No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM EARL PONDER,
Petitioner,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his counsel rendered ineffective assistance of counsel by failing to properly object to testimony referring to the "word on the street" identifying the Petitioner as the shooter – testimony that violated the Petitioner's Confrontation Clause rights.

2. Whether a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, WILLIAM EARL PONDER, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on November 3, 2020. (A-3)[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

The Sixth Amendment further provides that [i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Finally, 28 U.S.C. section 2254 authorizes "an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . .

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

." "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Court stated the following regarding the "great writ":

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

(Citation omitted).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

At the conclusion of a jury trial in 2011, the Petitioner was convicted of attempted first-degree murder. The state trial court sentenced the Petitioner to life imprisonment. On direct appeal, the Florida First District Court of Appeal affirmed the conviction and sentence. *See Ponder v. State*, 80 So. 3d 1026 (Fla. 1st DCA 2012).

Following the direct appeal, the Petitioner timely filed a state postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. In the state postconviction motion, the Petitioner raised five grounds – two of which are the subject of the instant pleading: (1) defense counsel was ineffective for failing to exclude

testimony referring to the "word on the street" identifying the Petitioner as the shooter because such testimony violated the Confrontation Clause of the Sixth Amendment to the Constitution and (2) newly discovered evidence establishes that a cap found at the scene contained the alleged victim's DNA (thereby calling into question all of the alleged victim's testimony). The state postconviction court granted an evidentiary hearing on the motion and the evidentiary hearing was held on October 22, 2014. On January 26, 2015, the state postconviction court denied the Petitioner's rule 3.850 motion. On appeal, the Florida First District Court of Appeal affirmed the denial of the Petitioner's rule 3.850 motion. *See Ponder v. State*, 209 So. 3d 59 (Fla. 1st DCA 2016).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. (A-46). In his § 2254 petition, the Petitioner argued the same claims that he previously presented in his state postconviction motion. On October 16, 2019, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-10). Thereafter, on January 16, 2020, the district court denied the Petitioner's § 2254 petition. (A-4, A-9).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On November 3, 2020, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim (and in the order, the circuit judge summarily stated – with no elaboration – that "Ponder has failed to make the requisite showing"). (A-3).

2. Statement of the facts.

a. Trial facts.

In his state postconviction motion, the Petitioner provided the following summary of the trial facts:

> Jamil Gardner, Breanna Morgan, and William Barr went together to Greg Sharp's house one evening in November 2009. Upon arrival, Gardner and Barr exited their SUV while Morgan remained inside. Sharp was just around the corner. Once outside the vehicle, Gardner saw two males and a female get out of another vehicle parked nearby. A verbal altercation ensued.
>
> At some point during the altercation, one of the men pointed a gun at Gardner. Gardner slapped the gun down and punched the gunman in the face, knocking him to the ground. As the gunman fell, the gun fired and struck Gardner in the leg. Gardner ran, but soon fell down and realized that he was shot. He struggled to get up, and saw the gunman approaching him once again. While he lay there on his back, the gunman shot him twice and then ran away.
>
> Gardner managed to get up and get back into the SUV with Morgan, Barr, and Sharp. As they rushed to the hospital, the SUV flipped and crashed. An ambulance responded to the scene and took Gardner to the hospital.
>
> At the hospital, Gardner told Stephen Cremin, the emergency room physician, that he didn't remember "everything" and reported that a "drunk guy" shot him. He also spoke to law enforcement at the hospital and provided a description of the suspect. He described a man wearing a black hat, black t-shirt (short-sleeve), and black pants. He recalled that the gunman had a low-cut hairstyle, but did not notice any tattoos on the gunman.[FN1] He described the gun as a revolver.
>
> While in the hospital, Gardner learned that the word on the street was that a man named Willie Ponder was the person who shot him. He did not know Ponder and claimed that he had never seen him before the shooting. Regardless, he provided Ponder's name to the Investigators.
>
> Investigators discovered some physical evidence at the scene: a hat and several .22 caliber casings from a firearm.[FN2] Both were collected and processed. The hat contained DNA from three or more donors, but Ponder was excluded as a potential donor.
>
> Investigator Angie Booth put Ponder's photo in a lineup. He identified "number five" (Ponder) as the shooter and claimed that he never saw a photo of Ponder before he was shown that lineup. However,

> at the time he made the identification, Gardner had been receiving Oxycodone injections from a pump to cope with the pain. At a pretrial deposition, Gardner stated "I spotted him right off the bat, even though I - you know, just being disoriented or whatever."
>
> After leaving the hospital, Gardner told Morgan that he had identified the shooter in a photo lineup, but denied disclosing the name, Willie Ponder. Morgan contradicted Gardner and testified that he "mentioned his name." She also testified that she did not remember if Gardner told her that he identified someone in the photo lineup.
>
> The only other witness to the shooting was Breanna Morgan.[FN3] Morgan remained inside the SUV during the altercation, but testified that she saw the entire encounter. She was shown the same photo lineup that was shown to Gardner. Like Gardner, she also selected number five (Ponder) from the lineup, but wrote, "[i]t's not really positive, but if I was in person I can show you him." She denied that Gardner showed her a photo of Ponder before she was shown the lineup.
>
> [FN1: Ponder had tattoos on his arms on the date of the crime.]
>
> [FN2: The casings discovered on site indicate the weapon was an automatic and not a revolver.]
>
> [FN3: Sharp claimed that he was nearby, but never saw the shooter. Barr did not testify at the trial, and was uncooperative according to the investigator.]

