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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10639-E

WILLIE PONDER,

Petitioner-Appellant,

versus

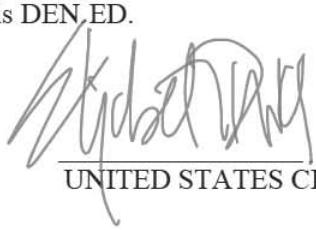
SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, Willie Ponder must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000). Because Ponder has failed to make the requisite showing, the motion for a certificate of appealability is DENIED.



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

WILLIE PONDER,

Petitioner,

v. CASE NO. 4:17cv217-RH-HTC

SECRETARY DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

ORDER DENYING THE PETITION AND DENYING A CERTIFICATE OF APPEALABILITY

By petition for a writ of habeas corpus under 28 U.S.C. § 2254, Willie Ponder challenges his state-court conviction for attempted murder and related offenses. The petition is before the court on the magistrate judge's report and recommendation, ECF No. 37, and the objections, ECF No. 40. I have reviewed de novo the issues raised by the objections. The report and recommendation is correct and is adopted as the court's opinion, with this additional note.

The charges arose from a quarrel that led to a shooting near a public street. Eyewitnesses identified Mr. Ponder as the shooter. Mr. Ponder asserted that he was

not the shooter and indeed was not even present—that the witnesses who identified him were mistaken. This is the stuff of which jury trials are made.

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. The defense attorney stood down, not wishing to alienate the jury, and eventually used the "word on the street" references to support the defense, suggesting that the eyewitnesses unreliably identified Mr. Ponder only because they heard the word on the street.

Mr. Ponder asserts his attorney rendered ineffective assistance on this issue. To prevail on an ineffective-assistance claim, a petitioner must show both deficient performance and prejudice *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). After an evidentiary hearing, the state court denied Mr. Ponder's application for collateral relief on this issue, finding neither deficient performance nor prejudice. A federal habeas court may set aside a state court's ruling on the merits of a petitioner's claim only if the ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the ruling "was based on an

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). As the report and recommendation demonstrates, Mr. Ponder has not met this standard. Mr. Ponder is not entitled to relief on this claim or, as also shown by the report and recommendation, on his other claims.

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.

Rule 11 of the Rules Governing § 2254 Cases requires a district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack*

v. McDaniel, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' "

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Mr. Ponder has not made the required showing. This order thus denies a certificate of appealability.

For these reasons,

IT IS ORDERED:

1. The report and recommendation is accepted.

2. The clerk must enter judgment stating, "The petition is denied with prejudice."

3. A certificate of appealability is denied.

4. The clerk must close the file.

SO ORDERED on January 16, 2020.

s/Robert L. Hinkle
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIE PONDER

VS

CASE NO. 4:17cv217-RH/HTC

SECRETARY DEPARTMENT OF CORRECTIONS

JUDGMENT

The petition is denied with prejudice.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

January 16, 2020
DATE

s/ *Kimberly J. Westphal*
Deputy Clerk: Kimberly J. Westphal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIE PONDER,

Petitioner,

v. Case No. 4:17cv217-RH-HTC

SECRETARY DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner Willie Ponder's ("Ponder") amended petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF Doc. 6. The matter was referred to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After considering the amended petition, the State's response (ECF Doc. 25), and Ponder's reply (ECF Doc. 35), the undersigned recommends the Petition be **DENIED** without an evidentiary hearing.

Ponder's petition is premised on five grounds: (1) defense counsel was ineffective for failing to object to testimony referring to "word on the street" identifying Ponder as the shooter; (2) defense counsel was ineffective for failing to

object to the lineup presented to the victim and a witness; (3) defense counsel was ineffective for failing to impeach witness Breanna Morgan's testimony; (4) newly discovered DNA evidence establishes that Ponder is "actually innocent"; and (5) defense counsel was ineffective for failing to move to dismiss the charging document. For the reasons set forth below, the undersigned finds that grounds (4) and (5) are procedurally defaulted and the state court's adjudication of the remaining grounds on the merits was not contrary to clearly established federal law or based on an unreasonable application of the facts to the law. *See* 28 U.S.C. § 2254(d).

I. Background

A. Factual Background

The following relevant factual background is taken from the trial transcript, which starts with Exhibit B3, ECF Doc. 25-2 at 68.

1. The Offense

At approximately 9:30 p.m. to 10:00 p.m. on November 17, 2009, Jamil Gardner, Breanna Morgan, and William Barr drove together to a house on Cypress Lake Road in Tallahassee, Florida, to pick up Gardner's friend Greg Sharp. As they pulled up, they saw Sharp and his girlfriend arguing and stopped just around the corner from them. Gardner and Barr exited their SUV while Morgan remained inside. Once outside the vehicle, Gardner saw two males and a female get out of another vehicle parked nearby. ECF Doc. 25-2 at 97-101.

One of the males, later identified as Petitioner, came over and began arguing with Barr until Barr removed his shirt, getting ready to fight. *Id.* At some point, Sharp and his girlfriend also came over, having stopped their argument. Ponder then began arguing with Sharp and his girlfriend. After a few moments, Gardner tried to get Sharp to get in the car to leave, but Sharp told him to go and get the "Glock .40." Ponder asked Gardner, "you've got a Glock .40?" as he pulled a gun out and aimed it at Gardner from around three to four feet away. ECF Doc. 25-2 at 101-06.

Gardner attempted to slap the gun down and punched Ponder in the face, knocking him to the ground. As Ponder fell, the gun fired, and a bullet struck Gardner in the leg. Gardner ran, but soon fell and realized he was shot. He struggled to get up and Ponder approached him once again. While he lay there on his back, Ponder came up and stood directly over him, aiming the gun at him. Ponder fired two shots which hit Gardner and ran off. ECF Doc. 25-2 at 107-09. Gardner managed to get up and get back into the SUV with Morgan, Barr, and Sharp.

2. Ponder Is Identified as the Shooter

Gardner was subsequently taken to the hospital. While there, Gardner was interviewed twice by investigator, Angie Booth. The first interview occurred on the first day Gardner was in the intensive care unit. Gardner told Booth he had heard from family and friends that the name of the person who shot him was Ponder. *Id.* at 122, 149, 253. Gardner added, however, that he did not know Ponder. *Id.* at 253.

The next interview occurred as Gardner was being discharged. *Id.* at 257-58. Booth showed Gardner a photographic lineup that included a photo of Ponder. *Id.* at 126. ECF Doc. 25-2 at 124-25. Booth did not tell Gardner the shooter's picture was definitely in the array of photographs. *Id.* at 126. Gardner selected Ponder from the lineup. A couple of weeks later, on December 6, 2009, the police showed Morgan, who was also present during the shooting, a photo array that included Ponder's photo and asked Morgan to see if she recognized the shooter. Morgan also identified Ponder as the shooter.

Based on the two identifications, a warrant was issued for Ponder. *Id.* at 262. Officer Gavin Larremore testified at trial that on December 6, 2009, he received a tip as to Ponder's location – a woman's apartment in Buckingham Apartments. *Id.* at 262. When officers reached the apartment, the woman told them that Ponder was not present. *Id.* at 263. The officers eventually located Ponder hiding in the attic. *Id.* After fifteen minutes of ordering him to come out, Ponder came out and was arrested. *Id.*

3. The trial

Gardner testified at the trial regarding his identification of Ponder as the shooter. Gardner testified he was able to see Ponder's face clearly and described him as around 5'8", 160-70 pounds with a "low cut" hairstyle, wearing a "[b]lack hat, black T-shirt, and black pants." ECF Doc. 25-2 at 106 & 142. Gardner

described the gun as a black revolver. *Id.* at 107. Also, Gardner was asked at trial if he noticed if the gunman had any tattoos. Gardner answered, "I couldn't see any tattoos. It was dark." *Id.* at 134. A picture of Ponder's tattoos was entered into the record at trial. ECF Doc. 25-4 at 28.

Gardner testified regarding how he identified Ponder in the photo lineup. According to Gardner, he recognized Ponder's face in the lineup "[f]rom when [he] got shot," stating "I remembered his face." *Id.* at 127. Gardner was asked if he had seen Ponder's picture prior to the lineup in any other way, such as in the news. *Id.* He responded, "No, ma'am." *Id.*

Gardner was also asked about his mental state at the time he reviewed the photographic lineup, because he had testified previously at his deposition that "as soon as I looked at it, I could – I spotted him right off the bat, even though I – you know, just being disoriented or whatever." *Id.* at 130. When asked at trial what he meant by "disoriented," he testified: "at the time I looked at the lineup, I was not on medication or anything. They had stopped medication before – right before I got discharged. But I still had been taking medication, so I had to make sure that I wasn't just picking somebody out that looked like him." *Id.* at 131. He also stated that he was not "under the influence of anything that affected [his] ability to look at those photographs and see or try to identify the person who shot [him]." *Id.* Booth also

testified that Gardner did not seem disoriented, seemed normal, and was able to understand what he was saying to her. *Id.* at 257.

Gardner was also shown a picture of a hat recovered from the crime scene and testified he recognized the hat because "[i]t was on the Defendant's head." ECF Doc. 25-2 at 115. The hat was tested for DNA and, although it contained usable DNA from three or more donors, Ponder was excluded as a potential donor. *Id.* at 181-83.

Morgan also testified at trial regarding her identification of Ponder as the shooter. She testified she did not previously know Ponder and had never seen a picture of Ponder prior to being shown a lineup at the police station. *Id.* at 221-22. Morgan was shown three sheets containing photo arrays, including the same photo array sheet that was shown to Gardner. She told the officer that the shooter was not on the first two but was on the third one she was shown. *Id.* at 209-10.[1] 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." *Id.* at 223-24. She

[1] This part of Morgan's testimony was given during the proffer with just the judge and the attorneys present. During her trial testimony, she was only asked about the third lineup that contained Ponder's photo. Thus, the jury did not hear the evidence of Morgan looking at three photo arrays instead of just the one that contained Ponder's picture.

testified that she also crossed out the word "positively" in the sentence confirming that she had "positively identified" the shooter. *Id.*

Morgan was asked if Gardner had shown her a picture of Ponder prior to her interview on December 4, 2009. She stated, "No. He mentioned his name, but he never showed me a picture."[2] *Id.* at 225. She also testified that she had not seen a picture of Ponder from any other source prior to her identification of him from the photographic lineup. *Id.*

On January 14, 2011, Petitioner was found guilty as charged of Attempted First Degree Murder in Case No. 09CF3864A. Ex. B1 pp. 94-95, in ECF Doc. 25-1. The jury also found that Petitioner discharged a firearm and caused great bodily harm during the commission of the offense. *Id.* Petitioner was adjudicated guilty on March 9, 2011 and sentenced to life in prison as a Prison Releasee Reoffender with a twenty-five year minimum mandatory for using a firearm during the commission of the offense. *Id.* at 98-107.

B. Procedural History

Petitioner appealed his judgment and sentence to the First District Court of Appeal ("1st DCA"), *id.* at 108, which *per curiam* affirmed his judgment and

[2] Gardner testified that, after leaving the hospital, he told Morgan he had identified the shooter in a photo lineup but denied telling her the name Willie Ponder. *Id.* at 152-53.

sentence without written opinion on February 28, 2012. *See Ponder v. State*, 80 So. 3d 1026 (Fla. 1st DCA 2012); Ex. B9, ECF Doc. 25-5 at 39.[3] The 1st DCA's mandate issued on March 15, 2012. Ex. B10, ECF Doc. 25-5 at 41.

On May 10, 2013, Petitioner filed a Rule 3.850 Motion for Postconviction Relief in the state circuit court, alleging five ineffective assistance of counsel ("IAC") claims. Ex. C1. pp. 1-21, ECF Doc. 25-5 at 45. Ponder filed a second Motion for Postconviction Relief in the state circuit court on May 20, 2013, which included a "newly discovered evidence" claim, in addition to four IAC claims. Ex. C1. pp. 22-45 in ECF Doc. 25-5. Following an evidentiary hearing on October 22, 2014 (*Id.* at 65-129, ECF Doc. 25-5 at 109-73), the state court denied relief on all five grounds. *Id.* at 53-56, ECF Doc. 25-5 at 97-100.

Petitioner appealed the denial of his Rule 3.850 Motion to the First DCA (Ex. C1. pp. 57-58, Ex. C3, Ex. C4, Ex. C5 in ECF Docs. 25-5 and 25-6), which initially *per curiam* affirmed without written opinion. Ex. C6. pp. 1-5 in ECF Doc. 25-6. However, the 1st DCA subsequently granted Petitioner's motion for a written opinion (Ex. C7 in ECF Doc. 25-6) and issued an opinion on December 21, 2016, to address only one issue, that counsel was ineffective for failing to object to "word on the street" testimony. *See Ponder v. State*, 209 So. 3d 59 (Fla. 1st DCA 2016); Ex. C8

[3] Judges Wolf, Padovano, and Marstiller concurred in the per curiam affirmance.

in ECF Doc. 25-7.[4] The 1st DCA's mandate issued on January 6, 2017. Ex. C9 in ECF Doc. 25-7.

On January 11, 2017, Petitioner filed (per mailbox rule)[5] a *pro se* "Successive Motion for Postconviction Relief 3.850(h)" in the state circuit court alleging a single claim: that his trial counsel was ineffective for failing "to dismiss the indictment or information filed on January 28, 2010[6] thus being fatally defective constituting an incorporation by reference shot gun pleading." Ex. Dl. p. 6, ECF Doc. 25-7 at 17. The state court entered an order on January 30, 2017 denying Petitioner's motion as successive and untimely (Ex. Dl. pp. 11-12 in ECF Doc. 25-7), and Petitioner appealed the court's ruling to the First DCA. *Id.* at 13-20. The First DCA *per curiam* affirmed the postconviction order without written opinion on September 7, 2017 in Case No. 1D17-0908. *Ponder v. State*, 2017 WL 3909788 at 1 (Fla. 1st DCA Sept. 7, 2017). Ex. D3, ECF Doc 25-7 at 37.[7] The court's mandate issued on October 5, 2017. (Ex. D4).

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[4] Chief Judge Roberts and Judges Wetherell and Bilbrey concurred in the written opinion. ECF Doc. 25-7 at 5.
[5] See *Houston v. Lack*, 487 U.S. 266, 275-76 (1988) (Under the "prison mailbox rule," a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing.).
[6] The January 28, 2010 Information is found at Ex. D1 p. 10 in 25-7.
[7] Judges Bilbrey, Winsor and M.K. Thomas concurred in the *per curiam* affirmance.

Petitioner filed the instant petition on May 15, 2017 (ECF Doc. 1), followed by an Amended Petition for Writ of Habeas Corpus filed on June 15, 2017. ECF Doc. 6. The petition is timely. Petitioner's judgment became final on May 28, 2012, ninety (90) days after the 1st DCA affirmed his judgment and sentence on direct appeal in *Ponder v. State*, 80 So. 3d 1026 (Fla. 1st DCA 2012).[8] *See Nix v. Secretary for Dept. of Corrections*, 393 F. 3d 1235, 1236-1237 (11th Cir. 2004) ("Because the time for seeking direct review of a criminal conviction does not expire until after the ninety-day period for filing for certiorari with the Supreme Court has ended, the most straightforward and reasonable interpretation of § 2244(d)(l)(A) is that the ninety-day certiorari period does not count towards the one-year limitations period."). Petitioner's limitations period was tolled on May 10, 2013, when Petitioner filed his Rule 3.850 motion, until May 8, 2017, when the Florida Supreme Court entered its ruling declining to accept jurisdiction to review the 1st DCA's decision in *Ponder v. State*, 209 So. 3d 59 (Fla. 1st DCA 2016). Because 347 days had expired prior to the statute of limitations period being tolled, Petitioner had eighteen (18) days after May 8, 2017, to file his petition. Petitioner filed the petition on May 15, 2017, seven (7) days later.

