at his cousin's house. Doc. 8-2 at 48.

On Washington Street, Richards ran into Reed. Doc. 8-2 at 48-49. Reed was "a friend from around the neighborhood," whom Richards had known for three years. Doc. 8-2 at 49. Reed "wanted to use the car and

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[1] This is either five minutes before or ten minutes after the accident occurred, according to Richards's timeline of events. *Compare* Doc. 8-2 at 47 (2:45 or 3:00 A.M.), *with* Doc. 8-2 at 43 (2:55 A.M.).

[2] The car was reported as stolen on July 12, 2004, the day before the accident. *See* Doc. 8-2 at 69.

go somewhere." Doc. 8-2 at 50. Richards told Reed he could take the car and drive him home. Doc. 8-2 at 50.

On this drive home, Richards and Reed ran into Jarvess Coleman, who "looked like he needed a ride home, too." Doc. 8-2 at 50-51. Reed and Richards offered Coleman a ride. Doc. 8-2 at 51. Coleman accepted and entered the car; Richards sat in the passenger seat. Doc. 8-2 at 51, 73. According to Richards, Reed headed west on I-4 from downtown Orlando, took the West Michigan Street exit, then turned on South Rio Grande Avenue toward Coleman's house. Doc. 8-2 at 51. During this trip, Richards recounted that Reed was "going over hundred miles per hour swerving in and out of lanes." Doc. 8-2 at 51.

After Reed dropped Coleman off, they headed north on South Rio Grande Avenue toward Richards's home in Pine Hills. Doc. 8-2 at 52. Reed continued "speeding and swerving in and out of lanes." Doc. 8-2 at 52-53. As they approached the intersection of South Rio Grande Avenue and Grand Street (where the accident occurred), Richards "noticed one other car" going in the same direction and "two pedestrians crossing the road." Doc. 8-2 at 53. The pedestrians were on the right side of the road trying to cross South Rio Grande Avenue. Doc. 8-2 at 53. Reed "swerved

around the car and ran in the middle of the median and ran over the two people." Doc. 8-2 a 53.

At the time of the collision, Richards said Reed was going "[e]xactly, 110 miles per hour." Doc. 8-2 at 54. Richards knew this because he looked at the speedometer. Doc. 8-2 at 55. Richards recalled "[a] loud thump on the car and Mr. Reed saying that I got them, Flip." Doc. 8-2 at 56. (Flip was Richards's nickname. Doc. 8-2 at 56.) During the collision, Richards heard the left rear window shatter. Doc. 8-2 at 57. About 20 minutes had elapsed between the time Reed started driving and the accident. Doc. 8-2 at 59.

After the accident, Reed continued driving north, took a right on Anderson Street, and drove to a Citgo gas station at the Orange Blossom Trail intersection. Doc. 8-2 at 57, 76. At the Citgo station, Reed purchased rubbing alcohol and, with his shirt, rubbed down the driver side door handles, steering wheel, and inside door handle panel for 5-10 minutes. Doc. 8-2 at 57-58, 76. Reed did not rub down the passenger side. Doc. 8-2 at 76. While Reed was rubbing the car down, Richards was screaming and wanted to leave. Doc. 8-2 at 58.

Richards decided to walk to Candace Stewart's home a few blocks away. Doc. 8-2 at 58-60. (Stewart is the mother of Richards's child. Doc. 8-2 at 77.) Reed followed. Doc. 8-2 at 59-60. Before they left the Citgo Station, Reed tried unsuccessfully to remove the car's tags. Doc. 8-2 at 59. During the walk, Reed told Richards that if any questions arose in a law enforcement investigation or legal proceeding, Richards should say he did not know anything about the car or what happened, and that if he did not comply, "something" would happen. Doc. 8-2 at 60.

When they arrived, Stewart and her roommate Patterson were home. Doc. 8-2 at 59. At Stewart's and Patterson's home, Reed was sweating and nervous and did not leave Richards alone for long periods of time. Doc. 8-2 at 61. Eventually, Reed said he was going to his house. Doc. 8-2 at 61. Patterson was going to drive Reed home, but because she was scared, Richards rode along as well. Doc. 8-2 at 62.

They first drove to the gas station on the other corner of Orange Blossom Trail and Anderson Street, and Reed said he wanted to blow the car up. Doc. 8-2 at 63. Patterson said she would not stop at the gas station. Doc. 8-2 at 63. Then they went back to South Rio Grande Avenue and headed south. Doc. 8-2 at 62-63. But the police had already

blocked southbound traffic on South Rio Grande at the Grand Street intersection. Doc. 8-2 at 63. When they saw the accident scene, Reed said the pedestrians were dead. Doc. 8-2 at 64. Reed asked Patterson to turn around and take South Orange Blossom Trail instead. Doc. 8-2 at 62-63.

Patterson eventually arrived at Reed's home. Doc. 8-2 at 64. Richards did not know whether Reed left anything in Patterson's car: Richards had been in the front seat, whereas Reed had been in the rear seat. Doc. 8-2 at 64.

On the return drive, Richards did not explain to Patterson what had happened that evening. Doc. 8-2 at 66. Nevertheless, 15 minutes after Patterson and Richards returned to Patterson's home, Patterson reported Reed to the police. Doc. 8-2 at 65. Richards speculated that Patterson knew to call the police because "[w]hen [Patterson and Reed] was in the front room [of Stewart's home] I guess they was talking about it." Doc. 8-2 at 83.

5. Patterson Testifies

Richards and Reed told Patterson they had been at the Juvenile concert at Tabu and needed a ride home. Doc. 8-2 at 93. Before Reed came to her house that evening, Patterson did not know him. Doc. 8-2 at

93. To Patterson, Richards and Reed seemed "nervous" and "kind of excited," as if "they was in a fight at the club." Doc. 8-2 at 94. While at the home, Reed asked Patterson three times for rubbing alcohol, which she provided. Doc. 8-2 at 96. Reed did not tell her why he wanted it. Doc. 8-2 at 96. Although Patterson initially objected, eventually she relented and agreed to give Richards and Reed a ride home. Doc. 8-2 at 95.

Reed asked Patterson to drive to the Citgo station. Doc. 8-2 at 96. Reed wanted something to eat. Doc. 8-2 at 96. When Patterson stopped at the gas station, a man walked toward Patterson's car, and she thought Reed was going to fight him. Doc. 8-2 at 96-97. Reed took off his jacket and hat and said "I'm going to blow this mother fucker up." Doc. 8-2 at 97. Patterson was upset that (she thought) Reed was going to fight this man, so she called Stewart. Doc. 8-2 at 97. Patterson handed her phone to Richards, and Stewart asked him why Reed was going to fight this man. Doc. 8-2 at 98. Richards said "we're not out here to fight nobody. It is far beyond that. . . . I'll tell you later." Doc. 8-2 at 100. Shortly thereafter, they left the Citgo station and doubled back to South Rio Grande Avenue. Doc. 8-2 at 101.