(A-86-88).

b. The October 22, 2014, state court postconviction evidentiary hearing.

Jo Ellen Brown. Ms. Brown, a senior crime laboratory analyst for the Florida Department of Law Enforcement ("FDLE"), testified that prior to the Petitioner's trial, FDLE discovered DNA evidence on a piece of evidence in the Petitioner's case (the inside of the black cap[2]). (A-126-127, A-129-130). Ms. Brown stated that on July 9, 2011 – *after* the Petitioner's trial[3] – there was a "hit" on the DNA sample from the

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[2] The black cap "had been located at the scene [and] witnesses identified it as having been worn by the shooter." (A-136).

[3] The trial in the Petitioner's case was held in January of 2011.

CODIS[4] system establishing that the DNA from the inside of the cap belonged to Jamil Gardner (the alleged victim). (A-127-129).

Joshua Zelman. Mr. Zelman, the Petitioner's trial attorney, testified that the identity of the perpetrator was the main issue during the Petitioner's trial. (A-136). *See also* (A-148) ("Our theory of the case was that this was a case of mistaken identity."). Mr. Zelman stated that both Jamil Gardner and Breannea Morgan said that the shooter in this case was wearing the black cap (and Mr. Zelman explained that both witnesses based their identifications of the Petitioner on their assertions that the Petitioner was wearing the black cap at the time of the shooting), and Mr. Zelman said that neither Mr. Gardner nor Ms. Morgan knew the Petitioner prior to the date of the shooting. (A-136-138). Mr. Zelman testified that the subsequent revelation that Mr. Gardner's DNA was on the inside of the cap undermines Mr. Gardner's credibility:

> I believe that the significance of Mr. Gardner's DNA being on the inside of that baseball cap undermines his credibility entirely. Whether it's the identification, whether it's he did or did not know Mr. Ponder, I would seriously call into question anything that he would have said during that trial.

(A-141). Thus, Mr. Zelman stated that had he known at the time of trial that Mr. Gardner's DNA was on the inside of the cap, he would have approached the case completely differently. (A-141). Notably, Mr. Zelman said that throughout the trial, the State made repeated references to the cap being the Petitioner's cap. (A-142). Mr. Zelman testified that the newly discovered DNA evidence "would be one of the biggest

[4] CODIS is the combined DNA Index system. (A-126).

issues" at a new trial. (A-141-142).

Regarding the "word on the street" testimony (i.e., that the "word on the street" was that the Petitioner was the shooter), Mr. Zelman stated the following:

> Q In conjunction with the trial, prior to trial, did you file a motion in limine to preclude reference to the, quote, word on the street as being hearsay?
>
> A No, but I probably should have.
>
> Q Prior to trial, did it occur to you, in conjunction with this word on the street reference, that there may be a confrontation clause problem under *Crawford v. Washington*?
>
> A No, that was not something that I had considered.
>
> Q Had you considered that, as well as the limine aspects, would you agree it would be appropriate to file a motion in limine and/or a motion to suppress any reference to, quote, the word on the street?
>
> A In retrospect, yes, I should have.
>
> Q Were you ever able pretrial through deposition or at trial to determine who these, quote, sources, end quote, were from the word on the street reference to Willie Ponder?
>
> A No. No, neither Ms. Morgan nor Mr. Gardner gave us straight answers about who they learned that from.
>
> Q At some point in time, did the testimony of either witness or any witness refer to word on the street it was Willie Ponder come out at trial?
>
> A It ultimately did, yes.

(A-143-144). Mr. Zelman conceded that the repeated references to the "word on the street" testimony was "absolutely" damaging to the Petitioner's case. (A-147).

H. REASONS FOR GRANTING THE WRIT

1. The first question presented is important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claim. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In his § 2254 petition (and in his state postconviction motion), the Petitioner argued that defense counsel rendered ineffective assistance of counsel for failing to exclude testimony referring to the "word on the street" identifying the Petitioner as the shooter. As a result of defense counsel's ineffectiveness, the Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the Constitution. But for counsel's ineffectiveness, the result of the proceeding would have been different.

Throughout the trial, the prosecutor and the State witnesses repeatedly told the jury that the "word on the street" was that the Petitioner was the person who shot Jamil Gardner. During opening statements, the prosecutor summarized the circumstances of the shooting, Mr. Gardner's flight to the hospital, and the initial investigation. The prosecutor began to describe the investigative steps and said:

> You'll hear testimony that there was *talk in the community about who the shooter was* and that that is how law enforcement developed a suspect in this case. Yes, Mr. Gardner was told of – and his family of the talk in the community while he was still in the hospital.