[8] The 90-day period begins to run on the date the appellate court enters judgment rather than the date the mandate is issued. *See Chavers v. Sec'y Fla. Dept of Corr.*, 468 F. 3d 1273, 1275 (11th Cir. 2006).

II. Legal Standard

A. Federal review of state court decision

Under the standard of review for a § 2254 motion, this Court is precluded from granting a habeas petition on Petitioner's claims unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The United States Supreme Court set forth the framework for a § 2254 review in *Williams v. Taylor*, 529 U.S. 362 (2000). *See id.*, at 412-13 (O'Connor, J., concurring). Under the *Williams* framework, a federal court must first determine the "clearly established Federal law," namely, "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The law is "clearly established" only when a Supreme Court holding at the time of the state court decision embodies the legal principle at issue. *See Thaler v. Haynes*, 559 U.S. 43, 47 (2010). Once the governing legal principle is identified, the federal court must determine whether the state court's adjudication is "contrary to" the identified governing legal principle or the state court "unreasonably applie[d] that principle to

the facts of the [] case." *See Williams*, 529 U.S. at 412-13 (O'Connor, J., concurring).

B. Ineffective Assistance of Counsel

The standard for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To obtain relief under *Strickland*, Petitioner must show (1) deficient performance by counsel and (2) a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 687–88. If Petitioner fails to make a showing as to either performance or prejudice, he is not entitled to relief. *Id.* at 697.

Strickland mandated one layer of deference to the decisions of trial counsel. 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). When § 2254(d) was amended by AEDPA in 1996, Congress added another layer of deference. *See Harrington*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.") (citations omitted). Thus, in the post-AEDPA era, it is a "rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to

merit relief in a federal habeas proceeding." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 911 (11th Cir. 2011).

Additionally, "[i]t is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence." *Nance v. Warden, Georgia Diagnostic Prison*, 922 F.3d 1298, 1302–03 (11th Cir. 2019). Decisions about which issues to press during trial are, without a doubt, strategic. *Nance,* 922 F.3d at 1302 (citing *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (per curiam)); *see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

With respect to the prejudice prong of *Strickland*, Petitioner's burden of demonstrating prejudice is high. *See Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). To establish prejudice, Petitioner must show "that every fair-minded jurist would conclude 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Jones v. GDCP Warden*, 753 F.3d 1171, 1184 (11th Cir. 2014) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," not that counsel's conduct more likely than not altered the outcome of the proceeding. *Id.* (citation omitted). And Petitioner

must show that the likelihood of a different result is substantial, not just conceivable. *Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009, 1016 (11th Cir. 2015).

III. Analysis

A. Ground One – IAC: Failure to Object to "Word on the Street Testimony"

In Ground One, Ponder argues defense counsel was ineffective for failing to object to testimony referring to the "word on the street" identifying Ponder as the shooter. ECF Doc. 6 at 11. This "word on the street" reference was made several times during the trial. First, during opening statements, the prosecutor told the jury they would "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." ECF Doc 25-2 at 88. At this point, defense counsel objected: "Judge, I'm going to object to any opening concerning hearsay statements said to that." *Id.* at 89. The judge sustained the objection. *Id.*

Nevertheless, 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.

Id. Despite objecting to the previous comment, defense counsel did not object to this additional comment.

Next, during Gardner's direct examination, the prosecutor asked whether Gardner was "being given information from either friends or family members about who it was, the name of the person who shot [him]?" *Id.* at 122. Defense counsel did not object to this hearsay testimony. Later, the prosecutor asked Gardner whether he "knew the name, Willie Ponder, at that point because of what people were telling [him]?" *Id.* at 124. Again, defense counsel did not object.

"Word on the street" testimony also came in through the testimony of witness Breanna Morgan. Before Morgan testified, the State proffered her testimony to the judge. ECF Doc 25-2 at 200-09. During the proffer, Morgan repeatedly referred to the shooter by name, as "Willie Ponder," or "Willie", even though she admitted she did not know Ponder and was given his name by someone else. After her proffer, defense counsel told the judge he objected to Morgan's references to Ponder by name, as based on hearsay, and asked that Morgan be directed to "identify in some way the person that shot Mr. Gardner or the shooter or something of that nature." *Id.* at 210. In response, the prosecutor stated, "I'll make sure that it's clear through the testimony that she didn't [know him] at the time." *Id.* The trial court agreed "it would be better to just let [Morgan] talk about the shooter and the person that shot Mr. Gardner rather than using his name and making it appear she knows this person." *Id.* at 211. The court, thus, instructed Morgan to "not refer to [Ponder] by name, you know, unless it's specifically asked of you." *Id.*

Despite the state trial court's instruction, during her direct examination Morgan referred to Ponder by name in describing the events leading up to the shooting. *Id.* at 216. Defense counsel objected to Morgan's initial reference and "request[ed] the witness be directed concerning the court's prior ruling." *Id.* at 216. The trial court overruled his objection without providing any reasoning. *Id.* Defense counsel did not object to Morgan's use of Ponder's name in her testimony again.

Investigator Angie Booth also testified that Gardner gave her "a name that he heard from other people", but he did not know who the person was that shot him. ECF Doc 25-2 at 255. Additionally, she told the jury that she took that information and created the photographic lineup that included Ponder's picture. Defense counsel objected, arguing "facts not in evidence." *Id.* At sidebar, the 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.

Defense counsel then made a hearsay objection, and the trial court sustained the objection, noting "a lot of it is out there" but that defense counsel could cross-examine on it. *Id.* at 256.

Ponder argues the above testimony and argument regarding what Gardner and Morgan heard from other people about Ponder being the shooter is "blatant hearsay", the admission of which violates his right to confront witnesses under the Sixth

Amendment. He further argues that "[b]ut for the 'word on the street' evidence, the jury would not have convicted Petitioner Ponder. As such, defense counsel's failure to object to this evidence constituted ineffective assistance of counsel." *Id.* at 20.

The state court held an evidentiary hearing on Ponder's Rule 3.850 motion, at which defense counsel testified. ECF Doc. 25-5 at 121. Counsel testified he knew before trial that "word on the street" evidence would be a feature at trial but declined to file a motion *in limine* on it, although he "probably should have." *Id.* at 130. Counsel also explained that once the judge overruled counsel's initial objection to the mention of "word on the street" evidence during Morgan's testimony, "[he] became frustrated and [] didn't want the jury to see [him] object and continue to get overruled on the same issue, so [he] abandoned that." *Id.* at 134.

In denying relief on this ground, the state court found that the objectionable testimony was hearsay but disagreed that counsel was ineffective. Instead the court stated that, "Defendant's trial attorney explained that he did not want to object again because it would make him look bad in front of the jury. I do not find the trial attorney's performance in this area deficient." ECF Doc. 25-5 at 98-99. The state court went on to explain that even if counsel's performance was deficient, such ineffectiveness was not prejudicial, stating:

> I can't find, however, that counsel was deficient in failing to file a motion in limine because there was no indication that such testimony would be elicited by the State prior to trial. Remarks made in opening

> statement, moreover, do not constitute evidence. And, as the Defendant acknowledges, his attorney did object initially to this line of questioning, and the Court seemed to agree, commenting that it was not an appropriate line of questioning, but when counsel objected again, the Court overruled the objection. Defendant's trial attorney explained that he did not want to object again because it would make him look bad in front of the jury. I do not find the trial attorney's performance in this area deficient.
>
> Even if it was deficient, I don't find the resulting prejudice that the Defendant asserts. In the context in which the statements were made during the trial, I think most jurors would understand that investigators in a case get a lot of information, tips, leads, etc. and that they run down these leads to the extent possible. Here, they got a lead based upon some "word on the street" that gave them the Defendant's name. Such rumors have little value, other than as a possible lead, and then only if confirmed by people who have actual knowledge of the events, e.g., the victim and the other eye witness. Given the vague, generalized nature of the reference to "word on the street" and how it was used by the investigators, I cannot find any prejudice even had the trial counsel been deficient in not properly objecting to it. Moreover, trial counsel also reasoned that this testimony played into a defense theory of misidentification because it suggested that the victim and the eyewitness were desperate, or eager at least, to be able to point the finger at someone, even though they couldn't really identify him."

Id.

The First DCA affirmed the denial of the claim, finding that the trial court's determination, that there was no prejudice, was "supported by the record." *Ponder v. State*, 209 F.3d 59, 61 (Fla. 1st DCA 2016). Specifically, in its written opinion, the 1st DCA stated, "[g]iven the record, we cannot say the circuit erred in concluding ineffective assistance was not demonstrated. There were several objections made, and when the 'word on the street' references were made, defense counsel used such

[references] to bolster the defense, as noted." *See id.* Applying the *Strickland* test and the high deference to strategic decisions, the First DCA also stated that "there is a strong presumption that trial counsel's performance was not ineffective." *Id.*

The First DCA's decision was not contrary to law and was not an unreasonable application of the law to the facts. Counsel made a tactical decision not to continue objecting, i.e., he did not want to lose favor with the jury, once the judge had overruled his objection. On cross-examination, counsel admitted that he felt that "word on the street" evidence was "helpful" to his defense because it explained why Gardner and Morgan independently identified Ponder as the shooter on separate days and separate times. ECF Doc. 25-5 at 141-42. This explanation was that they were motivated by a desire to convict someone rather than identify the right person. Indeed, according to defense counsel, he used the "word on the street" evidence to undermine Morgan and Gardner's credibility – to argue that "since so many people were telling him [referring to Gardner] that it was Mr. Ponder, then it had to have been Mr. Ponder." *Id.*

Because counsel made a strategic decision not to continue to object to "word on the street" reference, after the objection was initially overruled, the state court did not err in determining that Ponder failed to meet the performance prong of *Strickland*. *See Strickland*, 466 U.S. at 690; *accord, e.g., Hinton*, 571 U.S. at 274 ("strategic choices made after thorough investigation of law and facts relevant to

plausible options are virtually unchallengeable"); *see also Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009).

Petitioner also fails to meet the prejudice prong of *Strickland.* Here, neither Gardner nor Morgan knew Ponder and yet both identified him on separate instances in a photo lineup. Gardner testified he had a clear look at the shooter's face from only feet away, twice. Although Morgan was not "100% positive" that the person she identified was the shooter, she testified she had a clear view of the shooter and the two made eye contact at one point. ECF Doc. 25 at 35; 25-2 at 224. Additionally, even though Morgan referenced Ponder by name during her testimony, the State also elicited testimony from her that she did now know who Ponder was the night of the shooter. ECF Doc. 25-2 at 216. Similar testimony was obtained by the defense on cross-examination. *Id.* at 230. As defense counsel explained to the judge after the proffered testimony and prior to Morgan's actual testimony, the issue with his objection to Morgan's reference to Ponder by name was that "at the time [of the shooting] she didn't know his name." According to defense counsel, that "is what I'm concerned about." *Id.* at 211. And, that issue was cleared up during the questions to Morgan on direct and cross.

Moreover, the totality of the evidence presented shows that the result would not have been different even if counsel had objected to "word on the street" testimony. *See Williamson*, 805 F.3d at 1016. In contrast to the testimonies of

Gardner and Morgan, who were present at the time of the incident, did not know Ponder, and had vivid recollections of the shooter, the defense's witnesses were all either friends or relatives of Ponder. Whitney Isaac, for example, was Ponder's girlfriend and mother of his child. She testified Ponder was at home with her at the time of the shooting because he was always with her at night. *Id.* at 276. Despite this testimony, Isaac could not recall specific details of that night. *Id.* at 286. Similarly, Marquis Davis grew up with Ponder. *Id.* at 292. Davis testified he saw the group of people involved in the altercation and Ponder was not one of them. ECF Doc. 25-2 at 293. Yet, Davis did not witness the shooting and was three houses away. *Id.* at 294. Davis also gave an oral statement to police, but never told them Ponder was not involved even though he knew Ponder was being accused of the crime. *Id.* Ponder's cousin and another friend also testified Ponder was not the shooter, but like Davis, never reported this information to the police or waited several months before doing so. *Id.*

C. Ground Two – IAC: Failure to Object to Photo Lineup

In Ground Two, Ponder argues defense counsel was ineffective for failing to object to testimony regarding the photographic lineup because the procedures used were unduly suggestive and he provides eleven different bases for his position. ECF Doc. 6 at 26.

During the state court evidentiary hearing, defense counsel testified he did not challenge the lineup procedure because he did not think the challenge would have merit, "based on research that [he] had done in prior cases." ECF Doc. 25-5 at 138. The First DCA affirmed the state court's order, denying relief, on this ground without written opinion. Ex. C8 in ECF Doc. 25-7. Therefore, this Court will "look through" the First DCA decision on this ground and the last related state-court decision that provides a relevant rationale on Ground Two and presume that the unexplained decision adopted the same reasoning. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Here, that last decision comes from the Order Denying Defendant's Motion for Postconviction Relief. ECF Doc 25-5 at 97. In that order, the state court agreed with defense counsel that a motion to suppress would be fruitless, because any flaws in the procedure "did not rise to such a level as to justify suppression of the testimony." ECF Doc. 25-5 at 99-100. Instead, the state court determined such issues were "more properly addressed by cross examination of the persons involved, and an argument that there was a likely misidentification as a result." *Id.*

"An attorney's failure to raise a meritless argument ... cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue." *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999); *see also Diaz v. Sec'y, Dep't of*

Corr., 402 F.3d 1136, 1142 (11th Cir. 2008) (finding that appellate counsel was "not ineffective for failure to raise a meritless argument"). Therefore, Ponder must show that a motion to suppress the photographic lineup identification evidence had a substantial likelihood of succeeding under Florida law. *See Williamson v. Fla. Dep't of Corr.*, 805 F.3d at 1016.

Under Florida law, the test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *See Rimmer v. State*, 825 So. 2d 304, 316 (Fla. 2002); *Thomas v. State,* 748 So.2d 970, 981 (Fla. 1999); *Green v. State,* 641 So.2d 391, 394 (Fla. 1994); *Grant v. State,* 390 So.2d 341, 343 (Fla. 1980). The factors to be considered in evaluating the likelihood of misidentification include:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Grant, 390 So.2d at 343 (quoting *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part

of the test. *See Thomas,* 748 So.2d at 981; *Green,* 641 So.2d at 394; *Grant,* 390 So.2d at 344.

Here, Ponder's allegation that the witnesses were told the suspect was definitely in the photo array is refuted by the record. Both Gardner and Morgan testified they were told the suspect might not be in the array and that they did not have to choose anyone. Indeed, Morgan was permitted to note that her identification was not 100% positive. Also, no witness testified that investigators gave positive feedback to the witnesses, influencing their choices. Second, the witnesses testified they were able to clearly see the face of the shooter from three to four feet away. Gardner also testified streetlights were illuminating the area of the shooting. ECF Doc. 25-2 at 142-43. Morgan testified she was close enough to the shooter to notice his gold teeth and to hear him say, "I'll rob you and take everything you have." ECF Doc. 25-2 at 217 & 230-31.