When they approached the accident scene, Reed stated "[m]an, they dead." Doc. 8-2 at 102. Reed directed Patterson to return to Orange Blossom Trail, and he continued giving her directions toward his house. Doc. 8-2 at 102-03. On the way back, Reed further stated "man, I am fucked up. I am fucked up. I done hit these people. I'm fucked." Doc. 8-2 at 111. (Patterson did not so testify at the first trial. *See* Doc. 8-3.)

After dropping Reed off, Patterson and Richards returned to Stewart's and Patterson's home. Doc. 8-2 at 103. On the way back, Richards explained what had happened that evening, and Patterson made the decision to call the police. Doc. 8-2 at 92, 103.

Patterson called the police, met them at the Citgo station, and gave a fake name (Kiki Williams) and a partially fabricated story that omitted Richards's role. Doc. 8-2 at 104-09. In Patterson's car, the police found Reed's hat. Doc. 8-2 at 107-08. Patterson rode with the police to Reed's house and identified Reed. Doc. 8-2 at 108-09. Patterson contacted the police a second time that afternoon, gave her true name, and explained Richards's role. Doc. 8-2 at 109-10.

On cross-examination, Patterson admitted that her boyfriend (and father of her son) was Bobby Sullivan, who frequently used her car in

her absence. Doc. 8-2 at 113-14. Patterson also testified, contrary to Richards, that during her drive to Reed's house, Reed sat in the front seat while Richards sat in the back. Doc. 8-2 at 118.

6. Corporal Patricia Payne Testifies

Corporal Patricia Payne was a homicide investigator for the Florida Highway Patrol with 13 years' experience as a regular road patrol trooper. Doc. 8-2 at 139. She testified there were no skid marks at the accident scene, which indicated no braking. Doc. 8-2 at 150. Applying an accident formula, Corporal Payne calculated the collision occurred at "a speed between 70 and 109 miles an hour." Doc. 8-2 at 152.

Corporal Payne took statements from Patterson and Richards. Doc. 8-2 at 168-82. Although Richards mentioned Coleman in his statement, Corporal Payne was unable to locate him. Doc. 8-2 at 176-77. The record does not reflect what Corporal Payne did in her attempt to locate Coleman. *See* Doc. 8-2 at 177. Corporal Payne testified Patterson told her that Reed "was mumbling under his breath something about I messed up. I messed up. I've killed those people. I messed up." Doc. 8-2 at 181. (Corporal Payne did not so testify at the first trial. *See* Doc. 8-3.) When Corporal Payne took Reed into custody and asked him about the

accident, he stated he was "at my people's house on Washington" earlier that evening and had been home since 11:30 P.M. Doc. 8-2 at 195-96. Later that day, Richards stated to Payne that he met Reed on Washington Street. Doc. 8-2 at 238.

7. Trooper Ann Mulligan Testifies

Trooper Ann Mulligan had worked for the Florida Highway patrol for eight years. Doc. 8-2 at 249. When taking a statement from Patterson, Trooper Mulligan found Reed's hat on the passenger seat floorboard. Doc. 8-2 at 256.

8. DNA Expert Shawn Johnson Testifies

DNA expert Shawn Johnson of the Florida Department of Law Enforcement testified there was not enough DNA on Reed's hat to get a complete DNA profile. Doc. 8-2 at 300. The DNA was mixed, which showed two individuals had worn the hat. Doc. 8-2 at 316. Nevertheless, the incomplete DNA profile showed the likelihood that Reed had not worn the hat was "one in 8.6 million Caucasians; one in 4.5 million African Americans and one in 8.2 million southeastern Hispanics." Doc. 8-2 at 306.

9. Reed Testifies

Reed testified that he went to Gary and Jerry Greel's home around 8:00 P.M. and watched television with them. Doc. 8-2 at 331. When Reed returned to his home in Orlando, Florida, his digital clock read 11:15 P.M. Doc. 8-2 at 332. Reed then took a shower and watched the movie Friday After Next, starring Ice Cube, with his family. Doc. 8-2 at 332. Reed went to sleep when the movie ended at 1:30 A.M. Doc. 8-2 at 334. The police woke Reed up at 5:00 A.M. Doc. 8-2 at 335, 348. Reed denied telling Corporal Payne he had been on Washington Street earlier that evening and called her a liar. Doc. 8-2 at 351.

Reed has known Sullivan all his life. Doc. 8-2 at 332-33. Reed had played pickup basketball with Sullivan on July 11, 2004. Doc. 8-2 at 333. On that day, Sullivan had driven Reed to and from the basketball courts. Doc. 8-2 at 333-34. Reed owned 30-40 baseball caps and was wearing one when Sullivan picked him up on July 11. Doc. 8-2 at 334.

Reed is not a friend of Richards; he just recognizes him from his old neighborhood near the TD Waterhouse Arena in downtown Orlando. Doc. 8-2 at 338, 342. And Reed does not know Patterson. Doc. 8-2 at 342. Reed said he was being framed for the accident. Doc. 8-2 at 352.

10. The Parties Give Closing Arguments

Among other things, Reed explained during closing arguments that it was unlikely that Richards "was in possession of that car every single moment for the last week except for the very—except for the last ten minutes prior to this accident." Doc. 8-2 at 377. Instead, it was "more likely that a young man [i.e., Richards] got drunk at a Juvenile concert, got in the vehicle he actually was in possession of, started driving around, maybe going a little bit too fast and kills two people," "[t]hen comes up with a story" and "decides I'm going to need some help on this one." Doc. 8-2 at 377. Reed also explained that Sullivan knew what Reed looked like and knew that the hat in the car belonged to Reed. Doc. 8-2 at 417-18.

The State, in contrast, argued that such a conspiracy would be too elaborate and unlikely to constitute reasonable doubt. Doc. 8-2 at 382-401.

11. The Jury Returns Guilty Verdicts

The jury returned guilty verdicts for all counts of vehicular homicide and driving while license suspended causing serious bodily injury or death. Doc. 8-2 at 460-61.

12. The Circuit Court Sentences Reed To 35 Years' Imprisonment

For the vehicular-homicide counts, the Circuit Court sentenced Reed to two consecutive sentences of 17.5 years' imprisonment (35 years total). Doc. 8-1 at 234-35. The Circuit Court did not sentence Reed for the remaining counts. *See* Doc. 8-1 at 234-35.

B. The Motion For Post-Conviction Relief

Pursuant to Florida Rule of Criminal Procedure 3.850, Reed filed a motion for post-conviction relief and an addendum thereto. Doc. 8-4 at 122-70. In ground 2, Reed claimed his trial counsel was ineffective "by failing to investigate, locate or conduct a basic interview into a named, disinterested, eye witness whose testimony was critical to defendant's defense": alibi witness Coleman. Doc. 8-4 at 150-53, 162-63.