(A-91) (emphasis added). After the state trial court sustained a hearsay objection by

defense counsel, the prosecutor continued and stated:

> Okay. I think it will be clear that law enforcement, through their investigation, *through things that were being said in the community, developed the Defendant in this case as a suspect.* And once they developed this defendant as a suspect – and then what they do in a lot of cases and a lot of times – Investigator Booth will testify to you that they get suspects, leads from talk coming from the community.

(A-92) (emphasis added). Despite objecting to the previous comment, defense counsel failed to object to this comment. The prosecutor then told the jury that the investigator created a photographic lineup containing the Petitioner's photograph as a result of the lead from the talk of the community.

At trial, during the prosecutor's direct examination of Mr. Gardner, the following occurred:

> Okay. Now, at some point – let me ask you this: when you got to the hospital, after this shooting, did you know the name of the person who had shot you?
>
> A Not when I got to the hospital.
>
> Q Okay. At some point, were people – and I'm not asking you to get into anything anyone was saying. But at some point, *were you being given information from either friends or family members about who it was, the name of the person who shot you*?
>
> A Yes, ma'am.

(A-96) (emphasis added). Defense counsel failed to object to this hearsay testimony. Later, the prosecutor asked Mr. Gardner:

> Q So am I correct that you knew the name, Willie Ponder, at that point because of *what people were telling you*?
>
> A Yes, ma'am.

(A-98) (emphasis added). Again, defense counsel failed to object.

Before Breannea Morgan testified at trial, the State proffered her testimony. (A-99-109). During the proffer, Ms. Morgan repeatedly referred to the shooter as "Willie Ponder" even though she admitted that she didn't know the Petitioner and was given his name by someone else. After her proffer, defense counsel objected to Ms. Morgan's references to the Petitioner by name. (A-109). The state trial court agreed and instructed Ms. Morgan to refer to the person that shot Mr. Gardner as "the shooter, or something of that nature . . . rather than talking about Willie Ponder like you know who he is." (A-110-111). Despite the state trial court's instruction, Ms. Morgan referred to the Petitioner by name *six times*. (A-115-117). Defense counsel objected the first time Ms. Morgan used the Petitioner's name, but the state trial court overruled his objection (without providing any reasoning). (A-116). However, defense counsel failed to object again following the subsequent naming of the Petitioner (five more times).

Investigator Angie Booth testified that Mr. Gardner gave her "a name that he heard, but he did not know who the person was that shot him." (A-118). She then told the jury that she took that information and created the photographic lineup that included the Petitioner's picture, followed by this exchange:

> Q And is it uncommon to get leads on suspects from the talk in the community where these shootings occur?
>
> A It's very common. And Crime Stoppers.
>
> Q Would it be fair to say that you rely on that information to follow up to see if you can find or identify somebody, as in this case, the shooter in this case?
>
> A We rely on it. We count on people coming forward or

> providing information, whether in person or – and honestly, we depend on that.
>
> Q And when Mr. Gardner mentioned to you a name that he had heard from other people, did you just take a picture of Willie Ponder and show it to him and say, is this the guy that shot you?
>
> A No. That would –

(A-120). Defense counsel objected at this point, arguing "facts not in evidence." (A-120). At sidebar, the state trial court said:

> I'm not sure that that objection takes us anywhere, Mr. Zelman. But, I mean, if you want a hearsay objection to what they've gathered, I'll sustain a hearsay objection to the whole line of questioning. I don't think it's an appropriate line of questioning, but there's no objection.

(A-120). Defense counsel then made a hearsay objection and the state trial court sustained the objection, noting "a lot of it is out there." (A-121).

The foregoing demonstrates that defense counsel failed to object to much of the "word on the street" evidence. Additionally, at no time did defense counsel move for a mistrial or request a curative instruction.

Hearsay is an out-of-court statement by a non-testifying declarant, which is offered to prove the truth of the matter asserted. *See* § 90.801(1)(c), Fla. Stat. When an out-of-court statement of a non-testifying witness furnishes evidence of a defendant's guilt, even if offered to show the sequence of an investigation, such testimony is clearly hearsay. In *Saintilus v. State*, 869 So. 2d 1280, 1281-1282 (Fla. 4th DCA 2004), the Florida appellate court held that the trial court erred by allowing two detectives to testify that: (1) in interviewing witnesses, a detective learned the nickname of a suspect and (2) someone from the police told a detective that the

defendant had that nickname. The *Saintilus* court admonished the State for attempting to introduce this type of hearsay testimony:

> In spite of substantial authority condemning this attempt to adduce prejudicial hearsay, the state often persists in offering this kind of hearsay to explain the "state of mind" of the officer who heard the hearsay, or to explain a logical sequence of events during the investigation leading up to an arrest. This type of testimony occurs with the persistence of venial sin. The state's insistence on attempting to adduce this particular brand of hearsay requires trial judges to be constantly on their guard against it.