Third, Ponder has offered no evidence that either Morgan or Gardner knew what Ponder looked like prior to identifying him as the shooter in the photo lineup. Both testified they had not seen Ponder except on the night of the shooting. Ponder also offers nothing but speculation that Gardner told Morgan he had picked number five on the array and that Morgan would have realized that the police were using the same photo array. Indeed, she testified during her proffer she was shown three sheets of six photos each, so she would have had to guess which of the three had the fifth

photo that Gardner chose. Moreover, while Morgan testified that Gardner told him Ponder's name, there is no testimony that Gardner told her what Ponder looked like. Finally, Gardner identified the shooter as the person in picture five two days after the shooting, and Morgan did so eighteen days later. Thus, an excessive time did not elapse between the event and the identification.

For these reasons, the undersigned finds that Ponder has failed to overcome the presumption of correctness afforded to the state court's factual determinations. Additionally, the state court's decision on this ground was neither "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254.

D. Ground Three – IAC: Failure to Impeach Morgan

In Ground Three, Ponder argues defense counsel was ineffective for failing to impeach Morgan's identification based upon her "prior inconsistent statements during her out-of-court identification." ECF Doc. 6 at 30. Specifically, Ponder makes the following argument:

> When Ms. Morgan was looking at the photographic lineup, she asked to look at additional photographs, but was told there were no other photographs to look at. (R-39). Clearly, Ms. Morgan did not believe that the shooter was within the lineup. Then she began looking at the photographs she had already seen and began eliminating photographs that did not match her memory. (R-39). Ultimately, Ms. Morgan identified Petitioner Ponder because he most resembled the shooter, but stated she was "not positive." (R-39). She also stated she did not want to come to the police station to view the lineup, but she did because she

> was sympathetic to Jamil Gardner and needed to get Petitioner Ponder off the streets.

Id. at 29-30.

As with Ground Two, the First DCA affirmed the state court's order denying this ground without written opinion. Ex. C8 in ECF Doc. 25-7. Therefore, this Court will "look through" the First DCA decision to the Order Denying Defendant's Motion for Postconviction Relief. ECF Doc 25-5 at 97. *See Wilson*, 138 S. Ct. at 1192. In that order, the state court found that "trial counsel did effectively cross examine this witness." ECF Doc. 25-7 at 98.

The state court's findings are supported by the trial transcript. At Ponder's trial, Morgan freely admitted she was only 80-85 percent sure that photo number five was the shooter, and that she wrote a note on the photo array that "it's not really positive, but if I was in person I can show you him." ECF Doc. 25-2 at 224. Also, defense counsel elicited repeated testimony from Morgan that she was not completely sure of her identification. He also pointed out on closing that the State never asked Morgan to identify Ponder in the courtroom. Counsel also questioned Morgan about differences between her testimony on direct and her apparent statements to the investigator that showed her the lineup regarding: (1) what Gardner told her about the identification he made during the photographic lineup, (2) what Gardner had told her about the need to go to the police station to give a report, (3)

the conduct of the shooter after he shot Gardner the second time, and (4) the percentage she was sure of her identification of the shooter. ECF Doc. 25-2 at 234-36. Thus, the state court's finding that counsel's performance in cross examining Morgan was not deficient is not unreasonable.

E. Ground Four – Newly Discovered Evidence

In Ground Four Ponder argues the state court erred in not granting a new trial based on "[n]ewly discovered evidence." After the trial, the Florida Department of Law Enforcement received a match on the DNA that was on the hat recovered from the scene and that Gardner testified had been worn by the shooter. The DNA matched that of Gardner, who had just been arrested for an unrelated crime.[9] *Id.* In August of 2011, the State Attorney disclosed that evidence to trial counsel, who forwarded it to Ponder on August 31, 2011. *Id.* at 88.

Ponder contends this new evidence shows that he is actually innocent. ECF Doc. 6. Ponder argued in his Rule 3.850 motion that "[h]ad this evidence been disclosed, defense counsel could have impeached the State's key witness, Jamil Gardner. . . . No jury would have believed Gardner's identification after he insisted that the shooter wore a hat." ECF Doc. 25-5 at 78-79. Thus, "this evidence would likely result in an acquittal at a retrial." *Id.* at 79.

[9] The DNA from the hat was entered into the CODIS DNA database. Once Gardner was arrested, his DNA was entered into CODIS, thus resulting in a match. ECF Doc. 25-5 at 87.

As an initial matter, a freestanding claim of actual innocence is not cognizable on federal habeas review. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *Townsend v. Sain*, 372 U.S. 293, 317 (1963) ("[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1272 (11th Cir. 2010) ("[T]his Court's own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases[.]"); *Swindle v. Davis*, 846 F.2d 706, 707 (11th Cir. 1988) ("Newly discovered evidence which goes only to the guilt or innocence of the petitioner is not sufficient to require habeas relief."). This rule "is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 400-01.

Furthermore, Petitioner's claim is procedurally barred because nowhere in his state petition does Ponder frame this argument as a violation of the Constitution or federal law. Thus, as the State argues, this claim is unexhausted. *See Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010) ("a critical prerequisite for any state petitioner

seeking federal habeas relief is the requirement that he first properly raise the federal constitutional claim in the state courts").

Before bringing a § 2254 habeas action in federal court, a petitioner must exhaust all available state court remedies for challenging his conviction, 28 U.S.C. § 2254(b)(1),[10] thereby giving the state the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*quoting Picard v. Connor*, 404 U.S. 270, 275 (1971) (citation omitted)). A petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Picard*, 404 U.S. at 277-78. Additionally, "the state court petition must make the state courts aware that the claims asserted do, in fact, raise federal constitutional issues." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010).

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[10] Section 2254 provides, in pertinent part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

A claim that was not presented to the state court and which can no longer be litigated under state procedural rules is considered procedurally defaulted, i.e., procedurally barred from federal review. *O'Sullivan*, 526 U.S. at 839-40; *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999); *Chambers v. Thompson*, 150 F.3d 1324, 1326-27 (11th Cir. 1998) (holding that federal habeas courts should enforce applicable state procedural bars even as to claims that were never presented to the state courts). Under Florida law, a claim based on newly discovered evidence must be brought within 2 years of the discovery of the evidence. Fla. R. Crim. P. 3.830(b). Here, the evidence was known to Ponder by August 31, 2011. Thus, he cannot now return to state court and file a 3.850 motion framing this issue as a federal claim.

Because there are no procedural avenues remaining available under Florida law which would allow Ponder to return to the state forum and exhaust the subject claims, the claims are likewise procedurally foreclosed from federal review. *Collier v. Jones*, 910 F.2d 770, 773 (11th Cir.1990) (finding dismissal of federal petition appropriate where the "claims are presented to the federal courts in a posture analogous to claims that have never been presented to a state court, and which have become procedurally barred under state law").

A petitioner seeking to overcome a procedural default must show cause and prejudice, or a fundamental miscarriage of justice. *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993). "For cause to exist, an external impediment, whether it be

governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim." *McCleskey v. Zant*, 499 U.S. 467, 497 (*quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Clearly, no such external impediment existed here. During the 3.850 evidentiary hearing on this issue, defense counsel testified that the State disclosed the new DNA evidence to him "relatively quickly, so that any potential timeliness issues would be avoided." ECF Doc. 25-5 at 128.

The miscarriage of justice exception also does not apply as it requires the Petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327. A substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. *Id.*

DNA evidence showing that Gardner's DNA was on the hat is not such evidence. As the state court found, this evidence "may have been helpful at trial in

cross examining the victim and the other eye witness," but it "would not have changed the result of the trial," because "the defense already had the key information concerning the cap, i.e., that the Defendant's DNA was not in it." ECF Doc. 25-5 at 99. Moreover, when Ponder was arrested, his girlfriend told agents he was not home, even though agents found him hiding in an attic, which is not the conduct of someone who is "actually innocent." Thus, Ground Four was procedurally defaulted by Ponder, and, even if it were not, it would nonetheless fail on its merits because the state's court's determination that the DNA evidence did not entitle Petitioner to a new trial was not contrary to law or an unreasonable determination of the facts.

F. Ground Five – IAC: Failure to Dismiss Charging Documents

In Ground Five, Ponder argues defense counsel was ineffective for failing to move to dismiss the charging document. Ponder raised this argument for the first time in his successive 3.850 motion, which was rejected by the state court as untimely. As noted above, Ponder's conviction became final on May 28, 2012, and Ponder failed to file his successive 3.850 on this issue until January 2017, more than 2 years later. *See* Fla. R. Crim. P. 3.850(b) (requiring postconviction motions to be filed within 2 years of the conviction becoming final).

Ponder does not offer any explanation for this delay. The state court thus was not unreasonable in concluding that the claim was time-barred. ECF Doc. 25-7 at 22. Also, the state court reasonably concluded that there was "no good reason the

current ineffective assistance of counsel claim could not have been raised in the original motion" which was filed in May of 2013. *Id.* at 22-23. Thus, the state court found that the claim was procedurally barred as successive as well. *Id.*

Generally, if the last state court to examine a claim states clearly and explicitly that the claim is procedurally barred and that bar provides an adequate and independent ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Cone v. Bell*, 556 U.S. 449, 465 (2009) ("[W]hen a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review."). The Eleventh Circuit has concluded that the procedural requirements of Florida's Rule 3.850 constitute independent and adequate state grounds under applicable law. *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1260 n.25 (11th Cir. 2005) (citing *Whiddon v. Dugger*, 894 F.2d 1266, 1267-68 (11th Cir. 1990)). Since the state court clearly and explicitly stated that this claim was being denied as untimely and successive, federal review of this claim is precluded.

G. Evidentiary hearing

The undersigned finds that an evidentiary hearing is not warranted. In deciding whether to grant an evidentiary hearing, this Court must consider "whether

such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). In considering the Petitioner's 3.850 motion, the state court granted Petitioner an evidentiary hearing on all grounds raised. The undersigned does not find that a second evidentiary hearing on the same grounds is necessary, particularly when considering the deferential standards accorded to the state court's factual findings as prescribed by § 2254. *See id.* Upon consideration, the undersigned finds that the claims in this case can be resolved without an evidentiary hearing. *See Schriro*, 550 U.S. at 474.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

After review of the record, the Court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is

also recommended that the district court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is respectfully RECOMMENDED:

1. That Petitioner's petition under 28 U.S.C. § 2254 be DENIED, without an evidentiary hearing;

2. That a certificate of appealability be DENIED; and

3. That the clerk close this matter.

Done in Pensacola, Florida, this 16th day of October, 2019.

/s/ Hope Thai Cannon
HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations may be filed within 14 days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. A copy of objections shall be served upon the Magistrate Judge and all other parties. A party failing to object to a Magistrate Judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636.

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

WILLIE EARL PONDER, Petitioner, v. SECRETARY, DEPARTMENT OF CORRECTIONS, Respondent.	Case No. 4:17cv217/RH/CJK

AMENDED[1] PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

1. Name and location of court which entered the judgment of conviction under attack Florida Second Judicial Circuit Court, Leon County, Florida

2. Date of judgment of conviction March 9, 2011

3. Length of sentence life imprisonment

4. Nature of offense involved (all counts) attempted first-degree murder

5. What was your plea? (Check one)

   (a) Not guilty (✓)
   (b) Guilty (__)
   (c) Nolo contendere (__)

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial: Jury

7. Did you testify at the trial? No

[1] This petition is amended to comply with the Court's May 17, 2017, order. (Doc 5).

8. Did you appeal from the judgment of conviction?
Yes (✓) No (__)

9. If you did appeal, answer the following:

(a) Name of court: Florida First District Court of Appeal

(b) Result: Conviction and sentence affirmed

(c) Date of result: February 28, 2012[2]

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes (✓) No (__)

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Florida Second Judicial Circuit Court, Leon County, Florida

(2) Nature of proceeding Florida Rule of Criminal Procedure 3.850 motion[3]

(3) Grounds raised: Ineffective assistance of counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes

(5) Result: Motion denied

(6) Date of result: January 26, 2015

(7) Did you appeal the result? Yes

i. Date of result: December 21, 2016

ii. Court: Florida First District Court of Appeal

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[2] Petitioner Ponder's conviction and sentences became final on May 28, 2012 – when the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court expired.

[3] The state postconviction motion was originally filed without an oath on May 10, 2013, and then re-filed with an oath on May 20, 2013.

iii. Result: Denial of the motion affirmed[4]

(b) (1) Name of court: Florida Second Judicial Circuit Court, Leon County, Florida

(2) Nature of proceeding *Pro se* rule 3.850 motion

(3) Grounds raised: Ineffective assistance of counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result: Motion denied

(6) Date of result: January 30, 2017

(7) Did you appeal the result? Yes

i. Date of result: appeal pending

ii. Court: Florida First District Court of Appeal

iii. Result: appeal pending

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes
(2) Second petition, etc. Yes

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

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[4] On October 13, 2016, the state appellate court affirmed – without a written opinion – the order denying Petitioner Ponder's state postconviction motion. Petitioner Ponder timely filed a motion for rehearing pursuant to Florida Rule of Appellate Procedure 9.330(a). In the motion for rehearing, Petitioner Ponder requested the state appellate court to issue a written opinion and asserted that a written opinion would provide a legitimate basis for review in the Florida Supreme Court (based on a conflict of decisions amongst the state appellate courts). On December 21, 2016, the state appellate court issued a written opinion. Thereafter, Petitioner Ponder timely sought review in the Florida Supreme Court. On May 8, 2017, the Florida Supreme Court declined to accept jurisdiction and denied the petition for review.

A. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

Willie Earl Ponder was the Defendant in the state court proceedings in the State of Florida (Second Judicial Circuit, Leon County, case number 2009-CF-3864). Mr. Ponder will be referred to as "Petitioner Ponder" in this pleading. The prosecution/State of Florida will be referred to as "the State."

Following a jury trial in 2011, Petitioner Ponder was convicted of attempted first-degree murder. (R-22).[5] The state trial court sentenced Petitioner Ponder 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).

On May 20, 2013, Petitioner Ponder filed a Florida Rule of Criminal Procedure 3.850 motion. In the state postconviction motion, Petitioner Ponder raised five grounds – four of which are the subject of the instant proceeding: (1) defense counsel was ineffective for failing to exclude testimony referring to the "word on the street" identifying Petitioner Ponder as the shooter because such testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution; (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); (3) defense counsel was ineffective for failing to exclude testimony regarding the photographic lineup and failing to challenge the lineup procedure employed by law enforcement; and (4) defense counsel was ineffective for failing to impeach Breannea Morgan with her inconsistent identification

[5] References to the state court postconviction record on appeal will be made by the designation "R" followed by the appropriate page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number.

testimony, bias, and self-interest. (R-22). The state postconviction court granted an evidentiary hearing and the evidentiary hearing was held on October 22, 2014. (R-65). On January 26, 2015, the state postconviction court denied Petitioner Ponder's rule 3.850 motion. (R-53). On appeal, the Florida First District Court of Appeal affirmed the denial of Petitioner Ponder's state postconviction motion. *See Ponder v. State*, 209 So. 3d 59 (Fla. 1st DCA 2016). Petitioner Ponder timely sought review in the Florida Supreme Court, but on May 8, 2017, the Florida Supreme Court declined to accept jurisdiction and denied the petition for review.