More specifically, the motion explained that Coleman's name had been mentioned in numerous pretrial discovery materials, including affidavits, police reports, and Richards's deposition. Doc. 8-4 at 150. Nevertheless, Reed's retained trial counsel failed to locate him even though Coleman was found after trial living in the same house he had lived in on the night of the accident and had lived in the same house and worked the same job for the past 15 years. Doc. 8-4 at 150-51. Cole-

man's testimony would have directly impeached Richards's testimony, because Coleman "recalls the night of the homicides and distinctly remembers being with the three stooges-at the Hard Rock Café." Doc. 8-4 at 150. As such, it was "impossible for him to even have encountered the two men on July 12th and 13th, 2004," and he was not "given a ride home by them." Doc. 8-4 at 150.

Coleman's notarized affidavit averred: "I Jarvess Coleman have no acknowledgement [*sic*] of what Willie Richardson [*sic*] is talking about. I have not seen him or Kelvin Reed in about 4 or 5 year[s]. I feel that it's my duty to tell the truth being that a man[']s life is on the line." Doc. 8-4 at 162-63.

C. The Post-Conviction Evidentiary Hearing

The Circuit Court (through a different judge who had not overseen the trial) entered an order denying all grounds except ground 2, as to which it set an evidentiary hearing. Doc. 8-4 at 239-44.

1. Coleman Testifies

Coleman has known Reed for about 10 years. Doc. 8-4 at 333. Coleman also knows Richards. Doc. 8-4 at 334. In July 2004, Coleman

lived at an address in Orlando, Florida.[3] Doc. 8-4 at 334. Coleman currently lives there and has lived there for about 15 years. Doc. 8-4 at 334. At no time in 2004 did Coleman ever meet Reed and Richards at Tabu or travel in a vehicle with them. Doc. 8-4 at 334. Moreover, Coleman has never been in a vehicle while Reed was driving 100 miles per hour, swerving in and out of traffic, or otherwise recklessly. Doc. 8-4 at 335. Coleman has never been in a vehicle with Reed and Richards together or Richards alone. Doc. 8-4 at 335. Although Coleman was living at the same address in Orlando in 2004 through 2006 and was willing to testify, no defense attorney ever contacted him. Doc. 8-4 at 335-36.

On cross-examination, Coleman admitted he was a convicted felon, but could not recall the number of felonies. Doc. 8-4 at 337. The State asked the Circuit Court to take judicial notice of the fact that Coleman had eight prior felony convictions. Doc. 8-4 at 339. Reed objected that the State had failed to provide certified copies of the judgments and sentences from each of those cases. Doc. 8-4 at 339. The Circuit Court did not rule on the motion or the objection. Doc. 8-4 at 339.

[3] Reed's address was also in Orlando, Florida, just a few blocks away. Doc. 8-2 at 331.

Coleman clarified he had never socialized with Reed or Richards; he just knew them from the neighborhood. Doc. 8-4 at 341-42. Coleman admitted he did not recall who asked him to sign the affidavit. Doc. 8-4 at 346-47. He thought one of Reed's family members asked for it, although he could not remember if it was a man or a woman because "it's been so long ago." Doc. 8-4 at 346. In this respect, Coleman explained this particular lapse in memory occurred because he sometimes has memory problems. Doc. 8-4 at 346-47.

2. Defense Counsel Thomas Luka Testifies

Reed's defense counsel Thomas Luka testified that the defense's theory of the case was that Reed had no contact with Richards that night, was not his friend, was not at Tabu, was home for the bulk of the evening, and was not driving. Doc. 8-4 at 354. Luka recalled that Richards testified there was a third party in the blue Pontiac Sunfire. Doc. 8-4 at 354. Luka did not recall Richards testifying that Reed was driving 100 miles per hour, recklessly, and swerving in and out of traffic while taking Coleman home. Doc. 8-4 at 355.

Initially, Luka testified Coleman was not listed as a State's witness. Doc. 8-4 at 357. Then Luka backtracked and said he could not re-

call whether the State had listed him, although "I can definitely tell you he was not listed by the Defense." Doc. 8-4 at 358. At that point, the State stipulated that Coleman was listed as a State's witness and that the address listed for him was where he currently lives. Doc. 8-4 at 358.

Luka believed Richards's testimony in his deposition and at trial was "fairly consistent, but I can recall definitely in the deposition that he did not indicate that he drove anyone home." Doc. 8-4 at 359. (This deposition transcript is not part of the record on appeal.) Luka further recalled that Richards did not testify at the first trial that Reed picked up and dropped off Coleman during the drive. Doc. 8-4 at 359. (This recollection was wrong. *See* Doc. 8-3 Trial Tr. at 28-29.)

Luka did not contact or even attempt to contact Coleman. Doc. 8-4 at 361, 368. Although the State had listed Coleman as a witness, "my client at that time indicated that he did not know specifically who Mr. Coleman was or what Mr. Coleman would say." Doc. 8-4 at 365, 367. The Circuit Court asked why Luka failed to contact Coleman:

> THE COURT: Is there a reason why?
>
> THE WITNESS: Yes, Your Honor, there is a reason why. Again, the Defense's strategy from the beginning was that Mr. Reed was never, in fact, in the vehicle at any given time. I did not want to risk anything—I did not want to risk

> defeating that defense by coming up with evidence or eliciting evidence or testimony from an individual who would place, either Mr. Reed at any time during that evening with either Mr. Richardson [*sic*] or with the vehicle. And so for that reason, I decided tactically that it would not benefit Mr. Reed in any way if Mr. Coleman was called to testify.

Doc. 8-4 at 361.

Luka conceded, however, that because he never attempted to contact Coleman, he did not know how Coleman would have testified. Doc. 8-4 at 363. Luka also conceded that, unlike the State, he does not have to list witnesses whose testimony he does not like, even if their testimony would be relevant. Doc. 8-4 at 363. In other words, Luka conceded that defense counsel, unlike the State, are not subject to any discovery obligations under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Luka nevertheless attempted to defend his decision: "I'm not required to disclose evidence that may help the State. On the other hand though, I cannot suborn any perjury." Doc. 8-4 at 364. Accordingly, Luka suggested he would have had an ethical obligation to withdraw if, during a pretrial interview, Coleman had told him that he was in a car with Reed and Richards. Doc. 8-4 at 364-65, 367-68, 371-72. Still, Luka conceded that witnesses testify against a defendant's version of the story "in every trial." Doc. 8-4 at 365.

On cross-examination, the State refreshed Luka's recollection that law enforcement had unsuccessfully tried to contact Coleman. Doc. 8-4 at 370-71.