Id. at 1282. *See also* Charles W. Ehrhardt, *Florida Evidence* § 801.2 at 823-26 (2014 ed.) ("Testimony of a witness concerning an out-of-court statement by the victim of a crime, a defendant, or a police officer is hearsay if the out-of-court statement is offered to prove the truth of the matter asserted. An investigating officer sometimes testifies concerning detailed information that was received during the investigation by the officer from third person, such as an informant or a radio dispatcher. The testimony is hearsay if it is offered to prove the truth of the matter asserted by the informant or dispatcher. Usually, evidence of the contents of a BOLO dispatch received over the police radio, the statement of a witness, or a tip received from a confidential informant is hearsay, whether or not it directly accuses the defendant. If counsel attempts to avoid a hearsay objection by offering the testimony to show the officer's 'course of conduct' leading to the arrest of the defendant, a logical sequence of events or some similar purpose, the well-reasoned cases recognize that the testimony concerning the out-of-court statements is hearsay.") (footnotes omitted); *Keen v. State*, 775 So. 2d 263 (Fla. 2000) (rejecting the argument that the challenged testimony was not offered to

prove the truth of the matter asserted when the investigative sequence was irrelevant); *Wright v. State*, 586 So. 2d 1024 (Fla. 1991) (holding that irrelevant non-hearsay purpose does not render hearsay admissible); *Postell v. State*, 398 So. 2d 851 (Fla. 3d DCA 1981).

Additionally, in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), this Court held that admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment to the Constitution if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. A central premise relied upon by the Court in *Crawford* was that cross-examination is essential before certain types of hearsay can be admitted in a criminal trial. *See id.* In other words, cross-examination is critical in the search for truth and mandatory to test the validity of accusatory statements. "[The Confrontation Clause] commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

The "word on the street" evidence was blatant hearsay and the admission of this evidence during the Petitioner's trial violated the Petitioner's Sixth Amendment Confrontation Clause rights. As a result of the improper "word on the street" evidence (and the "inescapable inference"[5] therefrom), the jury was told – *repeatedly* – that

[5] *See Postell*, 398 So. 2d at 854 ("[T]he inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated."); *Mathieu v. State*, 552 So. 2d 1157 (Fla. 3d DCA 1989) (reversing conviction because inescapable inference from non-testifying friends of the victim identified the defendant by name as perpetrator of the robbery).

unnamed people in the community had identified the Petitioner as the person who shot Mr. Gardner. None of these unnamed "people" testified during the Petitioner's trial and therefore the Petitioner was denied his right to confront/cross-examine these unnamed people regarding their alleged assertion. These unnamed people ultimately furnished direct evidence of the Petitioner's guilt – evidence that the jury heard throughout the trial.

However, during the trial, defense counsel never objected on the basis that the "word on the street" evidence violated the Petitioner's Confrontation Clause rights. Moreover, defense counsel failed to object on numerous occasions during the trial and consequently the jury heard about the "word on the street" identifying the Petitioner as the shooter. From the very beginning of the trial, the "word on the street" evidence infected the Petitioner's trial:

> Okay. I think it will be clear that law enforcement, through their investigation, *through things that were being said in the community, developed the Defendant in this case as a suspect*. And once they developed this defendant as a suspect – and *then what they do in a lot of cases and a lot of times* – Investigator Booth will testify to you that they get suspects, leads from talk coming from the community.

(A-92) (emphasis added). As a result of the prosecutor's improper opening statement, before the jurors heard any evidence, they were already told that the "word on the street" is usually correct and the "word on the street" in this case points directly to the man on trial. The Petitioner was immediately disadvantaged by these improper comments. The improper opening statement became even more prejudicial when the prosecutor suggested that the "word on the street" is reliable since law enforcement

relies upon such information "in a lot of cases and a lot of times."

The prosecutor's opening did not prove to be the only opportunity to shower the jury with gossip and rumor. True to her promise, the prosecutor elicited the following testimony from Mr. Gardner:

> Q Okay. At some point, were people – and I'm not asking you to get into anything anyone was saying. But at some point, were you being given information from either friends or family members about who it was, the name of the person who shot you?
>
> A Yes, ma'am.

(A-96). The prosecutor then asked questions about the photographic lineup used by law enforcement and clarified that Mr. Gardner never saw a photograph of the Petitioner before viewing the lineup – a fact that does not cure the harm caused by informing the jury that "friends and family" identified the Petitioner. The prosecutor then asked:

> Q So am I correct that you knew the name, Willie Ponder, at that point because of *what people were telling you*?
>
> A Yes, ma'am.

(A-98) (emphasis added).

After Mr. Gardner testified to the "word on the street," as alluded to in her opening statement, the prosecutor asked the investigator to comment upon the value of these tips:

> Q Would it be fair to say that you rely on that information to follow up to see if you can find or identify somebody, as in this case, the shooter in this case?
>
> A We rely on it. We count on people coming forward or

> providing information, whether in person or – and honestly, we depend on that.