2. Statement of the facts.

a. Trial Summary.

In his state postconviction motion, Petitioner Ponder 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.]

(R-23-25).

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 Petitioner Ponder's trial, FDLE discovered DNA evidence on a piece of evidence in Petitioner Ponder's case (the inside of the black cap[6]). (R-

[6] The black cap "had been located at the scene [and] witnesses identified it as having been worn by the shooter." (R-79).

69-70, 72-73). Ms. Brown stated that on July 9, 2011 – *after* Petitioner Ponder's trial[7] – there was a "hit" on the DNA sample from the CODIS[8] system establishing that the DNA from the inside of the cap belonged to Jamil Gardner (the alleged victim). (R-70-72).

Joshua Zelman. Mr. Zelman, Petitioner Ponder's trial attorney, testified that the identity of the perpetrator was the main issue during Petitioner Ponder's trial. (R-79). *See also* (R-98) ("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 Petitioner Ponder on their assertions that Petitioner Ponder was wearing the black cap at the time of the shooting), and Mr. Zelman said that neither Mr. Gardner nor Ms. Morgan knew Petitioner Ponder prior to the date of the shooting. (R-79-81). 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.

(R-84). 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. (R-84). Notably, Mr. Zelman said that throughout the trial, the State made repeated references to the cap being Petitioner Ponder's cap. (R-85). Mr. Zelman testified that the newly discovered DNA evidence "would be one of the biggest issues" at a new trial. (R-84-85).

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[7] The trial in Petitioner Ponder's case was held in January of 2011.

[8] CODIS is the combined DNA Index system. (R-69).

Regarding the "word on the street" testimony (i.e., that the "word on the street" was that Petitioner Ponder 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.

(R-86-87). Mr. Zelman conceded that the repeated references to the "word on the street" testimony was "absolutely" damaging to Petitioner Ponder's case. (R-90).

B. STANDARD OF REVIEW.

Petitioner Ponder's request for federal habeas corpus relief is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereafter "AEDPA"). Under the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim

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

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court clarified the nature of habeas review as set out in § 2254(d)(1). Writing for a majority of the Court, Justice O'Connor explained:

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13.

As to findings of fact under 28 U.S.C. § 2254(d)(2), federal courts determine whether the state court's finding was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's determination of the facts shall be "presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). *See Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1323 (11th Cir. 2000). However, the statutory

presumption of correctness applies only to findings of fact made by the state court, not mixed determinations of law and fact. *See Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir. 1994).

In *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003), the Supreme Court stated:

> AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

In other words, the "reasonableness" standard does not apply to determinations of factual issues. Petitioner Ponder is not required to prove that the state court's factual findings were unreasonable, only that they were rebutted by clear and convincing evidence. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* at 340.

In Petitioner Ponder's case, the state courts' rulings resulted in an unreasonable application of Petitioner Ponder's constitutional rights and clearly established federal law. Morever, the state courts' rulings and orders were based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings.

C. ARGUMENT AND CITATIONS TO AUTHORITY

Ground 1. Defense counsel rendered ineffective assistance of counsel by failing to exclude testimony referring to the "word on the street" identifying Petitioner Ponder as the shooter because such testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In his state postconviction motion, Petitioner Ponder alleged that defense counsel rendered ineffective assistance of counsel for failing to exclude testimony referring to the "word on the street" identifying Petitioner Ponder as the shooter.[9] As a result of defense counsel's ineffectiveness, Petitioner Ponder was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. But for counsel's ineffectiveness, the result of the proceeding would have been different.

The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970); *Chatom v. White,* 858 F.2d 1479, 1484 (11th Cir. 1988). The familiar test utilized by courts in analyzing ineffective assistance of counsel claims is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland v. Washington, 446 U.S. 668, 687 (1984).

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[9] Petitioner Ponder also raised this claim on direct appeal. However, in its direct appeal answer brief, the State argued that Petitioner Ponder's Confrontation Clause claim was not preserved for appeal.

Throughout the trial, the prosecutor and the State witnesses repeatedly told the jury that the "word on the street" was that Petitioner Ponder 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.

(T1-20) (emphasis added). After the state trial court sustained a hearsay objection by defense counsel (T1-21), 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.

(T1-21) (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 Petitioner Ponder'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.

(T1-54) (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.

(T1-56) (emphasis added). Again, defense counsel failed to object.

Before Breannea Morgan testified at trial, the State proffered her testimony. (T2-131-41). During the proffer, Ms. Morgan repeatedly referred to the shooter as "Willie Ponder" even though she admitted that she didn't know Petitioner Ponder and was given his name by someone else. After her proffer, defense counsel objected to Ms. Morgan's references to Petitioner Ponder by name. (T2-141). 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." (T2-142-43). Despite the state trial court's instruction, Ms. Morgan referred to Petitioner Ponder by name six times. (T2-147-49). Defense counsel objected the first time Ms. Morgan used Petitioner Ponder's name, but the state trial court overruled his objection (without providing any reasoning). (T2-147). However, defense counsel failed to object again following the subsequent naming of Petitioner Ponder (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." (T2-184). She then told the jury that she took that

information and created the photographic lineup that included Petitioner Ponder'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 –

(T2-186). Defense counsel objected at this point, arguing "facts not in evidence." (T2-186). 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.

(T2-186). Defense counsel then made a hearsay objection and the trial court sustained the objection, noting "a lot of it is out there." (T2-187).

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, 1281-82 (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 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), the United States Supreme Court held that admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment of the United States 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 Supreme 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 Petitioner Ponder's trial violated Petitioner Ponder's Sixth Amendment Confrontation Clause rights. As a result of the improper "word on the street" evidence (and the "inescapable inference"[10] therefrom), the jury was told – *repeatedly* – that unnamed people in the community had identified

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[10] *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).

Petitioner Ponder as the person who shot Mr. Gardner. None of these unnamed "people" testified during Petitioner Ponder's trial and therefore Petitioner Ponder was denied his right to confront/cross-examine these unnamed people regarding their alleged assertion. These unnamed people ultimately furnished direct evidence of Petitioner Ponder'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 Petitioner Ponder'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 Petitioner Ponder as the shooter. From the very beginning of the trial, the "word on the street" evidence infected Petitioner Ponder'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.

(T1-21) (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. Petitioner Ponder 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.

(T1-154). The prosecutor then asked questions about the photographic lineup used by law enforcement and clarified that Mr. Gardner never saw a photograph of Petitioner Ponder before viewing the lineup – a fact that does not cure the harm caused by informing the jury that "friends and family" identified Petitioner Ponder. 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.

(T1-56) (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.

(T2-186). 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.[11]

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[11] The state trial court sustained a hearsay objection defense counsel, but the trial court was also aware of the highly prejudicial impact of this testimony: "I don't think it's an appropriate

The prejudicial effect of the inadmissible testimony was exacerbated by Ms. Morgan's testimony. She originally proffered her testimony and referred to Petitioner Ponder 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 Petitioner Ponder by name. As such, he advised her to refer to him in any other way other than by name. (T2-142-43). 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 Petitioner Ponder. Thus, the jury heard Ms. Morgan, who had never known Petitioner Ponder, refer to him six times by name. The State tried to clarify their lack of a relationship, but that did not erase the inference that she firmly believed Petitioner Ponder was the shooter based upon the "word on the street."

Given the lack of additional evidence implicating Petitioner Ponder,[12] the "word on the street" evidence strongly influenced the jury's verdict. Clearly something had to convince the jurors to ignore Petitioner Ponder's defense witnesses.[13]

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line of questioning, but there's no objection." (T2-186). 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.

[12] The hat worn by the shooter did not contain Petitioner Ponder'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 Petitioner Ponder's arms nor fit Petitioner Ponder'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.

[13] Petitioner Ponder called several witnesses in support of his defense of mistaken

But for the "word on the street" evidence, the jury would not have convicted Petitioner Ponder. 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 its order denying this claim, the state postconviction court agreed that the "word on the street" evidence was inadmissible:

> The Defendant is correct in his analysis concerning the hearsay statements of the "word on the street" that identified the Defendant as the shooter and prompted the investigators to prepare a photo line-up containing the Defendant for viewing by the victim and the other witness, Morgan. Even though the actual statements were not admitted, the obvious inference was that some unknown person or persons told the victim that the Defendant was the one who shot him. The victim in turn gave this information to the investigators. The hearsay and confrontation issues this presents cannot be avoided by arguing that the statements are not offered to prove the truth to the matter, but rather to show how the Defendant's photo ended up in the line-up because the latter fact is irrelevant.

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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". (R 9).]

(R-27).

(R-54). However, despite acknowledging that the "word on the street" evidence was inadmissible, the state postconviction court concluded that defense counsel did not render ineffective assistance of counsel:

> I can't find, however, that counsel was deficient in failing to file a motion in limine because there was no indication that such testimony would be elicited by the State prior to trial. Remarks made in opening statement, moreover, do not constitute evidence. And, as the Defendant acknowledges, his attorney did object initially to this line of questioning, and the Court seemed to agree, commenting that it was not an appropriate line of questioning, but when counsel objected again, the Court overruled the objection. Defendant's trial attorney explained that he did not want to object again because it would make him look bad in front of the jury. I do not find the trial attorney's performance in this area deficient.

(R-54). Contrary to the state postconviction court's conclusion, regardless of whether "[r]emarks made in opening statement . . . constitute evidence," improper remarks by a prosecutor in opening statement can result in an unfair trial. *See First v. State*, 696 So. 2d 1357 (Fla. 2d DCA 1997) (reversing for a new trial due to prosecutor's improper comment during opening statement that defendant's alibi witness was a "liar" – in a case where defense counsel properly objected to the comment and preserved the claim for appellate review). Moreover, 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 Petitioner Ponder 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 Petitioner Ponder'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").[14]

Finally, the state postconviction court concluded that Petitioner Ponder was not prejudiced by the improper "word on the street" evidence:

> Even if it was deficient, I don't find the resulting prejudice that the Defendant asserts. In the context in which the statements were made during the trial, I think most jurors would understand that investigators in a case get a lot of information, tips, leads, etc. and that they run down these leads to the extent possible. Here, they got a lead based upon some "word on the street" that gave them the Defendant's name. Such rumors have little value, other than as a possible lead, and then only if confirmed by people who have actual knowledge of the events, e.g., the victim and the other eye witness. Given the vague, generalized nature of the reference to "word on the street" and how it was used by the investigators, I cannot find any prejudice even had the trial counsel been deficient in not properly objecting to it. Moreover, trial counsel also reasoned that this testimony played into a defense theory of misidentification because it suggested that the victim and the eye witness were desperate, or eager at least, to be able to point the finger at someone, even though they couldn't really identify him.

(R-54-55).[15] Contrary to the state postconviction court's conclusion, the "word on the street" evidence was extremely prejudicial to Petitioner Ponder's case. In support of his argument,

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[14] 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").

[15] There is nothing in the record to support the state postconviction court's conclusion about what "most jurors" understand about "word on the street" evidence. However, the record is clear that "all jurors" in Petitioner Ponder's case were told – repeatedly – that people in the community had identified Petitioner Ponder as the shooter.

Petitioner Ponder relies on *Saintilus*. As explained above, in *Saintilus*, the court held that "word on the street" evidence is inadmissible hearsay:

> 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.

Saintilus, 869 So. 2d at 1282. In reversing for a new trial, the court explained:

> 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.*

Id. at 1283. As in *Saintilus*, the improper "word on the street" evidence that the jury heard in Petitioner Ponder's case was prejudicial. The jury heard that unnamed people identified Petitioner Ponder as the shooter – even though these unnamed people never testified at trial and Petitioner Ponder was never afforded an opportunity to confront/cross-examine these unnamed people. This case presents a classic Confrontation Clause violation.

Accordingly, defense counsel was ineffective for failing to exclude testimony referring to the "word on the street" identifying Petitioner Ponder 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.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Ponder's Sixth Amendment right to the effective assistance of counsel and

Confrontation Clause rights. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 2. Defense counsel was ineffective for failing to exclude testimony regarding the photographic lineup and failing to challenge the lineup procedure employed by law enforcement.

In his state postconviction motion, Petitioner Ponder alleged that defense counsel rendered ineffective assistance of counsel for failing to exclude testimony regarding the photographic lineup and failing to challenge the lineup procedure employed by law enforcement. As a result, Petitioner Ponder was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. But for counsel's ineffectiveness, the result of the proceeding would have been different.

Defense counsel should have learned that the procedures used to identify Petitioner Ponder in a photographic lineup were unduly suggestive. To determine if an out-of-court identification was impermissibly suggestive, a court must consider the following: (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. *See Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980) (citing *Manson v. Brathwait*, 432 U.S. 98, 110 (1977)).

The State presented two eyewitnesses (Jamil Gardner and Breannea Morgan) that identified Petitioner Ponder from a photographic lineup. However, the identification procedure was unduly suggestive. First, neither identification was made during a blind procedure. (R-36). The officer conducting the identification knew that the suspect was in the lineup. (R-36). Second, neither witness was advised that the suspect may not be included within the lineup they were viewing and

that they were not required to make an identification. (R-36). Third, the investigator provided confirming feedback to both of the eyewitnesses, which increased their confidence in their identification. (R-36).

Furthermore, the same lineup was shown to the second witness (Ms. Morgan) after she had spoken with Mr. Gardner about his selection. (R-36). Mr. Gardner told her that he identified the suspect from the lineup and tainted her identification. (R-36). So not only was she not told the suspect may not be included in the lineup, she was told he was in fact in the lineup she was about to see. (R-36-37). Additionally, Mr. Gardner identified photograph number 5, and he told Ms. Morgan about his selection. (R-37).

Both of the eyewitnesses observed the suspect at night in the dark. (R-37). Moreover, Mr. Gardner was in a heated argument with the suspect and in an extremely excited state. (R-37). The argument escalated and he made his alleged identification while he had a gun pointed in his face. (R-37). He claimed to have been staring directly at the gun when it was pointed at him and not at the face of the assailant. (R-37). He misidentified the gun according to the State's theory. (R-37). Mr. Gardner testified that he saw a revolver, but expert testimony suggested the bullets were fired from an automatic weapon. (R-37).

Ms. Morgan was inside a vehicle in the backseat during her alleged identification. (R-37). The windows/car frame would have obscured her observations and other obstacles presented from her vantage point inside the car. (R-37).

In summary, neither witness had a sufficient opportunity to view the suspect at the time of the crime; both witness' degree of attention was limited; neither accurately described Petitioner Ponder before selecting him from the lineup; Ms. Morgan was not certain of her identification

despite the suggestive procedure; and a significant period of time passed between the shooting and the identification. (R-37).

As such, defense counsel should have retained an expert to advise the state trial court of all of the procedures shortcomings and moved to suppress the identification. Had counsel done so, the identification would have been suppressed and the State would have been unable to identify Petitioner Ponder. However, defense counsel's failure to suppress the identification deprived Petitioner Ponder of his right to a fair and just trial.