3. Reed Testifies

Before the first and second trials, Reed asked Luka "several times" to contact Coleman. Doc. 8-4 at 376, 383. Despite Reed's repeated quests to contact Coleman, Luka "didn't explain anything to me." Doc. 8-4 at 386. Reed never denied to Luka that he knew Coleman. Doc. 8-4 at 376. Reed conceded that he did not know what Coleman would have said. Doc. 8-4 at 378. Reed also conceded that, while he was on house arrest before his trials, he did not telephone Coleman. Doc. 8-4 at 379. Nevertheless, Reed did ask a man nicknamed Duck to look for Coleman. Doc. 8-4 at 380. Reed did not ask his relatives to find Coleman. Doc. 8-4 at 381. Reed explained that Coleman's affidavit came about when one of his friends contacted Coleman, and Coleman gave the affidavit to Reed's mother, Vanessa Chestnut. Doc. 8-4 at 391. The word "subpoena" did not appear anywhere in Reed's testimony. *See* Doc. 8-4 at 375-94.

4. Luka Gives Rebuttal Testimony

The State recalled Luka as a rebuttal testimony to ask the following question:

> Q. It has been claimed that on at least three occasions prior to the first trial and a number of occasions during the first trial and before the second you were asked by Mr. Reed to contact *and subpoena* Mr. Coleman. Is that your recollection?
>
> A. That is not my recollection

Doc. 8-4 at 394-95 (emphasis added).

5. The Parties Give Closing Arguments

Reed argued "Mr. Luka's reasoning for not calling—or for not even sending an investigator or not sending Mr. Coleman a letter or not trying to contact Mr. Coleman was, in all due respect to Mr. Luka, was to put blinders [on]." Doc. 8-4 at 398. Luka's decision was ineffective assistance of counsel, however, because "there are ways to question [witnesses] without doing a deposition, without having the State present; send them a letter, send an investigator, try and contact them on the phone." Doc. 8-4 at 399. But "[t]hat wasn't done." Doc. 8-4 at 399.

The State argued that Reed had not met his burden of demonstrating Coleman was available. Doc. 8-4 at 400. The State further argued that Luka had an ethical reason for not contacting Coleman, be-

cause it might somehow prevent Luka from allowing Reed to testify in his own defense. Doc. 8-4 at 400-01.

D. The Circuit Court's Post-Conviction Order

After the evidentiary hearing, the Circuit Court entered an order denying ground 2 as well. Doc. 8-4 at 293-96.

The Circuit Court concluded Coleman "was not a credible witness" because he "could not provide information surrounding how it came about that he signed the affidavit attached to the Defendant's motion or who approached him about signing the affidavit." Doc. 8-4 at 294. In that regard, Coleman "had memory problems" that prevented him from "provid[ing] the requested information." Doc. 8-4 at 294. Moreover, although Coleman "testified that he has resided at the same residence for the past 15 years and was available to testify at the Defendant's trial," he also "testified that he was around back then, but did not want to get involved in the case." Doc. 8-4 at 294. The Circuit Court did not point to any particular part of Coleman's testimony as incredible.

Similarly, the Circuit Court concluded Reed's "testimony regarding his request for Mr. Luka to locate and call Mr. Jarvis [*sic*] as a witness was not credible." Doc. 8-4 at 294.

In contrast, the Circuit Court concluded Luka "was a credible witness" even though his "memory concerning certain factual matters surrounding the Defendant's two trials was sometimes inaccurate." Doc. 8-4 at 294. In particular, the Circuit Court credited Luka's testimony that his decision to not conduct any pretrial investigation of Coleman was a "tactical decision" to prevent him from "find[ing] out that the Defendant was being untruthful" by "contradict[ing] the Defendant's version of events." Doc. 8-4 at 294. The Circuit Court also credited Luka's testimony that "[state] troopers were unable to locate Mr. Coleman." Doc. 8-4 at 294. Finally, the Circuit Court credited Luka's supposed testimony that Reed "never asked him to contact Mr. Coleman." Doc. 8-4 at 294. The Circuit Court did not mention that Luka had never testified that Reed did not ask him to contact Coleman; rather, Luka actually testified that he did not recall Reed asking him to "contact and subpoena" Coleman. Doc. 8-4 at 394-95.

In light of these credibility determinations, the Circuit Court ruled that Luka's counsel was not ineffective because he "offered a reasonable explanation for his failure to interview and call Mr. Coleman as a defense witness." Doc. 8-4 at 295. Additionally, the Circuit Court

ruled that Reed "failed to demonstrate that Mr. Coleman was even available to testify at trial." Doc. 8-4 at 295. Finally, the Circuit Court ruled that Reed "failed to demonstrate prejudice" because Patterson had also testified against Reed, and Coleman's testimony would not have impeached Patterson's eyewitness identification. *See* Doc. 8-4 at 295.

On appeal, the Fifth District affirmed the Circuit Court's order in a per curiam opinion. Doc. 8-4 at 435-36.

E. The Order Granting The Writ Of Habeas Corpus

The District Court granted a conditional writ of habeas corpus as to ground 2. Doc. 14 at 9-21, 26.

1. The District Court Explains Pretrial Investigations Must Be Reasonable Under The Circumstances

At the outset, the District Court observed the "expectation . . . is that defense counsel must conduct a pretrial investigation that is reasonable under the circumstances presented in the case." Doc. 14 at 12 (citing *Futch* v. *Dugger*, 874 F.2d 1483, 1486 (11th Cir. 1989)). In that regard, the District Court explained that if "Luka had spoken with Coleman prior to trial and decided that Coleman would not make a credible witness at trial or would have presented harmful testimony at

trial, then this type of strategic decision by counsel would stand scrutiny under the performance prong of *Strickland*." Doc. 14 at 13. But because Luka "did not speak with" Coleman, "he never had the information to make the determination as to whether or not the witness would have been helpful or harmful to his trial strategy." Doc. 14 at 13-14.

2. The District Court Explains The Issue Whether A Tactical Decision Was Reasonable Is A Question Of Law, Not A Question Of Fact

The District Court recognized that the Circuit Court concluded Luka "offered a reasonable explanation as to why he did not call Coleman as a witness," but explained that "whether Luka's 'tactical decision was reasonable, and therefore within the wide range of competent professional assistance, is an issue of law.'" Doc. 14 at 14 (quoting *Dingle* v. *Sec'y for the Dep't of Corrs.*, 480 F.3d 1092, 1099 (11th Cir. 2007)). Accordingly, the issue presented was not a factual one, but rather "whether the state court's decision that defense counsel was not ineffective is contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court." Doc. 14 at 14.