(A-120). This made the testimony even more prejudicial because it makes this type of hearsay sound inherently trustworthy. In saying that law enforcement officials "depend on that," the investigator made such hearsay sound necessary to solve crimes or impossible to solve them without it.[6]

The prejudicial effect of the inadmissible testimony was exacerbated by Ms. Morgan's testimony. She originally proffered her testimony and referred to the Petitioner by name throughout her proffer, even though she did not know him. In doing so, she made it sound like she knew him personally and that she had no doubt about the name of the individual that shot Mr. Gardner. Once again, the state trial court seemed to be well aware of the unfair prejudice that would result from Ms. Morgan calling the Petitioner by name. As such, the state trial court advised her to refer to him in any other way other than by name. (A-110-111). Curiously, the state trial court did not sustain an objection by defense counsel when he called attention to the previous ruling, but defense counsel failed to seek clarification and failed to object again following the subsequent naming of the Petitioner. Thus, the jury heard Ms. Morgan, who had never known the Petitioner, refer to him six times by name. The

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[6] The state trial court sustained a hearsay objection of defense counsel, but the state trial court was also aware of the highly prejudicial impact of this testimony: "I don't think it's an appropriate line of questioning, but there's no objection." (A-120). Presumably, the state trial court was referring to any testimony regarding investigative steps in this case, or any other case, that involved accusatory hearsay that could not be tested in court.

State tried to clarify their lack of a relationship, but that did not erase the inference that she firmly believed the Petitioner was the shooter based upon the "word on the street."

Given the lack of additional evidence implicating the Petitioner,[7] the "word on the street" evidence strongly influenced the jury's verdict. Clearly something had to convince the jurors to ignore the Petitioner's defense witnesses.[8]

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[7] The hat worn by the shooter did not contain the Petitioner's DNA. Mr. Gardner's description of the gun (a revolver) was not consistent with the casings found at the scene. Mr. Gardner's initial description of the shooter did not describe the tattoos on the Petitioner's arms nor fit the Petitioner's description. And, the two eyewitnesses were the subjects of an intense altercation and involved in a violent car crash within minutes of seeing the suspect.

[8] The Petitioner called several witnesses in support of his defense of mistaken identity:

> Whitney Isaac, Ponder's girlfriend and mother of his child, testified that Ponder was at home with her in Quincy during the shooting. However, she did not recall specific details of the night of the shooting.
>
> Marquis Davis testified that he saw the group of people involved in the altercation and that Ponder was not one of them. He did not witness the shooting, but was only three houses away when he heard the gunshots that occurred two minutes after he saw the altercation. Davis claimed that he gave an oral statement to the police some time after the incident, but never told law enforcement that he knew Ponder was not involved.
>
> Tyranney Scott and Darius Nelson testified that they were at a cookout nearby when they heard gunfire. They both saw someone running through an adjacent yard. Nelson described a tall person dressed in black with "something in his hand" running through the yard. Scott described a person that was at least six feet tall,[FN] wore dark colored clothes, and carried a gun. During cross-examination, Nelson acknowledged that he never reported this information to law enforcement and Scott reported the information five months before the trial.
>
> [FN: Ponder is 5'6". (A-151).]

(A-149-150).

But for the "word on the street" evidence, the jury would not have convicted the Petitioner. As such, defense counsel's failure to exclude this evidence or properly object to all of the evidence during the trial constituted ineffective assistance of counsel.

In the report and recommendation, the magistrate judge concluded that defense counsel did not render ineffective assistance of counsel because "[c]ounsel made a tactical decision not to continue objecting, i.e., he did not want to lose favor with the jury . . . ." (A-28). Contrary to the magistrate judge's conclusion, the clear prejudice from the "word on the street" evidence far outweighed any concern regarding "looking bad in front of the jury." As explained by the Utah Supreme Court:

> Given the circumstances of this case as outlined above, we are at a loss to conceive of a "sound trial strategy" that would justify defense counsel's decision to remain completely silent while the prosecutor made the Contested Statement. *In the face of such obviously improper and inflammatory comments, defense counsel should have immediately objected and moved for a mistrial or, at the very least, demanded a curative instruction.* But by failing to do so, not only did defense counsel fail to address the prejudice elicited by the Contested Statement, but he also failed to preserve the issue for appeal. And in our view these failures are sufficiently egregious to support the conclusions that defense counsel's decision cannot be considered to be a "sound trial strategy," as required by *Strickland*, and that defense counsel's performance fell below *Strickland's* objective standard of reasonableness.
>
> The State attempts to counter this line of argument by asserting that defense counsel's decision to remain silent does qualify as a "sound" trial strategy because counsel may have feared that an objection or motion might highlight or compound the prejudicial nature of the Contested Statement for the jury. The dissent agrees and goes to great lengths to make the point that, under certain circumstances, strategically refusing to object is an acceptable trial strategy. But here we are not disputing the fact that there are times when counsel's decision not to object can be both strategic and proper. That proposition is axiomatic. *We simply conclude that this was not one of those times.*
>
> As the dissent acknowledges, "[t]he question of where to draw the line – of when to object and when to stand pat – is . . . difficult." And

under the circumstances of this case, we are simply drawing this line in a different place than that advocated by the dissent. *We believe that, given the improper and inflammatory nature of the prosecutor's remarks, it was not reasonable for defense counsel to stand silent*. Thus, contrary to what is asserted by the dissent, we are not departing from *Strickland*, we are applying it. And while we recognize that it can be a legitimate strategy to remain silent due to a fear of prejudice, under the facts of this case such a strategy does not qualify as "reasonable" or "sound," since no more prejudicial accusation can be made within the context of a child sex abuse case than that the defendant has a history of sexually abusing children, which is precisely the accusation the prosecutor made here. Within the context of this case, therefore, we decline to assume, as the State and dissent urge us to do, that defense counsel failed to object because he had made a reasonable and sound strategic decision. Instead, we conclude that, given the nature of the Contested Statement, *such a strategy was patently unreasonable.*

. . . .