Alternatively, defense counsel could have used an expert to inform the jury of the flawed identification procedure used by law enforcement. This would have enabled the jury to reject the identification. In addition, defense counsel should have requested jury instructions addressing the reliability of the out-of-court identification. Defense counsel should have requested the following:

- An instruction that advised the jury that a witness is less likely to perceive other aspects of a situation when a weapon is used;
- An instruction that advised the jury that excessive stress limits a witness's ability to accurately perceive an event and will later describe the event inaccurately;
- An instruction that advised the jury that eyewitnesses tend to select a person who looks most like the perpetrator relative to the other members of the lineup;
- An instruction regarding police failure to use procedures that have been proven to decrease the risk of error; and
- A cautionary instruction about the failure to provide proper directions to witness before an ID procedure (culprit may or may not be in the lineup, etc.).

Given the lack of additional evidence implicating Petitioner Ponder, the improper identification strongly influenced the jury's verdict. As previously stated in Ground 1, the State's evidence identifying Petitioner Ponder was limited and the identification was the central issue at trial. Defense counsel should have requested all of the above-listed instructions so that the jury could properly

weigh the out-of-court identification procedure. Had counsel requested these instructions, the jury would have rejected the identification and acquitted Petitioner Ponder.

Accordingly, defense counsel was ineffective for failing to exclude testimony regarding the photographic lineup and failing to challenge the lineup procedure employed by law enforcement. 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.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Ponder's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 3. Defense counsel was ineffective for failing to impeach Breannea Morgan with her inconsistent identification testimony, bias, and self-interest.

In his state postconviction motion, Petitioner Ponder alleged that defense counsel rendered ineffective assistance of counsel for failing to impeach Breannea Morgan with her inconsistent identification testimony, bias, and self-interest. As a result, Petitioner Ponder was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. But for counsel's ineffectiveness, the result of the proceeding would have been different.

When Ms. Morgan was looking at the photographic lineup, she asked to look at additional photographs, but was told there were no other photographs to look at. (R-39). Clearly, Ms. Morgan did not believe that the shooter was within the lineup. Then she began looking at the photographs

she had already seen and began eliminating photographs that did not match her memory. (R-39). Ultimately, Ms. Morgan identified Petitioner Ponder because he most resembled the shooter, but stated she was "not positive." (R-39).[16] She also stated that she did not want to come to the police station to view the lineup, but she did because she was sympathetic to Jamil Gardner and needed to get Petitioner Ponder off the streets. (R-39).

Defense counsel should have impeached Ms. Morgan's identification based upon her prior inconsistent statements during her out-of-court identification. Counsel should have admitted all of the statements she made during the identification process to question her credibility and establish her bias and interest to support Mr. Gardner's identification of Petitioner Ponder.

Given the lack of additional evidence implicating Petitioner Ponder, Ms. Morgan's corroborating identification must have influenced the jury. As previously stated in Grounds 1 and 2, there was minimal evidence against Petitioner Ponder and the identification of the shooter was the central issue at trial. Had counsel impeached Ms. Morgan, the State's attempt to identify Petitioner Ponder as the shooter would have been severely limited.

Accordingly, defense counsel was ineffective for failing to impeach Ms. Morgan with her inconsistent identification testimony, bias, and self-interest. 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.

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[16] During the state court postconviction evidentiary hearing, defense counsel conceded that when Ms. Morgan was interviewed by law enforcement officials, Ms. Morgan stated that she was not "100 percent sure" of her identification of Petitioner Ponder. (R-109).

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Ponder's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 4. Newly discovered evidence (i.e., evidence that Petitioner Ponder is "actually innocent" of the charge in this case).

On January 14, 2011, a jury found Petitioner Ponder guilty after hearing all of the State's evidence. During the trial, Jamil Gardner identified a cap that he claimed was worn by the shooter. (T1-38, 47-48). The State was unable to link Petitioner Ponder with the DNA found on the cap, but the State maintained that the cap belonged to Petitioner Ponder. (T3-287) (prosecutor's closing argument: "Mr. Gardner was able to hit him and cause the defendant to fall, the hat to come off his head."); (T3-290) (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 lab report, dated July 20, 2011, that concluded that Mr. Gardner's DNA was found *on the inside of the cap.* (R-43). As explained in Petitioner Ponder's state postconviction motion, had Petitioner Ponder 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 Petitioner Ponder 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 Petitioner Ponder as the shooter after Mr. Gardner insisted that 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 Petitioner Ponder'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.

(R-55). Contrary to the state postconviction court's reasoning, the "key information concerning the cap" was not that Petitioner Ponder'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 Petitioner Ponder as the shooter) is *completely undermined*. Mr. Gardner was the State's star witness at trial and the credibility of his identification of Petitioner Ponder 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.

(R-84-85).

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 Petitioner Ponder is "actually innocent"[17]). *See Mordenti v. State*, 894 So. 2d 161, 164-77 (Fla. 2004) (ordering new trial based on cumulative analysis of *Brady*[18] and *Giglio*[19] claims where falsity of witness's testimony,

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[17] Petitioner Ponder acknowledges that 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)). However, in *Baker v. Yates*, 339 Fed. Appx. 690, 692 (9th Cir. 2009), the Ninth Circuit Court of Appeals stated:

> 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, 554-55 (2006). *We 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.) More recently, the United States Supreme Court has 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*, – U.S. –, –, 133 S. Ct. 1924, 1931 (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). In light of the foregoing, Petitioner Ponder submits that his freestanding claim of actual innocence is properly raised in this § 2254 proceeding.

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

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

established by recantation, "could have impacted the jury's determination of Mordenti's character when deliberating").

Ground 5. Defense counsel was ineffective for failing to move to dismiss the charging document.

In his *pro se* state postconviction motion, Petitioner Ponder alleged that defense counsel rendered ineffective assistance of counsel for failing to move to dismiss the charging document. As a result, Petitioner Ponder was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. But for counsel's ineffectiveness, the result of the proceeding would have been different.

In his *pro se* state postconviction motion, Petitioner Ponder asserted the following:

> Trial counsel's failure to file a Florida Criminal Procedure 3.190 (c)(4) motion to dismiss the indictment or information filed on January 28, 2010 thus being fatally defective constituting a incorporation by reference shot gun pleading. The indictment or information charges count one attempted first degree murder F.S. 782.04(1)(a) and 775.087 the Florida Statute 775.087 being the weapon enhancement general intent being non specific intent. Count one fails to charge independent corroborative evidence of a lawful foundation of a first degree felony. Being in the latter, general intent, lesser included offense of jurisdiction by charging backwards in the negative. Thus alternating unlawfully as an inapplicable general intent essential element erroneously being charged in the first instant. Where there is no allegata there can be no probata. (See *Jackson v. State of Florida,* 515 So. 2d 394-95-96 Fla. 1st DCA 1987) enhancements refer to the authority of a judge to impose a more severe sentence for a convicted offense when certain factual findings have been made. An enhancement statute is commonly associated with the province of the judge in sentencing. Statutes authorizing enhancements do not add an element that would create a separate, substantive crime, but simply authorize a judge to impose a more severe sentence based on certain factual findings. *Mills v. State of Florida,* 822 So. 2d 1284, 1288-89, Fla.(2002)
>
> Being critical to relief in the defendant's case the indictment only charges the doing of the act rather than the specific intent of the intended act thus being in absence of the negligent *knowingly reckless act*, by a single design from Florida Rules of Criminal Procedure Criminal Homicide penal code statute *210.1* Thus the indictment or information lacking independent corroborative evidence of Florida Statute, legislative enactment *790.23* actual possession, knowledge of (*a firearm*),

> thus charging *firearm* in *presumptions* and (*allegations*) only a (*non fact* of a firearm not being substantially sworn into law in the allegata where there no (*allegata*) there can be no (*probata*)
>
> Furthermore the defendant's indictment or information departs from the plain meaning of the Florida Statute 782.04(A). Verbatim alleging from or with a predicated design the applicable tracking of Florida Statute 782.04(A) is from a premeditated design the defendant's indictment or information being extended by presumptions beyond it's legislative terms therefore the indictment or information charges an invalid criminal statute and must be dismissed on it's face, as a nullity and the lack of power to control subject matter jurisdiction in commands of Article (3) Section (6) 2016 of the Florida Constitution. The defendant alleges that had trial counsel filed a motion to dismiss the indictment or information on the ground of the lack of independent corroborative evidence that it would have been granted by the trial court, and the defendant discharged from illegal and unlawful confinement. An evidentiary hearing is warranted.
>
> As the plea was proven without contradiction the charge complained of was not erroneous. See *Jones v. Shoemaker,* 41 Fla. 232, 26 South Rep. 191. Even though the charge be correct the judgment may not correct if the plea is frivolous. The judgment is not assigned as error, but its correctness with reference to the plea will be considered. Where a trial had upon an entirely immaterial issue not determining the rights of the parties in the litigation the court can not know for whom to give judgment. In such a case a judgment non obstante verdicto or repleaders should be awarded. *Jones v. State of Florida,* 41 Fla. 232 S. Ct. 1899.

For the reasons alleged by Petitioner Ponder in his *pro se* postconviction motion, defense counsel was ineffective for failing to move to dismiss the charging document. 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.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Ponder's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

13. If any of the grounds listed in 12 were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

All grounds were properly raised in state court

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes (__) No (✓)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing N/A

(b) At arraignment and plea N/A

(c) At trial Josh Zelman, 517 East College Avenue, Tallahassee, Florida 32301-2528

(d) At sentencing Mr. Zelman

(e) On appeal Clyde Taylor, 2303 North Ponce de Leon Boulevard, Suite L, Saint Augustine, Florida 32084-2606

(f) In any postconviction proceeding Mr. Taylor

(g) On appeal from any adverse ruling in a postconviction proceeding undersigned counsel

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes (__) No (✓)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (__) No (✓)

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition: Petitioner Ponder's conviction and sentence became final on May 28, 2012. The one-year limitations period was tolled on May 20, 2013, when Petitioner Ponder filed his Florida Rule of Criminal Procedure 3.850 motion. The limitations

period continued to be tolled until May 8, 2017, when the Florida Supreme Court denied Petitioner Ponder's petition for review. The instant petition is therefore timely.

19. NUMBER OF WORDS CERTIFICATE: Undersigned counsel certifies that there are 12,355 words in this petition.

Wherefore, Petitioner Ponder prays that the Court will grant him the relief to which he is entitled in this proceeding.

Respectfully submitted,

/s/ Michael Ufferman
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Counsel for Petitioner **PONDER**

Oath

I certify and declare, under penalty of perjury that the foregoing is true and correct.

Date: 6/10/17

Petitioner's signature: Willie Ponder

Printed name of Petitioner: WILLIE PONDER

Prisoner ID #: N17838

Correctional Institution: Northwest Florida Reception Center

Address: 4455 Sam Mitchell Drive
Chipley, FL 32428

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
PL01, The Capitol
Tallahassee, Florida 32399-1050
Email: criminalappealsintake@myfloridalegal.com

by email delivery this 15th day of June, 2017;

Julie L. Jones, Secretary
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

by U.S. mail delivery this 15th day of June, 2017.

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
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Counsel for Petitioner **PONDER**

xc: Willie Earl Ponder

IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO: 2009-3864-CF

STATE OF FLORIDA,

vs.

WILLIE PONDER,

Defendant/Petitioner.
_____/

MOTION FOR POSTCONVICTION RELIEF

COMES NOW, Petitioner, WILLIE PONDER, by and through the undersigned attorney, and pursuant to Fla. R. Crim. P. Rule 3.850 hereby moves this Court for post-conviction relief based upon the following:

1. A jury found Ponder guilty of attempted first-degree murder and determined that he discharged a firearm and caused great bodily harm during the commission of the crime. The court sentenced Ponder to life in prison with a 25-year minimum and designated him a prison releasee reoffender.

2. Petitioner did NOT testify at any pretrial hearing.

3. Petitioner DID file a direct appeal with the district court of appeal. The First District Court of Appeal affirmed the judgment and sentence on February 28, 2012.

4. Petitioner HAS filed a motion for post-conviction relief in federal court, but voluntarily dismissed the motion before filing this motion.

5. Petitioner alleges the following are grounds to vacate his sentence:

Statement of 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.[1] He described the gun as a revolver.

[1] Ponder had tattoos on his arms on the date of the crime.

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[2]. 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.[3] 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

[2] The casings discovered on site indicate the weapon was an automatic and not a revolver.
[3] 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.

(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.

Summary of the Trial

During opening statements, the State summarized the circumstances of the shooting, 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.

After the court sustained a hearsay objection by Ponder's attorney, she 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.

She then told the jury that the investigator created a photo lineup containing Ponder's photo as a result of the lead from the talk of the community.

At trial, the prosecutor asked Gardner (without objection), "[s]o am I correct that you knew the name, Willie Ponder, at that point because of what people were telling you?" Gardner denied feeling any effects of medication when he saw the lineup, however, he did acknowledge taking Oxycodone within hours of making the identification. Regardless, Gardner identified Ponder in court as the shooter.

FDLE

Florida Department of Law Enforcement

Gerald M. Bailey
Commissioner

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Post Office Box 1489
Tallahassee, Florida 32302
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Rick Scott, Governor
Pam Bondi, Attorney General
Jeff Atwater, Chief Financial Officer
Adam Putnam, Commissioner of Agriculture

LABORATORY REPORT
July 20, 2011

TO: Chief Dennis M. Jones
Tallahassee Police Department
234 East Seventh Avenue
Tallahassee, FL 32303-5593

ATTN: Angeline Booth

VICTIM(S): Jamil R. Gardner

SUBJECT(S): Willie Ponder

OFFENSE(S): Assault
Leon County
11/17/2009

FDLE NUMBER: 20090102985
SUBMISSION: 1
AGENCY NUMBER: 09-35617

SUBPOENAS PERTAINING TO THIS CASE SHOULD REFER TO THE FDLE NUMBER.

Jo Ellen Brown
Senior Crime Laboratory Analyst
Biology Section

REFERENCE:

This report is in reference to the following evidence submitted to the Florida Department of Law Enforcement on December 1, 2009, by Joann Houston and to a report dated January 19, 2010, written by Claudette Cleary. This report may contain conclusions, opinions, and/or interpretations made by the author.

EVIDENCE:

FDLE Item#	Agency Exhibit#	Description
1	1	Black Jordan cap from Cypress Lake

This letter is to inform you of a possible investigative lead. During a search of CODIS, a match occurred between the DNA profile obtained from the black Jordan cap from Cypress Lake (Exhibit 1) and a qualifying offender sample. The information for the qualifying offender is as follows:

Name: Jamil Gardner
DOB: 1/14/1989
DOC Number: N24414
FDLE Number: 06642581

This individual had been identified as the victim of this crime and therefore, the major DNA profile from the black Jordan cap (Exhibit 1), has been removed from CODIS.

EXHIBIT
A

the context in which the statements were made during the trial, I think most jurors would understand that investigators in a case get a lot of information, tips, leads, etc. and that they run down these leads to the extent possible. Here, they got a lead based upon some "word on the street" that gave them the Defendant's name. Such rumors have little value, other than as a possible lead, and then only if confirmed by people who have actual knowledge of the events, e.g., the victim and the other eye witness. Given the vague, generalized nature of the reference to "word on the street" and how it was used by the investigators, I cannot find any prejudice even had the trial counsel been deficient in not properly objecting to it. Moreover, trial counsel also reasoned that this testimony played into a defense theory of misidentification because it suggested that the victim and the eye witness were desperate, or eager at least, to be able to point the finger at someone, even though they couldn't' really identify him.

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.