3. The District Court Rules The Circuit Court's Conclusion That Luka's Performance Was Adequate Was Contrary To Or Involved An Unreasonable Application Of *Strickland*

With respect to *Strickland*'s performance prong, the District Court concluded Luka's strategic reason for failing to contact Coleman was unreasonable for two reasons. First, "counsel was under no duty to call Coleman as a witness at trial." Doc. 14 at 14. For that reason, Luka could have interviewed Coleman without any risk that Coleman would "hurt [Reed's] defense by potentially [testifying at trial] that [Reed was] in the vehicle the night the crimes were committed." Doc. 14 at 14. Second, "Luka was under no ethical obligation to disclose to the State any conversations that he had with Coleman." Doc. 14 at 14. Unlike prosecutors, defense counsel have no obligation under *Brady* "to produce inculpatory material." Doc. 14 at 14-15 & n.6 (citations omitted). For that reason, "Luka could have spoken to Coleman to determine what his testimony would be without defeating [Reed's] defense." Doc. 14 at 15. As such, the District Court rejected the Circuit Court's legal conclusion that Luka had a reasonable reason for not contacting Coleman as contrary to or involving an unreasonable application of *Strickland*. *See* Doc. 14 at 15.

4. The District Court Rules The Circuit Court's Conclusion That Reed Was Not Prejudiced Was Contrary To Or Involved An Unreasonable Application Of *Strickland*

The District Court also rejected the Circuit Court's conclusion that Reed could not establish prejudice under *Strickland*. Doc. 14 at 16-20.

The District Court rejected the notion that Luka had provided *per se* ineffective assistance of counsel. Doc. 14 at 16 n.7 (distinguishing *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984)). Nevertheless, the District Court concluded the Circuit Court "did not consider or unreasonably discounted the evidence presented in the state evidentiary hearing when considered in combination with the totality of the evidence that was before the jury at trial." Doc. 14 at 18. In that regard, Coleman's "testimony would have impeached Richards' testimony regarding who was present in the vehicle as well as other events of the evening." Doc. 14 at 18. Moreover, Coleman's "testimony would have also called into question the credibility of Patterson" because she "would have reason to give testimony that would corroborate Richards' testimony, as he was the only other person present in the vehicle at the time of the offenses and had motive to accuse Petitioner of committing the offenses." Doc. 14 at 19.

Accordingly, when the Circuit Court "summarily discounted the impact of Coleman's testimony, it failed to assess his testimony in conjunction with the conflicting evidence produced at trial and consider the potential impact of Coleman's testimony on the jury." Doc. 14 at 20. It was therefore "'not reasonable to discount entirely the effect that this testimony might have had on the jury.'" Doc. 14 at 19 (quoting *Sochor* v. *Sec'y, Dep't of Corrs.*, 685 F.3d 1016, 1029 (11th Cir. 2012)).

Standard Of Review

A district court's decision whether a state court acted contrary to clearly established federal law, unreasonably applied federal law, or made an unreasonable determination of fact is reviewed de novo. *Smith* v. *Sec'y, Dep't of Corrs.*, 572 F.3d 1327, 1332 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The District Court correctly concluded Luka rendered ineffective assistance of counsel that prejudiced Reed's defense.

1. There are five reasons why the District Court correctly ruled Luka's tactical decision not to call Coleman as a witness without first performing any pretrial investigation of him was unreasonable. First, the State waived its arguments in this Court and the District Court.

See infra Arguments I.A.1, I.B.1, I.C.1. Second, Luka had no reasonable strategic reason for not contacting Coleman. *See infra* Argument I.A.2. Third, Luka had no reasonable ethical reason for not contacting Coleman. *See infra* Argument I.B.2. Fourth, the Circuit Court's factual finding that law enforcement was unable to locate Coleman did not excuse Luka from his legal obligation to perform a reasonable pretrial investigation under the circumstances. *See infra* Argument I.C.2. Fifth, the Circuit Court's factual finding that Reed never asked Luka to contact Coleman was an unreasonable determination of the facts in light of the evidence presented. *See infra* Argument I.D.

2. The District Court correctly concluded Luka's unreasonable tactical decision prejudiced Reed's defense. The State's argument that the District Court must defer to the Circuit Court's finding that Coleman would not be a credible witness at trial is foreclosed by precedent: only juries get to make that kind of credibility determination, not judges. And the State's argument that Florida state law requires habeas petitioners to show prejudice under *Strickland* by alleging that a witness was available to testify at trial misconceives the issue and relies on state law contrary to this Court's precedent.

ARGUMENT AND CITATIONS OF AUTHORITY

I. LUKA'S TACTICAL DECISION NOT TO CALL COLEMAN AS A WITNESS WITHOUT FIRST PERFORMING ANY PRETRIAL INVESTIGATION OF HIM WAS UNREASONABLE

The State argues "the District Court violated the 'due deference' provision of AEDPA by reversing the State court decision based upon a credibility determination" that Coleman was unavailable for trial and that Luka had a reasonable explanation for his failure to interview and call Mr. Coleman as a defense witness. State's Br. at 8-17. Setting aside the fact that AEDPA contains no "due deference" clause, 28 U.S.C. § 2254, the State's arguments are incorrect. Procedurally, the State waived many of its appellate arguments because it failed to present them properly to the District Court in the first instance and to this Court with supporting legal authority. Substantively, the State misconceives the issue as one of fact rather than law, which leads it to conflate AEDPA's scopes of federal habeas review for state courts' factual and legal findings. In short, the District Court correctly concluded Luka violated *Strickland*'s performance prong.

A. Luka Had No Reasonable Strategic Reason Not To Contact Coleman

Without citation to any legal authority, the State argues that Luka had a "strategic . . . reason for not finding and speaking with Coleman" because (1) "at the pretrial stage, it appeared that Coleman could at least place Richards and Reed together that evening, a fact that completely undermined Reed's defense," (2) Coleman "had limited memory/knowledge," and (3) Coleman "was allegedly never in the vehicle and could not testify as to who was or was not driving." State's Br. at 13, 18-19. The State is wrong.

1. The State Waived Any Argument That Luka's Strategic Decision Was Reasonable

As an initial matter, the State waived these arguments. On appeal, an appellant's arguments and citations of authority "must contain appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Given this requirement, an appellant's argument "raised perfunctorily without citation to authority constitutes waiver." *Continental Tech. Servs., Inc.* v. *Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991).

In this Court, the State cites no legal authority to support any of any of its contentions that Luka's strategic decision was reasonable. Instead, the State merely notes in its statement of the case the supposed strategic reason Luka stated at the post-conviction evidentiary hearing (State's Br. at 3-4) and then asserts in its argument and citations of authority that Luka made a reasonable strategic decision for related reasons (State's Br. at 13). But regurgitation of the record and *ipse dixit* do not an appellate argument make. As such, the State has waived any arguments that Luka's strategic decision not to contact Coleman was reasonable.