Furthermore, if we were to accept the State's argument that defense counsel's failure to object (based on a "fear of highlighting") qualified as a sound trial strategy in this case, *it is difficult to conceive of many cases where such a strategy would not be available to the State to preclude an ineffective assistance claim*. As we have noted, the prosecutor's violation of the judge's order was so brazen and the accusation so obviously inflammatory that it had already been brightly highlighted by its very nature. As a result, we consider it to be clear in this case that the State's "fear of highlighting" argument fails to defeat Defendant's ineffective assistance claim.

But we think it important to note that, even in closer cases, the "fear of highlighting" argument *should be analyzed with some skepticism*. For at bottom, when accepted, *it permits the State to engage in improper conduct without consequence.* It insulates the State from objection to its misconduct by the very fact that an objection might render that misconduct even more effective by bolstering the State's case. Further, in those cases where defense counsel fails to object to improper comments by the State, the imputation of a "fear of highlighting" argument will almost always be available to the State. And *were that argument too readily accepted, it would significantly undermine our ineffective assistance of counsel doctrine.*

Finally, the "fear of highlighting" argument also puts defense counsel at a significant disadvantage at trial. She faces a Hobson's

> choice: on the one hand, if she objects, she risks highlighting the improper comment. If she does not, she is effectively barred from raising the issue on appeal because her silence may be deemed a "sound" strategy. Thus, if the argument is too readily accepted, it could stand as a substantial obstacle to a fair trial. This is not to say it should never be accepted. Our rules of preservation are critical to the appellate process and are themselves an important mechanism for promoting fairness. It is only to say that it is an argument that always warrants careful scrutiny, with the inequities we have noted in mind.
>
> For the foregoing reasons, we conclude that defense counsel's decision not to object cannot, under all of the circumstances of this case, qualify as a "sound trial strategy." Therefore, we conclude that *Strickland's* first presumption is overcome. And because it was unreasonable for counsel not to object, we also conclude that counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*.

State v. Larrabee, 321 P.3d 1136, 1143-45 (Ut. 2013) (emphasis added) (footnotes omitted). As in *Larrabee*, in the instant case, when the prosecutor informed the jury that unnamed people in the community had identified the Petitioner as the shooter, defense counsel should have immediately objected and moved for a mistrial or, at the very least, demanded a curative instruction. And as in *Larrabee*, given the clear violation of the Petitioner's Confrontation Clause rights, "it was not reasonable for defense counsel to stand silent" and "such a strategy was patently unreasonable." *Larrabee*, 321 P.3d at 1144. As explained by the Utah Supreme Court, if the State and/or a defense attorney can simply cite the fear of looking bad in front of a jury as a basis for failing to object to the introduction of inadmissible evidence, "it is difficult to conceive of many cases where such a strategy would not be available to the State to preclude an ineffective assistance claim." *Id.* at 1145. This type of alleged justification for failing to object "should be analyzed with some skepticism" because "it permits the

State to engage in improper conduct without consequence" and "were that argument too readily accepted, it would significantly undermine our ineffective assistance of counsel doctrine." *Id.* *See also People v. Dorsey*, 46 Cal. App. 3d 706, 719 (Cal. Ct. App. 1975) (rejecting prosecution's argument "that the reason the privilege was not claimed was because counsel did not want to look bad by making repeated objections in the presence of the jury").[9]

The magistrate judge also concluded that the Petitioner "fails to meet the prejudice prong of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." (A-29). Contrary to the magistrate judge's conclusion, the "word on the street" testimony in this case was *extremely prejudicial* (which is why the prosecutor repeated the "word on the street" evidence throughout the trial). As a result of the improper evidence/testimony, the jury was told – *repeatedly* – that unnamed people in the community had identified the Petitioner as the person who shot Mr. Gardner. None of these unnamed "people" testified during the Petitioner's trial and therefore the Petitioner was denied his right to confront/cross-examine these unnamed people regarding their alleged assertion. These unnamed people ultimately furnished direct evidence of the Petitioner's guilt – evidence that the jury heard throughout the trial. In support of his argument

[9] As explained by Justice Pariente in her specially concurring opinion in *Salazar v. State*, 991 So. 2d 364, 380-81 (Fla. 2008), any concern that defense counsel had about "looking bad in front of the jury" would have been alleviated if defense counsel had requested a bench conference to preserve the objection outside the ears of the jury. *See Datus v. State*, 126 So. 3d 363, 366 (Fla. 4th DCA 2013) (citing Justice Pariente's specially concurring opinion in *Salazar* and stating "as suggested by Justice Pariente, an attorney may request a bench conference to preserve an objection outside the ears of the jury").