Defendant's argument in Ground Three presumes that the photo line-up would have been

fast to the hospital and the car ends up flipping and they end up crashing. And anyway, the cops end up going to two different locations, where the crash, where the shooting is. Neighbors are calling the police. One of the neighbors was a Gadsden County Sheriff's officer, I believe. Anyway, somebody calls the police that lived close by that heard the shots. The -- they find -- come across the scene of the crash. Mr. Gardner is ended up being taken to the hospital, in addition to the other passengers who got hurt when the car flipped over. And then an investigation ensues into the shooting.

Now, you'll hear testimony from Mr. Gardner at the time he was shot and at the hospital. Law enforcement come to the hospital to interview him about what happened. And he'll tell you that he could not give a name of the individual who had shot him. He gave a description to law enforcement of the individual who had shot him.

Now, you'll hear testimony the officers talked to Mr. Barr, Mr. Sharps, and they'll tell you how uncooperative they were about giving information. 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.

MR. ZELMAN: Judge, I'm going to object to any opening concerning hearsay statements said to that.

THE COURT: I'll sustain the objection at this point in time. I don't think there's any reason to get into that.

MS. RAY: 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.

They created a photographic lineup which contained a photograph of the Defendant in this case. They created that lineup and took it to the hospital where they conducted the photographic lineup with the victim in this case, Jamil Gardner. And Mr. Gardner picked out, without hesitation, the Defendant in this case, Mr. Ponder, as being the individual who shot him. He will also testify to you that prior to seeing that photo lineup, he had never seen a photograph of the Defendant in this case. Prior to the lineup, the testimony will be -- or prior to the shooting, he will tell you he had never seen the Defendant in this case.

it to you, can you give us an estimate of how close he was to you, how many feet away?

A Probably maybe, like, three or four feet away.

MS. RAY: Okay. May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. RAY:

Q And if you would, just assuming that I'm the Defendant in this case -- and I'm going to back up. You tell me when to stop. How close were you to the Defendant?

A Come closer. You've got to come closer.

THE COURT: Closer --

BY MS. RAY:

Q I can't hear you.

THE COURT: -- he said.

BY MS. RAY:

Q Closer.

A Come a little closer. He was probably standing right there.

Q Okay. Were you able to clearly see this person's face?

A Yes, ma'am.

Q What was this person wearing?

A Black hat, black T-shirt, and black pants.

Q Was it a long- or short-sleeved T-shirt?

out of?

A Right here.

Q If you would, go ahead and put an X there and just put a WP for Willie Ponder.

(Witness complies.)

BY MS. RAY:

Q Thank you.

MS. RAY: Your Honor, may I publish this to the jury?

THE COURT: You may.

BY MS. RAY:

Q You can go ahead and take your seat now.

So is it fair to say your car was parked relatively close to the car you saw the Defendant get out of?

A Yes, ma'am.

MS. RAY: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. RAY:

Q I'm going to show you what's marked as State's Exhibit 10 for identification purposes. Do you recognize the hat that's laying on the ground there in State's Exhibit 10?

A Yes, ma'am.

Q And how do you recognize that?

A It was on Defendant's head.

Q So that's a fair and accurate photograph of where

that hat was after the shooting?

A Yes, ma'am.

MS. RAY: All right. Your Honor, at this time the State would move into evidence what's been marked as State's Exhibit 10.

THE COURT: Is there objection?

MR. ZELMAN: No objection, Your Honor.

THE COURT: Be admitted without objection.

(State's Exhibit No. 10 admitted in evidence.)

BY MS. RAY:

Q And let me ask you another question with regards to State's Exhibit 10. Does that photograph -- are you able to show the jury in State's Exhibit 10 where you were when Mr. Ponder pulled the gun on you originally?

A Yes, ma'am.

Q Okay. If you could --

A It's not in this picture. It's in --

Q This picture doesn't depict it?

A Okay.

Q Okay. Thank you.

MS. RAY: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. RAY:

Q I'm going to show you what's been marked as State's Exhibit 11 for identification purposes. Does State's

BY MS. RAY:

Q Were you -- was -- were the doctors that treated you able to remove all of the projectiles from your body?

A No, ma'am.

Q Do you -- so did they leave them --

A Yes, ma'am.

Q -- in?

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.

Q At some point, you -- while you're at the hospital, you speak to the police; is that correct?

A Yes, ma'am.

Q A female investigator?

A Yes, ma'am.

Q And you spoke with her more than once; is that correct?

A Yes, ma'am.

Q The first time that you spoke with her, did you give her a description of the individual who had shot you?

A Yes, ma'am.

Q The first time that you talked to her, do you recall talking to her?

A Yes, ma'am.

Q And in fact, the first time you talked to her was recorded; is that correct?

A Yes, ma'am.

Q And you've had an opportunity to listen to that, correct?

A Yes, ma'am.

Q And you understood all the questions that you were being asked, correct?

A Yes, ma'am.

Q And were you coherent when you were talking to her?

A Yes, ma'am.

Q Were you under the influence of medication at that point; do you recall?

A Not at that time.

Q Now, prior to you leaving the hospital -- and do you recall the -- when you were admitted and discharged?

A I was admitted on the 7th -- I believe the 17th for that little bit. I don't remember what time of the night we go there. It was late at night, and I left on the 19th.

Q So if the shooting occurred in the evening of the 17th, you were actually admitted into the hospital late that night, right, or in the early morning hours?

A Yes, ma'am.

Q And then you were discharged on the 19th; is that correct?

A Yes, ma'am.

Q In the evening, early evening?

A Yes, ma'am.

Q Prior to you being discharged, did the investigator come back to the hospital and show you a photographic lineup?

A Yes, ma'am.

Q Now, what I want to ask you is: Between the time of the shooting and the time that the investigator came to see you the second time and showed you the photo lineup, had anyone shown you any photographs of the Defendant in this case, Willie Ponder?

A No, ma'am.

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.

Q You did not know what this person, willie Ponder, looked like; is that correct?

A Besides seeing him at the scene of the crime, no.

Q So I guess what I want you to tell the jury is did

PROCEEDINGS

THE COURT: All right. We're back on the record. The jury is not present. I think Mr. Freeman is here. We have Breannea Morgan.

Come on up, Ms. Morgan. We -- we're going to put her in the witness stand. Mr. Freeman is here to observe. We'll let you consult if you need to.

Raise your right hand.

whereupon,

BREANNEA MORGAN

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: All right. Have a seat.

Ms. Ray, let's take a proffer from Ms. Morgan. We don't need to get into all the details, just a generalized proffer.

MS. RAY: Yes, Your Honor.

PROFFERED EXAMINATION

BY MS. RAY:

Q If you would, please go ahead and state your name for the record.

A Breannea Morgan.

THE COURT: If you can slide that chair up a little bit, it will get you closer to that microphone.

Q Can you go ahead and spell your name for the court

reporter, please?

A You want the correct way, or the way everybody else spells it?

THE COURT: The way your legal name is correctly spelled.

THE WITNESS: B-R-E-A-N-N-E-A, M-O-R-G-A-N.

BY MS. RAY:

Q Okay. And you were here in Tallahassee on November 17th, of the year 2009?

A Yes.

Q And were you with a gentleman by the name of Jamil Gardner?

A Yes. And a boy named Alex William Barr.

Q And did you end up driving somewhere with Mr. Barr that evening and Mr. Gardner?

A Well, Mr. Gardner came over that night, and he was, like, he was scared, because he had got a phone call about his ex-girlfriend having HIV, so he came over there to talk to us. And he got a phone call from a boy named Greg, and it went, like, the boy named Greg said, I'll give you $5 if you come over here and come get me.

Q So you went with Mr. Gardner over to where Mr. Sharp was?

A Yes.

Q And, and you said Mr. Barr was in the car, as well?

A Yes.

Q All right. And when you got over to the address, did you get out of the car?

A No, I didn't get out of the car.

Q Okay. Prior to the crash that happens later, did you ever get out of the car?

A No. I stayed in the car throughout the whole time.

Q And were the windows up or down?

A They was down.

Q And at some point, does Mr. Gardner get into an altercation with one of the individuals that are out there?

A Well, when we pulled up, Greg was arguing with his girlfriend in the middle of the road. And it was a whole group of other boys, like, like, right, right down the street not too far. And William Alex Barr was arguing with another boy named Greg, said something about a gun.

Q Okay. The boy that Mr. Barr was arguing with, is that Greg or somebody else you're talking about?

A No. It was somebody else.

Q Okay.

A And . . .

Q When you said Greg, you mean Greg Sharp?

A Yes, Greg. He said something about a gun.

Q Okay. Then what happened?

A And then the boy who they said that shot J -- named

Willie Ponder had walked to the end of the road, to, like, the black Acura and he came back down. And this one boy had stated, if y'all don't get off this block, it's going to be some problems.

So Jamil, he cranked the car. The door was still open. Willie Ponder walked down to where the car goes at the driver's door. He said, I'll rob you and take everything you have. And then after that, he showed him the gun.

Q Who showed him the gun?

A Willie Ponder showed Gardner the gun, and Gardner hit him, pushed him away, did something to make him fall on his back. Then the gun went off three times. And then I seen everybody running. Gardner ran in the back of the car, across the street into another yard, and he fell.

So after that, I seen Willie Ponder, he got up, ran in the back of the car, ran over there where Gardner was at, and he was, like, right there on the curve, like he's standing right there, because he fell on the ground.

Q He who?

A Willie Ponder.

Q Willie Ponder fell down?

A No. Gardner fell on the ground, because he had got shot in the leg. I guess his leg gave out. And Willie Ponder ran over there. I guess the gun was jammed. He hit it with his hand, like the palm of his hand, and then he kept --

started shooting in Gardner multiple times.

Q Now, you're using the name Willie Ponder. Did you know this person's name at the time?

A No, I didn't.

Q Okay. What leads you to refer to him as Willie Ponder today?

A Gardner found out -- he -- I guess he got a whole bunch of information from Greg. And Greg told Gardner who the boy was. And when he found out, he told me.

Q When who found out he told you?

A When Gardner found out, he, Gardner, told me the name was Willie Ponder.

Q Do you remember when that was?

A No, I don't.

Q Okay. After the shooting, are you in the vehicle then when --

A Yes. I was still in the vehicle.

Q Right. And at some point, the victim gets -- Mr. Gardner gets in the vehicle --

THE COURT: I think that's documented --

MS. RAY: Okay.

THE COURT: -- on the incident.

MS. RAY: All right.

THE COURT: Let's go to the identification.

MS. RAY: Okay.

BY MS. RAY:

Q You went to the police department, correct --

A Correct.

Q -- on December 4th of 2009?

A Yes. Because I was suing the girl's -- Gardner -- I was suing Gardner girlfriend car insurance.

Q You were doing what?

A I was suing --

Q Oh.

A -- Gardner girlfriend's car insurance, and they told me I had needed to write a statement, because I had never wrote a state. So I went to the police station to write a statement.

Q Is that the only reason you went to the police department, to write a statement?

A Yeah. And I heard that they was looking for me to write a statement.

Q Okay. And, in fact, you gave a recorded interview with an investigator; is that correct?

A Right.

Q And during the recorded -- or during the discussion with the investigator, did he show you a photo lineup?

A Yes. He showed me, like, three of them. It was, like, three papers he showed me. And I seen the one paper that you have.

Q Did he show you a paper with six photographs on it?
A Yes.
Q Prior to him showing you that paper, had anybody showed you a photograph and said, this is Willie Ponder?
A No.
Q Okay.
MS. RAY: May I approach the witness, Your Honor?
THE COURT: You may.
BY MS. RAY:
Q I'm going to show you what's been marked as State's Exhibit 7 for identification purposes and ask you to look at it and tell me if you recognize State's Exhibit 7. Do you recognize this? Is that your signature --
A Yes.
Q -- on the document? Is that the lineup that the investigator showed you on December 4th?
A Yes.
Q And I think you've already testified, prior to that, you had never seen a picture of Willie Ponder, correct?
A Right.
Q All right. And were you asked to look at those six photographs and tell the investigator whether or not you recognized the person who shot Mr. Gardner?
A Yes.
Q And did you indicate to the investigator that you

recognized someone out of those six photos as being the person who shot Mr. Gardner?

A Yes.

Q And who did you pick out of that lineup as being the person who shot Mr. Gardner?

A Number five.

Q And on the other paper that's attached to the pictures, there's some hand -- some writing in the words, "I have" -- the word "positively" has been scratched out, correct?

A Yes.

Q And did you scratch that out?

A No.

Q The investigator did?

A Yes.

Q Okay. And the rest of the sentence says, "identify the image of the individual in photograph number five and have initialed it." Are those your initials next to photograph five?

A Yes.

Q Is that your handwriting that's been written in after that?

A Yes.

Q Could you tell us what that says?

A It says, it's not really positive that -- if I seen

him, but in person I can show you him.

Q Okay. How certain were you when you looked at the six photographs here that number five, the person who is initialed as being the shooter, was the person that you saw shoot Jamil Gardner?

A At first, when I seen the paper, I wasn't that sure. I wasn't that sure who was he, but I remember from that night. Because before all this happened, before this shooting and everything happened, there was arguing. And I remember telling him, I said, can y'all go down the street with that, because I don't have nothing to do with it. And he smiled at me. So --

Q Who smiled at you?

A Willie Ponder.

Q So the man that is the shooter smiled at you on the street?

A Yes.

Q So you were close enough to see him?

A Yes.

Q Okay. And that is --

A And I had --

Q I'm sorry.

A And after that, I had gotten back in the backseat.

Q And that's the person you put your initials by on that lineup; is that correct?

A Yes.

MS. RAY: Judge, as far as the proffer, that would be all the questions I would ask at this time.

THE COURT: Any issues you feel like we need to cross on for purposes of proffer? I just want to make sure we didn't have any issues that need to be aired in front of the jury. I don't hear any. Is there anything you particularly want to be heard on?

MR. ZELMAN: There may be one.

PROFFERED EXAMINATION

BY MR. ZELMAN:

Q Ms. Morgan, you just testified that you were shown three pieces of paper when you met with the investigator with TPD?

A Yes.

Q Ms. Ray showed you two pieces of paper. What was the third piece?

A No. He just showed me a whole bunch of lineups. Like, he was, like, well, do you recognize this one? Like, is he on this one?

And I was, like, no.

And then he was, like, do you recognize the second paper?

And I was, like, no. And then he showed me the third paper. And that's when I had pointed out.

Q Were the same people on all three pieces of paper.

A They looked like they were when they was, like, back in the younger days. But . . .

MR. ZELMAN: Nothing further.

THE COURT: Do you want to be heard on her use of his name?

MR. ZELMAN: I think that, you know, she -- any information that Ms. Morgan has concerning Mr. Ponder's name is hearsay, and I would just ask the Court to direct her to, you know, identify in some way the person that shot Mr. Gardner or the shooter or something of that nature, since, you know, her only basis is hearsay.

THE COURT: State want to be heard on that?

MS. RAY: No. I mean, it's clear to me that she didn't know his name at the time. I'll make sure that it's clear through the testimony that she didn't at the time.

THE COURT: You know, I, I agree with defense. The only thing I don't want to do is hear on cross-examination, bring out the same information and make it look like, you know, the State was trying to conceal that fact, that she had been told by someone about Mr. Ponder. If you intend to cross-examine on that --

MR. ZELMAN: Well, I --

THE COURT: -- we'll let the State go ahead and do it.