Additionally, the State did not "clearly present" these arguments to the District Court "in such a way as to afford the district court an opportunity to recognize and rule on it." *Juris* v. *Inamed Corp.*, 685 F.3d 1294, 1324 (11th Cir. 2012) (citation and punctuation omitted). A "party does not preserve an argument for appellate review by 'merely informing the [district] court in the statement of facts in its opening brief [of the factual basis for the claim].'" *Ledford* v. *Peeples*, 568 F.3d 1258, 1299 (11th Cir. 2009) (citation and punctuation omitted). As such, this Court "will not decide an issue or argument not adequately presented to

the district court, which may include a failure to cite supporting authority." *Shuler* v. *Ingram & Assocs.*, 441 Fed. App'x 712, 716 n.3 (11th Cir. 2011)[4] (citations omitted).

Here, the State explained to the District Court that the record included testimony that (1) Coleman "could theoretically place Reed in the vehicle shortly before the crime was committed," (2) Coleman "could not remember how or when he signed the affidavit relating to this case" and "admitted to having 'memory problems,'" and (3) Coleman could not testify who was driving. Doc. 7 at 10.[5] Despite providing the District Court a factual basis for its legal claim, the State never cited any legal authority to support its putative argument that Luka's strategic decision not

[4] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

[5] To the extent the State made additional arguments in its motion for reconsideration (Doc. 16), they cannot be considered. Rule 59(e) cannot be used "to relitigate old matters, raise argument or present evidence that could have been raise prior to the entry of judgment." *Jacobs* v. *Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (citation and punctuation omitted). And movants cannot rely on Rule 60(b) unless they can demonstrate mistake, excusable neglect, newly discovered evidence, fraud, a void judgment, judgment satisfaction, or any other reason that justifies relief. Fed. R. Civ. P. 60(b); *Frederick* v. *Kirby Tankships, Inc.*, 205 F.3d 1277, 1288 (11th Cir. 2000) ("courts grant relief under Rule 60(b)(6) only for extraordinary circumstances"). The State cannot satisfy either Rule.

to contact Coleman was reasonable. Accordingly, these arguments were waived in the District Court as well.

2. Luka's Strategic Decision Was Unreasonable

Even if the State had properly presented these arguments in the District Court and this Court, they are incorrect.

"At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin* v. *Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2066 (1984).[6] "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. at 2066. "The appropriate standard for evaluating counsel's pretrial investigation is reasonableness under the circumstances." *Futch* v. *Dugger*, 874 F.2d 1483, 1486 (11th Cir. 1989).

Whether a "tactical decision was reasonable, and therefore within the wide range of competent professional assistance, is an issue of law,"

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[6] The State quotes *Strickland*'s language, but omits the words "precisely" and "reasonable." State's Br. at 10.

not an issue of fact. *Dingle*, 480 F.3d at 1099. As such, with respect to tactical decisions, AEDPA's "unreasonable determination of the facts" clause is inapplicable; only AEDPA's "contrary to [or] unreasonable application" clause controls. 28 U.S.C. § 2254(d). (The State's failure to recognize this legal foundation for the order on appeal is a leading reason why its appellate arguments veer off course.)

When a habeas petitioner asks his trial lawyer to contact a witness who "would support his defense," and the trial lawyer "ma[kes] no effort to contact" the witness, "then the facts are sufficient for the court to conclude that counsel was ineffective." *Futch*, 874 F.2d at 1486. A trial "counsel's anticipation of what a potential witness would say does not excuse the failure to find out." *Code* v. *Montgomery*, 799 F.2d 1481, 1484 (11th Cir. 1986) (holding trial counsel was ineffective by failing to investigate alibi witnesses) (citation and punctuation omitted). A "defendant's instructions may limit the scope of counsel's duty to investigate a particular defense or strategy," but "lawyers may not follow such commands blindly," *Foster* v. *Dugger*, 823 F.2d 402, 407 n.16 (11th Cir. 1987), even if a defendant asks his counsel not to contact a witness.

At the post-conviction evidentiary hearing, Luka provided only one strategic reason for not contacting Coleman: he "did not want to risk defeating [Reed's defense that he was never in the vehicle] by coming up with evidence or eliciting evidence or testimony from an individual who would place, either Mr. Reed at any time during that evening with either Mr. Richardson or with the vehicle." Doc. 8-4 at 361. The District Court correctly ruled this strategic decision—based on inaccurate speculation—was unreasonable because it was not preceded by a reasonable investigation. Doc. 14 at 14-16.

The State's first two arguments (that it appeared at the pretrial stage that Coleman might place Richards and Reed together and that Coleman had poor memory) are "circumstances" that were not known to Luka at the time he made the strategic decision not to call Coleman as a witness because he had not yet interviewed him. *Futch*, 874 F.2d at 1486. As this Court held in *Code*, even if Luka had "anticipat[ed]" that Coleman might say these things, that does not "excuse the failure to find out." 799 F.2d at 1484. And the State's third argument (that Coleman was allegedly never in the vehicle) is a "circumstance[]" that actually supported Luka contacting Coleman because his testimony would

impeach Richards's testimony. *Id.* Accordingly, as a matter of law, Luka's strategic decision not to call Coleman as a witness at trial was not supported by "reasonable professional judgment[]," rendering his counsel ineffective. *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066.

B. Luka Had No Reasonable Ethical Reason Not To Contact Coleman

Without citation to any legal authority, the State argues that Luka had an "ethical . . . reason for not finding and speaking with Coleman" because he might be placed "in an ethical dilemma as to whether his client could testify." State's Br. at 4, 18-19. The State is wrong.

1. The State Waived Any Argument That Luka's Strategic Decision Was Required By Ethics

Once again, the State has waived this argument because it merely regurgitates the supposed ethical reason Luka posited at the post-conviction evidentiary hearing instead of citing some legal authority for the proposition that Luka's ethical decision was reasonable. *See* Fed. R. App. P. 28(a)(8)(A); *Continental Tech. Servs., Inc.*, 927 F.2d at 1199. Moreover, the State also waived this argument when it failed to clearly present it to the District Court with in the first instance, with supporting legal authority, either in its response to Reed's petition (Doc. 7) or in

its motion for reconsideration (Doc. 16). *See Juris*, 685 F.3d at 1324; *Ledford*, 568 F.3d at 1299; *Shuler*, 441 Fed. App'x at 716 n.3; Fed. R. Civ. P. 59(e), 60(b).

2. Luka's Strategic Decision Was Not Required By Ethics

In any event, even if the State had properly raised this argument in this Court and the District Court, it is incorrect.