regarding the prejudicial impact of the improper "word on the street" testimony, the Petitioner continues to rely on the Florida appellate court's holding in *Saintilus*, 869 So. 2d at 1282-1283:

> The essence of the officer's testimony here was that unnamed witnesses had identified someone named Tutu as being involved in the robbery. Another detective sought to establish that Tutu was in fact the defendant, based on information he received from still other police officers. The only purpose of this testimony was to admit these hearsay statements to link defendant to the crimes, even though such hearsay is clearly inadmissible.
>
> . . . .
>
> . . . We do not find these errors to be harmless in this case because of the conflicting testimony over the identification of the perpetrator of the robbery. *In many cases we would find such testimony as was adduced here to be prejudicial.*

(Emphasis added). As in *Saintilus*, the improper "word on the street" evidence that the jury heard in the Petitioner's case was "prejudicial." The jury heard that unnamed people identified the Petitioner as the shooter – even though these unnamed people never testified at trial and the Petitioner was never afforded an opportunity to confront/cross-examine these unnamed people.[10] This case presents a classic

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[10] The improper "word on the street" comments/testimony became even more prejudicial when the prosecutor suggested that the "word on the street" is reliable since law enforcement relies upon such information "in a lot of cases and a lot of times." After Mr. Gardner testified to the "word on the street," as alluded to in her opening statement, the prosecutor asked the investigator to comment upon the value of these tips:

> Q Would it be fair to say that you rely on that information to follow up to see if you can find or identify somebody, as in this case, the shooter in this case?

Confrontation Clause violation.

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to exclude testimony referring to the "word on the street" identifying the Petitioner as the shooter. Counsel's actions fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has (1) made "a substantial showing of the denial of a constitutional right" (i.e., his Confrontation Clause rights and his right to effective assistance of counsel) and (2) the magistrate

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> A We rely on it. We count on people coming forward or providing information, whether in person or – and honestly, we depend on that.

(A-120). The investigator's testimony led the jury to believe that the "word on the street" is inherently trustworthy. In saying that law enforcement officials "depend on that," the investigator made such hearsay sound necessary to solve crimes or impossible to solve them without it.

Furthermore, as explained in footnote 12 of the amended § 2254 petition, the Petitioner called several witnesses in support of his defense of mistaken identity. Clearly the "word on the street" evidence was utilized by the jury as a basis to ignore the defense witnesses.

judge's resolution of this claim (later adopted by the district court) is "debatable amongst jurists of reason." *See* 28 U.S.C. § 2253(c)(2). Notably, in its order adopting the magistrate judge's report and recommendation, the district court stated the following:

> The prosecutor said in opening statement and elicited testimony during the trial that "word on the street" was that Mr. Ponder was the shooter. This was plainly inadmissible hearsay. The prosecutor's reference to it was inexcusable. The trial court sustained a defense objection when the prosecutor first did this, but the prosecutor was undeterred. This was even more clearly inexcusable. . . .
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> . . . .
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> The prosecutor should not take this outcome as an approval of her tactic. The United States Supreme Court long ago set a standard for a prosecutor that still applies today: "He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). When presented with a case in which a prosecutor struck foul blows but now says they had no effect on the outcome, *one is left to wonder why the prosecutor crossed the line in the first place.*

(A-5-6) (emphasis added). In light of the district court's statements, the Petitioner meets the standard for obtaining a certificate of appealability – this issue is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

Accordingly, the Eleventh Circuit should have granted a certificate of appealability for this claim. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

2. There is a circuit split over whether a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding.

In his § 2254 petition (and in his state postconviction motion), the Petitioner raised a claim involving newly discovered evidence and "actual innocence." During the trial, Jamil Gardner identified a cap that he claimed was worn by the shooter. (A-93, A-94-95). The State was unable to link the Petitioner with the DNA found on the cap, but the State maintained that the cap belonged to the Petitioner. (A-122) (prosecutor's closing argument: "Mr. Gardner was able to hit him and cause the defendant to fall, the hat to come off his head."); (A-125) (prosecutor's closing argument: "Men rape women all the time and they don't leave their DNA, you know. It doesn't mean he didn't have that hat on.").

On August 28, 2011, seven months *after* the trial, the State disclosed an FDLE[11] lab report, dated July 20, 2011, that concluded that Mr. Gardner's DNA was found *on the inside of the cap*. (A-89). As explained in the Petitioner's state postconviction motion, had the Petitioner known about this report at trial, it could have been used to challenge the State's entire theory of the case. Had this evidence been disclosed, defense counsel could have impeached the State's key witness (Mr. Gardner). Mr. Gardner testified that the Petitioner wore the cap when he shot him and he never testified that there would be *any reason* for his DNA to be present on the cap. Had it been known that the cap belonged to Mr. Gardner, no juror would have believed Mr. Gardner's identification of the Petitioner as the shooter after Mr. Gardner insisted that

[11] Florida Department of Law Enforcement.

the shooter wore the cap.

As such, the new evidence establishing that Mr. Gardner's DNA was found on the inside of the cap would have drastically changed the defense theory and the State's theory. This evidence would likely result in an acquittal at a retrial. Mr. Gardner would have to explain how his DNA was found on the inside of the cap he claims was worn by the shooter and why he failed to previously disclose this fact when he had numerous opportunities to do so.