MR. ZELMAN: I think that it's going to be clear from her testimony that somebody else told her what his name was. I don't think that's the issue as to -- at the time she didn't know his name is what I'm more concerned about.

THE COURT: Do you intend to cross-examine on that somebody told her that it was Willie Ponder?

MR. ZELMAN: The only -- I would -- the only cross-exam doesn't come out on direct is that at the time of shooting she doesn't know the person's name. That would be the only cross-examination that I would intend to do on that subject.

THE COURT: It seems to me that it would be better to just let her talk about the shooter and the person that shot Mr. Gardner rather than using his name and making it appear that she knows this person. It's my understanding, Ms. Morgan, you don't know this person.

THE WITNESS: No, I don't. I don't know him. I just was there that morning -- that night.

THE COURT: Okay. But when -- let's not refer to him by name, you know, unless it's specifically asked of you. In other words, indicate the person that shot Mr. Gardner, the shooter, or something of that nature --

THE WITNESS: Yeah.

THE COURT: -- rather than talking about Willie Ponder like you know who he is. Okay?

THE WITNESS: Okay.

THE COURT: Does that make sense to you?

THE WITNESS: Yes.

THE COURT: Mr. Freeman, do you wish to be heard on any issue? It would be my intention, upon her completing her testimony and us excusing her, that the order to show cause would be dismissed. She would be returned back to the jail to be released. But do you wish to be heard any further?

MR. FREEMAN: No, sir.

THE COURT: All right. Are we ready for a jury?

MS. RAY: Yeah. She wasn't going to be my next witness. Dr. Cremin's here. I'm sorry. And I promised him. He's got to get back to the hospital.

THE COURT: Can we make it warmer? It looks like she's shaking her. We'll, we'll let her step -- you know, we've got to build in a delay here, and they've got to take her back down and then we'll have to --

MS. RAY: Well, if -- maybe we can go confer with Dr. Cremin real quick and see if --

THE COURT: Let's let him wait. Let's have a jury. Let's have a jury.

(Jury enters.)

THE COURT: Everybody be seated.

You may proceed, Ms. Ray.

Whereupon,

BREANNEA MORGAN

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. RAY:

Q Ms. Morgan, would you please introduce yourself to the jury?

A Hi. My name is Breanna Morgan.

Q And, Ms. Morgan, I wanted to ask you about some questions about an incident that occurred on November 17th, in the year 2009. At some point that evening, did you get in a car with Jamil Gardner and William Barr to go somewhere?

A Yes.

Q Okay. And how did you know Jamil Gardner at that time?

A Well, my boyfriend, he's a friend of Gardner and --

Q How -- I'm sorry.

A Oh. And he used to come -- he'll come over, like, every, every once in a while and he'll chill over there and stuff with us.

Q And at the time of this event, how long had you

known Mr. Gardner?

A Probably for --

Q About.

A -- I'd say, like, two, three months.

Q And did you know Mr Barr?

A Yes.

Q How long had you known Mr. Barr?

A For almost a year.

Q And what was your understanding of why you and Mr. Barr and Mr. Gardner were driving over to the Cypress Lake Street area?

A Well, me, my boyfriend, and my boyfriend brother and Mr. Barr, we was all staying in an apartment together. And Gardner had just dropped my boyfriend off to apartment complex and dropped --

THE COURT: Ms. Morgan, the question is just, why were you going over to this place? We don't need all the explanation --

THE WITNESS: Oh.

THE COURT: -- leading up to that.

THE WITNESS: I just wanted to ride. I was just always in the house and stuff. And I was, like, can I go? And Mr. Barr was, like, no, stay home. And I'm, like, well, I'm always staying home. I just wanted to get out of the house.

BY MS. RAY:

Q So do you know why Jamil was going over there, Mr. Gardner was going over there?

THE COURT: Well, Ms. Ray, let's move on, please.

MS. RAY: Okay.

BY MS. RAY:

Q What happens when you get there?

A We pull up. You see Greg and his girlfriend arguing in the middle of the road.

Q Okay. And do you know Greg's last name?

A They say Sharp, Sharp, or something.

Q When you get there, do you get out of the car?

A No.

Q Okay. Where are you seated in the car?

A On the passenger side in the backseat.

Q All right. Are the windows up or down?

A They down.

Q Were they always down while you were there?

A Yes.

Q You could see Mr. Sharp or --

A Yeah, I --

Q -- or Greg?

A -- seen everything that was, like, going on.

Q And what happens after you see them arguing? What's the next thing you see?

A Jamil was, like, well, I'm going to come pick you up. Then there was the whole group of a bunch of other boys right up from, like, where we was at, like, right in front of the car. And --

Q Did you know any of those other boys?

A No, I didn't even know Greg.

Q Okay.

A I just found out his name.

Q What was Mr. Gardner doing?

A He was talking to Greg, because the phone call was, like, I'll give you $5 if you come pick me up.

Q So what happens next?

A Okay. William Barr start arguing with a boy that was in the group with Mr. Ponder. And --

MR. ZELMAN: Your Honor, I'm going to object and request the witness be directed concerning the Court's prior ruling.

THE COURT: I'll overrule the objection.

Move on, Ms. Ray.

MS. RAY: Okay.

BY MS. RAY:

Q You hear Mr. Barr say something to one of the men, and you didn't know who this man was, right?

A Right.

Q The one he was talking to.

Okay. What happens next?

A That's when Greg yelled out something about a gun.

Q What happens after Greg does that?

A Ponder walks to the back afterward, and it's, like, right up the street, and came back with a gun.

Q And what happens next?

A And he came around the driver's door and Jamil was, like, well, he looked like, well, I don't know you and stuff like that. He was, like, I'll rob you and take everything you have.

Q Okay. What happens next?

A Then after that, Gardner, like, pushed him away. He fell, and the gun went off three times.

Q Who fell?

A Mr. Gar -- I mean, Ponder.

Q And when you say Ponder, are you referring to the man that was out there with the gun?

A Yes. Willie Ponder --

Q What happened next?

A And then -- okay. Mr. Gardner ran around the car, and he ran across the street in the yard and he fell. And Mr. Willie Ponder got up and he ran right behind him, and the gun was jammed, but he hit the gun in the palm of his hand. And then he just started shooting, shooting him multiple times.

Q And when you say shooting him, you're referring to Mr. Gardner?

A Yes.

Q What did you-all -- what happens after the shooting? What do you do?

A I'm in the backseat, because I didn't do anything.

Q Okay.

A I was just --

Q Okay. Were you able to see for yourself all of the things that you've just described for the jury?

A Was I able to see?

Q Yeah.

A Yes.

Q What you're telling the jury isn't something that someone told you; it is things that you actually saw from inside the car, correct?

A Correct.

Q Does anybody get back in the car with you?

A Yes. Willie ran down the road, I guess, and Greg was, like, my homeboy being shot. So he hopped in the driver's seat. William Barr hops in the backseat with me -- or the driver's seat, the backseat. And Gardner had got in the passenger seat, and we drove off.

Q What happens on your -- after you left in the car?

A We got into a car accident on Orange Avenue by the

A I did. I swore him in, had him raise his hand, and read the oath perjury form that we give to witnesses. And I took a digitally recorded statement from him at the hospital.

Q And you've had an opportunity to listen to that recording; is that correct?

A I have.

Q And are you able to understand everything that he says on that recording?

A Every word.

Q Were you able to understand everything that he was telling you when you interviewed him at the hospital?

A Yes.

Q And at the time that you met with him on -- the first time, which would have been on the 18th, correct, at about three o'clock in the afternoon?

A That's correct.

Q Was he able to tell you who the person was that had shot him?

A He provided me a name that he had heard, but he did not know who the person was that shot him. He did not know the person that shot him.

Q And is it correct that you were not the first officer that had spoken to Mr. Gardner; is that correct?

A That is correct.

Q He had already given a description, a basic

description of the shooter to at least one other officer; is that correct?

A At least one other officer, yes.

Q Now, based on the information that you got from Mr. Gardner at that first interview at the hospital on the 18th, it included the information of a name that you've just mentioned; is that correct?

A Yes, ma'am.

Q Based on that information, what did you do? I mean, did you go talk to somebody or . . .

A Based on that information, I constructed a photographic lineup that included that subject in the lineup.

Q And was that on the same day or the next day?

A I talked to Mr. Gardner at 3:00 in the afternoon. I may have put the lineup together late that afternoon or early the next morning. And I showed it to Mr. Gardner the following day.

Q Let me ask you, Investigator, have you investigated shootings before in your career?

A Yes, ma'am.

Q Approximately how many shootings have you investigated?

A In the three years I've worked in homicide, we usually had some type of shooting every month. I might not have been the primary on it, but I assisted in it.

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 who shot you?

A No. That would --

MR. ZELMAN: Your Honor, objection. The witness hasn't mentioned a name yet, so it's facts not in evidence.

THE COURT: Let's go sidebar.

(Sidebar discussion held.)

THE COURT: 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.

MR. ZELMAN: Again, I would make that hearsay objection, Your Honor.

THE COURT: All right. That's -- let's not, you know -- I mean, a lot of it is out there. Don't think what I say is -- and cross-examine on it. Then let's leave it alone.

MR. ZELMAN: Uh-huh. I don't see the value in a lot of what --

THE COURT: Okay.

MR. ZELMAN: -- the --

THE COURT: It's all hearsay. I'll sustain the hearsay objection. Okay.

(Sidebar discussion concluded.)

MS. RAY: May I continue, Your Honor?

BY MS. RAY:

Q Did you create a photographic lineup and go back and speak with Mr. Gardner and show him a photographic lineup in order to determine whether he could identify anybody as being the shooter?

A Yes, I did.

Q And when did you do that?

A I believe it was the 19th.

Q Okay. And where was Mr. Gardner on the 19th? Was he still in the hospital?

A He was still in the hospital. He was in the process

of the year 2009 here on a street in Leon County, Tallahassee, Florida.

An argument, a verbal argument starts. And based on a verbal argument, the defendant in this case, Willie Ponder, is willing to take out a gun, point it in the face of the victim in this case, Jamil Gardner. Jamil was -- Mr. Gardner was able to hit him and cause the defendant to fall, the hat to come off his head. And, I don't know, maybe the first discharge of that firearm was an accident. Pointing it in his face wasn't an accident.

All right, let's just imagine for purposes of argument that that first shot was an accident. He got up -- the defendant, Mr. Ponder, got up after Mr. Gardner ran down the street, realizing that he is having trouble moving because he has been shot, falls to the ground, is on his hands and knees. The defendant follows him over there. Mr. Gardner ends up on his back. And the defendant, with other people out there, stands over him and shoots him one, two, three times into his body. Over what? An argument that they were having out in the street.

And I want you to think about that when you are evaluating the testimony of the witnesses in this case. And I want you to think about the demeanor of someone like Breanna Morgan, who had to be put in custody to get

her here to testify.

I would suggest to you that Ms. Morgan was afraid, afraid to come and testify against this defendant. And I would suggest that is because the evidence has shown just how little value was placed on Mr. Gardner's life when he was shot four times with that gun on November 17th of the year 2009. Is it any wonder she wasn't thrilled to come in here? But she did. She came in here and she testified.

And if you think after you have looked at her, listened to her testimony and looked at her demeanor, if you think she was lying, that's your job, that's what you need to decide, and I respect that. But I would suggest to you that after you consider all of the evidence in this case, you will come to the conclusion that is the only conclusion in this case. And that is that this young man walked over to the victim in this case, put a gun in his face, fired at him once, as I said, maybe it was accidental, chased him down and stood over him and fired three more times.

What else should you consider? Let's consider his actions afterwards, his demeanor. Think about on December 6th of the year 2009 where was the defendant in this case, Willie Ponder? He was hiding in an attic in another female's home. It took law enforcement 15

minutes to talk him out of the attic.

Why was he hiding in an attic? Because he knew the police were looking for him for this shooting. And he wasn't up there because he was just afraid that, I don't know, the police might do something to him if they found him on the street. He knew he had almost killed this man. He knew he was guilty. That, ladies and gentlemen, is why he was hiding up in an attic.

And, again, you can only -- you have to rely on the evidence that you heard in the courtroom today -- yesterday. And I would suggest to you that he was up in that attic for no other reason than he knows he is the person, despite the fact that he didn't leave his DNA on the hat that he had on that night, he is the person that shot Jamil Gardner.

And let's talk about the DNA and I'm sure you're going to hear a lot about it, and I would expect no less from the defense attorney in this case, Mr. Zelman. That there is going to be a lot of reliance on the defense on that hat and the fact that he couldn't possibly be the shooter because his DNA is not on the hat.

You heard the testimony of Claudette Cleary with the Florida Department of Law Enforcement. There is no dispute that the defendant's DNA is not on that hat. But you also heard her testify that that doesn't mean he

didn't wear that hat. Just because someone's DNA doesn't show up on something doesn't mean they didn't touch it or they didn't wear it if it is a piece of clothing.

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. Yes, is it something you should consider in your verdict? Yes. But just like I wouldn't ask you to disregard everything the defense witnesses said just because one of them is an eight time convicted felon, I wouldn't even ask you as a prosecutor not to listen to their evidence.

You need to look at all of the evidence in this case. And if you have an abiding conviction of guilt, you need to find him guilty. If his DNA not being on that hat causes you to feel that I have not met my burden, then, yes, you must find the defendant not guilty.

But I would suggest to you that if you look at all of the evidence in this case, including the two people who did identify the defendant as the shooter, and his actions afterwards, and this -- I'm going to talk about this alibi, so-called alibi in a little bit, okay. There is no alibi, ladies and gentlemen. There is no alibi.

It doesn't mean just because you don't believe the alibi that you can find him -- you have to find him

A My name is Jo Ellen Brown and I'm a senior crime laboratory analyst for the Florida Department of Law Enforcement.

Q In what areas are you a crime analyst?

A I work in the DNA/biology section.

Q Have you testified as an expert in previous proceedings throughout the State of Florida?

A Yes, I have.

MR. TAYLOR: I think by agreement we would stipulate this witness is an expert, Judge.

MR. EVANS: Yes, Your Honor.

MR. TAYLOR: As to DNA in particular.

THE COURT: All right.

BY MR. TAYLOR:

Q Ms. Brown, are you familiar with the case of State v. Willie Ponder, including some DNA work that was done by the FDLE labs?

A Yes, I am.

Q And can you tell the Court how you got involved in that situation or this case?

A At the time, I was a CODIS administrator. CODIS is the Combined DNA Index System, which is where DNA profiles are uploaded to national and state levels. And there was a match that occurred in CODIS with a sample that came from this case from a black hat. And I wrote a report based upon that match.

Q Okay. So if this case resolved itself by a jury verdict in January of 2011, would, as a matter of course, DNA evidence be submitted to FDLE?

A I'm sorry. I don't understand the question.

Q If this case was resolved in January 14, 2011, I'm concerned with how you got the CODIS hit and how you proceeded to enter something into CODIS. What all happened?

You had a cap ahead of time?

A Let me just check the notes. I actually did not do the work on the cap.

Q I'm sorry. That's true.

A Another analyst did.

Q Okay.

A I can tell you though when it was submitted.

Q Okay.

A The evidence, the black cap evidence, was submitted to the Florida Department of Law Enforcement on December 1, 2009.

Q Okay. And at that point in time was it entered into -- if any DNA was extracted from that cap, would it have been entered into CODIS?