The "privilege" to testify in one's own defense "cannot be construed to include the right to commit perjury." *Nix* v. *Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 997 (1986) (citation and punctuation omitted). Relatedly, the Florida Rules of Professional Conduct and Florida case law "prohibit[] lawyers from presenting false testimony or evidence." Fla. R. Prof'l Conduct 4-3.3 cmt. (collecting cases). Given this requirement, lawyers "may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal." *Id.* If a client insists on committing perjury, the lawyer should "attempt to persuade the client to testify truthfully," then "threaten to disclose the client's intent to commit perjury to the

judge," and, if necessary, finally "disclose the fact that the client intends to lie to the tribunal." *Id.*

But these ethical obligations apply only when a client insists on giving perjured testimony. "[M]ere differences in testimony found . . . between witnesses on the same subject, are not alone sufficient to show perjury." *Ferguson* v. *State*, 101 So. 3d 895, 897 (Fla. 4th DCA 2012). In literally every criminal case, there is a complaining witness who testifies the defendant committed the crime. Defendants are entitled to testify in their own defense that they did not commit the crime, unless their testimony would be perjured. That witnesses might be giving contradictory testimony does not alone render their testimonies perjurious.

When Luka suggested he might have an ethical obligation to withdraw if Coleman placed Reed and Richards together that night, his conclusion was wrong for two reasons. First, in *Code*, this Court held a trial "counsel's anticipation of what a potential witness would say does not excuse the failure to find out." 799 F.2d at 1484. For the same reason counsel cannot "anticipat[e]" a strategic problem without contacting a witness, counsel cannot "anticipat[e]" an ethical problem without a reasonable investigation. *See id.* Second, this supposed ethical problem

would not require Luka to withdraw. Rather, the Florida Rules of Professional Conduct provide that the remedy is to convince the client not to testify, threaten to tell the judge, and then finally tell the judge. *See* Fla. R. Prof'l Conduct 4-3.3 cmt. Luka could have performed his duty to conduct a reasonable investigation without having to withdraw.

C. The Fact That State Troopers Were Unable To Locate Coleman Did Not Excuse Luka From His Obligation To Perform A Reasonable Pretrial Investigation Under The Circumstances

The State argues Luka was not ineffective for failing to contact Coleman because he was not "available" for trial. State's Br. at 10-16. More specifically, the State cites *McCoy* v. *Jones*, 463 Fed. App'x 541 (6th Cir. 2012), and *Engesser* v. *Dooley*, 686 F.3d 928 (8th Cir. 2012), for the propositions that a trial counsel need not contact witnesses (1) when he is "aware that law enforcement officials had made several unsuccessful attempts to interview witnesses and that both witnesses had given statements to police that inculpated defendant," or (2) "who did not come forward until many years later." State's Br. at 11. But the State waived both of these arguments in the District Court, and both *McCoy* and *Engesser* are distinguishable in any event.

1. The State Waived Any Argument That Coleman Was Unavailable For Trial

As an initial matter, the State waived these arguments when it failed to clearly present them to the District Court, with supporting legal authority, in the first instance (*see* Doc. 7 at 10; Doc. 16 at 5). *See Juris*, 685 F.3d at 1324; *Ledford*, 568 F.3d at 1299; *Shuler*, 441 Fed. App'x at 716 n.3; Fed. R. Civ. P. 59(e), 60(b).

2. Law Enforcement's Inability To Locate Coleman Did Not Excuse Luka From His Obligation To Perform A Reasonable Pretrial Investigation

The "duty to investigate includes the duty to locate exculpatory witnesses." *Casey* v. *Frank*, 346 F. Supp. 2d 1000, 1014 (E.D. Wis. 2004). In "this day and age," it "is not difficult" for defense counsel to obtain witnesses' contact information and "locate" them. *McGahee* v. *United States*, 570 F. Supp. 2d 723, 734 (E.D. Pa. 2008). When defense counsel makes "no such effort," this failure is ineffective. *Id.* In this Circuit, there is no requirement that, to establish ineffectiveness for breaching the duty to investigate, the witness must also be available for trial. Rather, when a habeas petitioner tells his trial lawyer to contact a witness who "would support his defense," and the trial lawyer "ma[kes]

no effort to contact" the witness, "then the facts are sufficient for the court to conclude that counsel was ineffective." *Futch*, 874 F.2d at 1486.

a. The State Misplaces Its Reliance On The Sixth Circuit's Unpublished Decision In *McCoy* v. *Jones*

The State misplaces its reliance on *McCoy*.

As a procedural matter, *McCoy* is unpublished. That means it is not "binding on later panels" in the Sixth Circuit. 6th Cir. R. 32.1(b). Or as the Sixth Circuit has explained, its unpublished decisions "are, of course, not binding precedent on subsequent panels." *Crump* v. *Lafler*, 657 F.3d 393, 405 (6th Cir. 2011).

As for substance, *McCoy* is distinguishable because there were two reasons for its ruling. In *Ramonez* v. *Berghuis*, the Sixth Circuit had previously held that an "investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation." 490 F.3d 482, 488 (6th Cir. 2007) (holding failure to interview witnesses was ineffective). It is true that one reason *McCoy* distinguished *Ramonez* was that "law enforcement had been repeatedly unsuccessful in securing an appearance by the brothers." 463 Fed. App'x at 547. But the other, more

important, reason was that "any statements favorable to McCoy would stand in direct contradiction of police statements previously given by the brothers." *Id.* Accordingly, this alternative basis for *McCoy*'s holding renders it distinguishable.

b. The State Misplaces Its Reliance On The Eighth Circuit's Decision In *Engesser* v. *Dooley*

The State also misplaces its reliance on *Engesser*.

That Eighth Circuit case involved two witnesses who never came forward to anybody—prosecution or defense—until years after the trial. 686 F.3d at 933, 937. Specifically, in *Engesser*, the State of South Dakota disclosed "two additional witnesses . . . after the [post-conviction] evidentiary hearing." *Id.* at 933. Accordingly, the Eighth Circuit held "trial counsel would not have been deficient for failing to investigate witnesses who did not come forward until many years later." *Id.* at 937.

But here, the State's pretrial witness list for both trials listed Coleman and his home address, so he was known to all parties and counsel well before trial. *Engesser* is therefore inapplicable.

D. The Circuit Court's Factual Finding That Reed Never Asked Luka To Contact Coleman Was Unreasonable In Light Of The Evidence Presented

"A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude . . . the factual premise was incorrect by clear and convincing evidence." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). In such circumstances, "'this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them.'" *Cooper* v. *Sec'y, Dep't of Corrs.*, 646 F.3d 1328, 1353 (11th Cir. 2011) (citation omitted). Rather, "[w]hen a state court unreasonably determines the facts relevant to a claim, 'we do not owe the state court's findings deference under AEDPA,' and we 'apply the pre-AEDPA *de novo* standard of review' to the habeas claim." *Id.* (citation omitted).