In rejecting the Petitioner's newly discovered evidence claim, the state postconviction court concluded:

> The fact that there was DNA in the cap supposedly worn by the shooter which matched that of the victim may have been helpful at trial in cross examining the victim and the other eye witness. It's difficult to know. Defendant argues that the victim or prosecution would be forced to explain the victim's DNA in the cap. True, but if given this additional information, they could have perhaps done so.
>
> But even if it would have been helpful, I don't think it justifies a new trial because the defense already had the key information concerning the cap, i.e., that the Defendant's DNA was not in it. Since both the victim and Morgan claimed that the shooter was wearing the cap, this was a big arguing point for the defense to suggest that the Defendant was not the shooter. This additional information would not have changed the result of the trial.

(A-90). Contrary to the state postconviction court's reasoning, the "key information concerning the cap" was not that the Petitioner's DNA was not in it – the "key information" concerning the cap (i.e., the newly discovered evidence that Mr. Gardner's DNA was on the inside of the cap) is that Mr. Gardner's testimony/credibility (and his identification of the Petitioner as the shooter) is *completely undermined.* Mr. Gardner was the State's star witness at trial and the credibility of his identification of the

Petitioner as the shooter was the key issue for the jury to consider in this case. As explained by defense counsel during the state court postconviction evidentiary hearing, the newly discovered DNA evidence "would be one of the biggest issues" at a new trial:

> I believe that the significance of Mr. Gardner's DNA being on the inside of that baseball cap undermines his credibility entirely. Whether it's the identification, whether it's he did or did not know Mr. Ponder, I would seriously call into question anything that he would have said during that trial.

(A-141-142).

The new evidence establishing that Mr. Gardner's DNA was on the inside of the cap would probably produce an acquittal at a retrial (and establish that the Petitioner is "actually innocent"). *See Mordenti v. State*, 894 So. 2d 161, 164-77 (Fla. 2004) (ordering new trial based on cumulative analysis of *Brady*[12] and *Giglio*[13] claims where falsity of witness's testimony, established by recantation, "could have impacted the jury's determination of Mordenti's character when deliberating").

The Petitioner submits that this newly discovered DNA evidence amounts to a "freestanding claim of actual innocence." In *Baker v. Yates*, 339 Fed. Appx. 690, 692 (9th Cir. 2009), the Ninth Circuit Court of Appeals recognized that a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding:

> Baker asserts a freestanding claim of actual innocence. The Supreme Court has left open the question of whether such a claim is cognizable under federal law and, if so, whether the claim may be raised in a non-capital case. *See House v. Bell*, 547 U.S. 518, 554-555 (2006). *We*

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[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

[13] *Giglio v. United States*, 405 U.S. 150 (1972).

> *have assumed that freestanding innocence claims are cognizable* and have held that "'a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.'" *Osborne v. District Atty's Office for Third Judicial Dist.*, 521 F.3d 1118, 1130-1131 (9th Cir. 2008) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (*en banc*)).

(Emphasis added).

In contrast, in *Cunningham v. District Attorney's Office for Escambia County*, 592 F.3d 1237, 1272 (11th Cir. 2010), the Eleventh Circuit Court of Appeals stated that "this Court's own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases." (citing *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007)). In the instant case, the district court relied on this precedent in denying the Petitioner's freestanding claim of actual innocence.

In 2013, the Court stated that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). *See also Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.") (citations omitted).[14]

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[14] In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the Court assumed, without deciding, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *See also Jackson v. Calderon*, 211 F.3d 1148, 1164 (9th Cir. 2000) (noting that "a majority of the justices in *Herrera* would have supported a claim of free-standing

By granting the petition in the instant case, the Court will have the opportunity to resolve this circuit split and clarify whether a freestanding claim of actual innocence is cognizable in a § 2254 proceeding. The Petitioner submits that it is counterintuitive to allow "gateway" actual innocence claims but prohibit "freestanding" actual innocence claims. Federal judges in this country need guidance from this Court on this important question. *See White v. Keane*, 51 F. Supp. 2d 495, 504 (S.D.N.Y. 1999) (suggesting that a liberal reading of *Herrera* extends actual innocence claims to non-capital cases); *Wright v. Smeal*, No. 08-2073, 2009 WL 5033967 at *9-10 (E.D. Pa. Dec. 23, 2009) (addressing the merits of the petitioner's freestanding actual innocence claim in a non-capital case).

In light of the newly discovered DNA evidence in this case , the Petitioner should be afforded an opportunity to present his "actual innocence" claim in federal court. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Supreme Court stated the following regarding the "great writ":

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful

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actual innocence"); *In re Davis*, 2010 WL 3385081 at *43 (S.D. Ga. 2010) (concluding that "executing the 'actually' innocent violates the cruel and unusual punishment clause of the Eighth Amendment").

> confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

(Citation omitted). Concluding that a freestanding claim of actual innocence is cognizable in a § 2254 proceeding is consistent with the purpose of the "great writ." Accordingly, the Petitioner requests the Court to grant this petition.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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