Measured by those standards, the Circuit Court's factual finding that Reed "never asked [Luka] to contact Mr. Coleman" (Doc. 8-4 at 294) was "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). That simply is not what Luka testified. Rather, Luka testified that he did not recall Reed asking him to "contact and subpoena" Coleman. Doc. 8-4 at 394-95. No one—not

even Reed himself—testified that Reed asked Luka to "subpoena" Coleman. *See* Doc. 8-4 at 326-404. Accordingly, there was no conflict between Reed's testimony and Luka's testimony: Reed testified that he asked Luka to contact Coleman, and Luka never contradicted Reed's testimony. The Circuit Court's unsupported-by-the-record finding of a testimonial conflict was therefore "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

Even if the Circuit Court's credibility finding were not unreasonable, the factual issue whether Reed asked Luka to contact Coleman is academic: even if Reed asked Luka *not* to contact Coleman, "lawyers may not follow such commands blindly." *Foster*, 823 F.2d at 407 n.16. And of course, even according to Luka, Coleman made no such statement; rather, according to Luka, Reed said he did not know who Coleman was or what he would say. Doc. 8-4 at 365, 367.

At minimum, this Court must remand for the District Court to conduct an evidentiary hearing on the issue whether Reed asked Luka to contact Coleman. *See* 28 U.S.C. § 2254(e)(2).

E. The Circuit Court's Legal And Factual Findings Were So Lacking In Justification That It Committed Errors Beyond Any Possibility For Fairminded Disagreement

All told, the Circuit Court's legal and factual errors were "'so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement.'" *Burt* v. *Titlow*, 134 S. Ct. 10, 16 (Nov. 10, 2013) (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 786-87 (2011)). The Circuit Court misconceived Luka's tactical decision as based on sound trial strategy and ethics, invented an availability requirement when none existed, and misread the testimony at its own evidentiary hearing. In doing so, the Circuit Court's decision "was contrary to, or involved an unreasonable application of" *Strickland*. 28 U.S.C. § 2254(d)(1).

II. THE DISTRICT COURT CORRECTLY RULED THERE WAS A REASONABLE PROBABILITY THAT LUKA PREJUDICED REED'S DEFENSE

The District Court's ruling that there was a reasonable probability that Luka prejudiced Reed's defense was correct. On appeal, the State argues there was no prejudice for three reasons. First, given the Circuit Court's credibility finding, the jury would have "believe[d] Richards and discount[ed] Coleman." State's Br. at 12. Second, Coleman was "not

available" for trial. State's Br. at 12. Third, Coleman's testimony "could at best only marginally affect Richards testimony about an irrelevant matter." State's Br. at 12.

The State waived these first two *Strickland* prejudice arguments in the District Court. As for substance, the first argument is contrary to precedent. The second argument misconceives the issue presented to the District Court and this Court and relies on state law that is not consistent with this Court's precedent. And the third argument overlooks the importance of Coleman's putative testimony for Reed's framing defense.

A. To Demonstrate Prejudice, Habeas Petitioners Must Show There Was A Reasonable Probability That The Result Would Have Been Different

To establish prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

B. There Was A Reasonable Probability That Luka Prejudiced Reed's Defense

The District Court correctly ruled that when Luka rendered ineffective assistance of counsel, he prejudiced Reed's defense.

1. The State Waived All But One *Strickland* Prejudice Argument

The State raised only two *Strickland* prejudice arguments in the District Court. Doc. 7 at 10. First, "[e]ven if Coleman had testified as Reed claims, Coleman would at best only tangentially impeach a part of Richards testimony that did not relate to the accident." Doc. 7 at 10. Second, "Coleman would have placed Reed in the car just prior to the crimes." Doc. 7 at 10. (This second argument is factually baseless.)

In this Court, the State raises the first argument, but not the second. Specifically, the State contends (1) the District Court did not defer to the Circuit Court's credibility conclusion that the jury would have disbelieved Coleman's testimony had he testified at trial (State's Br. at 12), (2) habeas petitioners cannot show prejudice under *Strickland* unless they "allege that a witness was available to testify at trial" (State's Br. at 14 (citing *Nelson* v. *State*, 875 So.2d 579 (Fla. 2004), and *Small* v. *Fla. Dep't of Corrs.*, 470 Fed. App'x 808 (11th Cir. 2012))), and

(3) Coleman's putative testimony concerned "an irrelevant matter" (State's Br. at 12).

Again, the State waived these first two arguments when it failed to clearly present them to the District Court, with supporting legal authority, in the first instance (*see* Doc. 7 at 10; Doc. 16 at 5-6). *See Juris*, 685 F.3d at 1324; *Ledford*, 568 F.3d at 1299; *Shuler*, 441 Fed. App'x at 716 n.3; Fed. R. Civ. P. 59(e), 60(b).

2. The State's *Strickland* Prejudice Arguments Are Incorrect

In any event, the State's arguments regarding *Strickland*'s prejudice prong are incorrect.

The State's first argument (that the District Court did not defer to the Circuit Court's credibility conclusion that the jury would have disbelieved Coleman's testimony) is foreclosed by precedent. As the Sixth Circuit explained in *Ramonez*:

> [A] state court's blanket assessment of the credibility of a potential witness—at least when made in the context of evaluating whether there is a reasonable probability that the witness's testimony, if heard by the jury, would have changed the outcome of the trial—is not a fact determination within the bounds of Section 2254(e)(1). After all, what the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict. [O]ur Constitution

> leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence.

490 F.3d at 490.

The State's second argument (that habeas petitioners cannot show prejudice under *Strickland* unless they allege that a witness was available to testify at trial) misconceives the issue presented to the District Court and this Court. The issue is not whether Luka was ineffective for failing to call Coleman. Rather, the issue is whether Luka was ineffective for making the tactical decision not to call Coleman without first investigating what his testimony would be. Additionally, the State relies on Florida state law (and this Court's decision describing Florida state law), which has no relevance to the federal issue whether Luka's ineffective counsel caused prejudice to Reed's defense.

The State's third argument (that Coleman's putative testimony concerned an irrelevant matter) is also incorrect. The whole point of Reed's defense was that Richards and Patterson had conspired, perhaps with Sullivan's assistance, to frame Reed for a hit-and-run accident that Richards had committed. The way lies and conspiracies are exposed is by teasing out one little unnecessary factual detail. Once that thread is

exposed and pulled, the rest of the conspiracy falls apart. For that reason, Coleman's putative testimony did not concern an irrelevant matter. Rather, had Luka contacted and interviewed Coleman before trial, it would have been a centerpiece of his defense that Richards and Patterson were lying. And there was therefore a "reasonable probability" that the "result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Kelvin Reed

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 11,135 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

February 5, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 5th day of February, 2014, to:

John Ley, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF and regular mail on this 5th day of February, 2014, to:

Fla. Attorney General's Office

ASA Carmen F. Corrente
Fla. Attorney General's Office
444 Seabreeze Blvd, 5th Floor
Daytona Beach, FL 32118

February 5, 2014

/s/ Thomas Burns
Thomas A. Burns