A It was entered into CODIS. The date of the report from Claudette Cleary, who was the crime laboratory analyst who entered it, was January 19, 2010.

Q And then this case was resolved against the

defendant on January 14, 2011. When did you enter or get a hit on CODIS in conjunction with this particular cap?

A The date of the CODIS match was July 9, 2011.

Q Now, as I understand it, then once that cap is entered into CODIS or the DNA from the cap is entered into CODIS, it basically sits there, is that correct, in CODIS?

A It is in an electronic database and it's being searched constantly, yes.

Q And if there's no matches, for example, back at the time of the trial, January 14, 2011, no known matches, if a subsequent event occurs and a new DNA profile is entered into CODIS on some other individual, you could get a hit on CODIS, is that correct?

A That's correct.

Q And is that what occurred in this case, if you know from the notes?

A I do not know if that occurred. I can say that the match that occurred to the hat was from a convicted offender who was processed through the database in 2011.

Q Do you know exactly when he was processed through?

A No, I don't.

Q Okay. So sometime between -- so on July 9, 2011, which would be almost six months or seven months after the trial of the defendant in this case, FDLE gets a CODIS hit on that hat?

A Correct.
Q And to whom does the hit come back?
A The convicted offender to whom it matched was Jamil Gardner.
Q Garvin?
A Gardner, G-A-R-D-N-E-R.
Q And did you know Mr. Gardner was involved in this particular case as an alleged victim of the defendant?
A I did find that out, yes.
Q Okay. And, in conjunction with the hit, once you got that hit, what did you do next?
A I proceeded to have it confirmed by a database, where they run their sample again to make sure that no mistakes were made. And once they have confirmed that match or that hit, I then write a report, reporting that this particular piece of evidence matched to a particular convicted offender.
Q When you were writing your report, did you know or learn that there had been three unidentified suspects or DNA samples taken from that hat, three other individuals or three other unknown persons?
A I was not aware of that.
Q So, when you get this information on Mr. Gardner, you then filed the report, is that correct?
A That is correct.

Q Now, in conjunction with that, did you do any tests on the hat or can you tell from the notes in front of you in the file where this particular DNA was located in that -- and I believe it's a black cap?

A I can look back at the notes from Claudette Cleary and tell you what she wrote in her notes.

Q And Claudette Cleary was whom?

A She was the analyst that originally worked the DNA evidence from the hat.

Q And you're referring to her notes that she would have kept in the normal course of her lab work with FDLE?

A That is correct.

Q And what did those notes reflect?

A The hat was a Flight Jordan hat. It was size seven and a quarter inches. She swabbed the inside of the hat for the possible wearer with one swab. And then she extracted DNA from that swab.

THE COURT: I'm sorry. I didn't catch that last part.

THE WITNESS: Then she extracted DNA from that swab.

THE COURT: From the inside?

THE WITNESS: From the inside, yes.

BY MR. TAYLOR:

Q So it would have been, for lack of a better term, inside the hat band or inside the cap band?

A Correct.

Q Okay. Can you tell from her notes what type DNA -- what the source of the DNA was, that is, blood, skin, sweat, or other bodily fluids?

A No, there's no indication of that.

Q From the notes and from your working with the file, was there any evidence whatsoever DNA that the cap or hat was ever worn by the defendant in this case? And that would be Mr. Willie Ponder.

A There was a standard that had been submitted from Willie Ponder and he was reported to be excluded as a contributor to -- there was a mixture, actually, on the hat. The thing that was uploaded was the major contributor from this mixture. And Willie Ponder was excluded as a contributor to this major profile.

Q Was he also excluded as a minor contributor?

A I don't believe any conclusions were made, but let me just check that report.

The report from Claudette Cleary just states that Willie Ponder is excluded as a minor contributor to the mixed DNA profile, yes.

Q So he's out as both a major and a minor, is that correct?

A That's correct.

Q Again, referring to Ms. Cleary's notes and/or any

notes that you have, is Mr. Gardner, as to his DNA, listed as a major or minor contributor?

A Claudette Cleary, and no one else either, received any buccal swabs from Mr. Gardner directly. However, the match in CODIS was to the major contributor of that mixture in the hat.

Q The major contributor. Thank you.

And the reports do not reflect, again for the record, that it's either skin factions, blood, perspiration, or some other form of DNA?

A The only test that could have been done would have been a test for blood. And that was not done. But, otherwise, when we swab an item for the wearer, we are assuming that we are picking up epithelial cells, skin cells.

MR. TAYLOR: Skin cells, okay. Thank you.

That's all I've got, Judge.

THE COURT: Cross exam?

MR. EVANS: Yes, Your Honor.

CROSS-EXAMINATION

MR. EVANS: For the record, I think -- and I believe the defense would stipulate to this timeline that would be helpful for the Court. The defendant's trial had occurred on January 14 of 2011.

THE COURT: Okay. Yes.

MR. EVANS: And the reports of Claudette Cleary all

were submitted and turned over and done prior to the trial.

MR. TAYLOR: Agreed.

MR. EVANS: That the victim was arrested -- Jamil Gardner, the victim of the case, was arrested on February 24, 2011. Is that agreed to?

MR. TAYLOR: Yes, I'm sorry, agreed.

MR. EVANS: Defendant was sentenced on March 9 of 2011.

MR. TAYLOR: Yes, sir.

MR. EVANS: Victim was then sentenced on --

THE COURT: Let me back you up. I missed that. 2011, what date?

MR. EVANS: March 9 of 2011 is when the defendant was sentenced.

THE COURT: Okay.

MR. EVANS: Victim was sentenced on his case on June 22 of 2011.

MR. TAYLOR: Agreed.

BY MR. EVANS:

Q And, Ms. Brown, your report is dated July 20 of 2011, is that correct?

A That is correct.

MR. TAYLOR: Agreed.

MR. EVANS: And then the discovery notice from

Ms. Ray to Mr. Zelman was done on August 28 of 2011.

MR. TAYLOR: Agreed.

BY MR. EVANS:

Q And I think we're also in agreement -- Ms. Brown, whenever someone is sentenced on a crime, that's whenever their DNA is collected and submitted to FDLE; is that correct?

A That is when it's submitted to the CODIS database, yes.

Q And you have indications that this evidence of Mr. Gardner's -- or Mr. Gardner's profile of DNA went in in 2011, is that correct?

A Yes.

Q So, it would be consistent with having come in at the time he was sentenced in June of 2011 and a CODIS hit taking place in July, is that correct?

A That's consistent, yes.

MR. EVANS: I think that's all the questions I have, Your Honor.

THE COURT: All right.

MR. TAYLOR: Nothing further, Judge. Thank you.

THE COURT: Thank you, ma'am.

MR. TAYLOR: She may be excused.

Call Josh Zelman.

Whereupon,

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Sir, would you state your name and occupation for the record?

A Joshua D. Zelman. And I'm an attorney.

Q And how long have you been a member of the Bar?

A A little over 11 years.

Q In conjunction with this case, State v. Willie Ponder, were you involved in the representation of Mr. Ponder?

A Yes, I was appointed to represent him for trial.

Q And did you, in fact, take this case to trial?

A Yes.

Q Okay. We're going to skip around a little bit. We just talked with this last witness concerning the DNA, so let's talk about this hat or cap. It's Ground Two in the defendant's motion.

Prior to the trial, you had discovery from the State that included some DNA evidence or reports; is that correct?

A Yes.

Q And what all did you have and, as a result of what you had, what were your plans concerning the DNA with this cap?

A Well, what the State had disclosed to us was that a

black baseball cap had been located at the scene, witnesses identified it as having been worn by the shooter. The reports that we received from the Florida Department of Law Enforcement via the State indicated that there were three profiles, DNA profiles, on the hat, and that Mr. Ponder had been excluded as a contributor to those profiles.

Q Now, this issue of the cap or the hat, did it tie into part of the identification of the defendant in this case?

A Absolutely.

Q Was this case one where the identity of the perpetrator was an issue?

A Absolutely.

Q And what were the claims or the evidence that you were facing starting the trial that pointed to Mr. Ponder as being the perpetrator in this case?

A If memory serves me correctly, we had the identification from Mr. Gardner, the alleged victim, as well as Brianna Morgan, who was a witness at the scene. And we were also looking at some word on the street.

Q Did you have any information to the effect that either Mr. Morgan (SIC) or this Brianna knew the defendant prior to the trial?

A Both Mr. Gardner and Ms. Morgan indicated in no uncertain terms that they had no prior knowledge of Mr. Ponder, they'd never met him, they'd never seen him.

Q Did either or both of these witnesses indicate that the shooter, who they identified as the defendant, was wearing this black baseball cap?

A Both did.

Q Both of them indicated that he was wearing the cap?

A Yes.

Q Were there other questions concerning the credibility of, for example, Mr. Gardner in his identification of the defendant?

A Yes, there were. Let me see if I can find my notes.

With respect to Mr. Gardner, although there were some streetlights, it was dark outside, which we believed would have made it more difficult for him to see Mr. Ponder's face -- or the shooter's face, rather. He seemed to base a lot of the identification -- he kept referring to the shooter as the one, the guy wearing the hat.

Q So the hat was an issue as to Mr. Gardner's ID?

A Absolutely.

Q And what about with Ms. Morgan's identification?

A She indicated that he was wearing a hat.

Q Did she also indicate that he had the hat on under a hoodie?

A I'm looking at my notes from the trial and she did indicate that during her trial testimony.

Q And do you recall that being similar or a different

description than that given by Mr. Gardner as to the clothing that was worn by Mr. Ponder?

A In my mind, it would have been completely inconsistent.

Q Did Mr. Ponder, according to Mr. Gardner, have on a short-sleeved shirt?

A Yes.

Q Did Mr. Gardner indicate that the shooter had any body tattoos, particularly on the arms?

A I'm reviewing my notes from the different statements that he gave.

The first indication of tattoos was in Mr. Gardner's deposition that was on August 9 of 2010.

Q Did you get similar testimony from Ms. Morgan?

A My notes don't indicate whether or not she ever mentioned anything about a tattoo.

Q Was this Ms. Morgan as close to the shooter as was Mr. Gardner?

A I would say not exactly. Mr. Gardner actually got into a fight with the shooter. Ms. Morgan, I believe, was standing relatively close. If I could just have a moment.

Q Sure. And I realize you haven't seen your file in a while. Do you recall whether or not she was in the backseat of the car?

A She did not get -- my notes indicated from her

testimony that she did not ever did get out of the car.

Q So the car was in one location and the altercation at least was a number of feet away; would that be a fair statement?

A Yes.

Q Now, at the time of the trial when you had this issue with the hat and you had three identifications that could not be matched to anybody in CODIS as to possible DNA, how did you prepare and attack that DNA issue or the lack of DNA as to your client?

A Well, we subpoenaed the DNA analyst from FDLE so that we could highlight for the jury the fact that, despite the claims from at least two of the witnesses that the shooter was wearing the baseball cap, the person who they were charging with the shooting, his DNA was not on the hat.

So we were using the State's own expert essentially against them to establish that Mr. Ponder, if his DNA wasn't on the hat and the hat was worn by the shooter, he couldn't have been the shooter.

Q When did you receive this late FDLE report from Ms. Brown?

A According to the letter that I mailed to Mr. Ponder and to your office, I received it on Monday, August 29, 2011.

Q When you received that report, did you -- strike that.

As a result of having that report -- if you had had that report at the time of the trial, would your attack or your strategies have been different in conjunction with the presentation of your case, including the testimony of Ms. Cleary from FDLE?

A Absolutely. We would have -- depending on which route we decided to go, we would have either continued to try to use the State's expert against them or we would have also retained an independent DNA expert, who would be able to testify and we would have focused our questions on how skin cells would have potentially been transferred from Mr. Gardner to the inside, the sweat band of the hat.

So if the jury were to believe Mr. Gardner, they would also have to believe that somehow his skin cells or his sweat ended up on the inside band of the baseball cap.

Q That was allegedly sworn by --

A The shooter.

Q The shooter?

A Correct.

Q The fact that there was no CODIS, however, to compare this DNA to was not the fault of either the State or the defense; would that be a fair statement?

A Yes.

Q In other words, the victim hadn't been arrested yet for some other crime?

A Correct. And I'll point out that it seemed to me that as soon as Ms. Ray received the DNA report, it was disclosed to me relatively quickly, so that any potential timeliness issues would be avoided.

Q This new evidence then of the DNA specifically pointing to the alleged victim as, at least at some point in time, the wearer of the hat --

A Yes.

Q Is there any significance to the fact that that alleged victim indicated he didn't know Mr. Ponder, had never seen him before the night in question?

A 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.

Q Now, the identification -- okay. In conjunction with this hat and this DNA, it is your testimony then that you would have approached the case completely different had you had this information?

A Yes.

Q And in a new trial, would, in fact, this be a significant issue in conjunction with the hat evidence in this case?

A I think it would be one of the biggest issues.
Q Did the State during the course of the trial, either in opening or closing, make an issue of the hat?
A Yes.
Q And were there references to the hat being the defendant's hat repeatedly in this case?
A Yes.
Q Specifically in closing, do you recall the prosecutor indicating that the fact that there was no DNA of the defendant on the hat didn't mean that he didn't have it on at some point in time?
A That rings a bell.
Q Do you recall that -- and, of course, the opening statements and closing statements would reflect the State's reliance on the hat being the defendant's in this case?
A Yes.
Q And that would go to both the identification of the defendant and the position of the cap on his head?
A Yes.
Q Which would bolster the credibility of both Gardner and --
A Yes.
Q Turning our attention now to Issue Number One in the 3.850, at some point in time -- well, strike that. Prior to trial, were you aware through discovery that Mr. Ponder's name

came up as a suspect in this case through some source of information to law enforcement?

A Yes.

Q What was that information?

A Essentially, it was word on the street, people talking, family and friends of Mr. Gardner.

Q Did you learn through discovery that while Gardner was recovering in the hospital he'd been told by, quote, family members and others that the word on the street was that the shooter was Willie Ponder?

A Yes.

Q Did you learn through discovery that Ms. Morgan had learned from other sources that the word on the street was the shooter was Willie Ponder?

A I want to say yes, but I can't find in my notes where that's indicated.

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.

Q And, as a result of that, did you make any type of ore tenus objection to the reference to word on the street?

A Yes, I did.

Q And the trial judge in this case was?

A Judge Hankinson.

Q Okay. And at the time you made the objection, do you recall how and what you -- what your objection was?

A I believe it was a hearsay objection. We initially did it outside the presence of the jury so the State could proffer the testimony and I could make a complete argument as to whether or not that word on the street was hearsay.

Q And that would be the proffer of the testimony of

Brianna Morgan?

A Yes.

Q Which would be in the trial record?

A Yes.

Q And, as a result, did the Court enter an order or make a ruling in conjunction with your objection?

A Yes.

Q And what was that?

A Sustained my objection.

Q Which meant that the, quote, word on the street in reference to Willie Ponder would not come in?

A Correct.

Q Did Ms. Morgan then testify in front of the jury?

A She did.

Q And what occurred during that testimony of Ms. Morgan?

A She initially -- if my memory is correct, she initially went through with what the Court's order had been. She was present when the judge ruled on my objection. And then, ultimately, she started discussing, well, she heard this or word on the street that. And I objected.

Q Did she mention Willie Ponder?

A By name, yes.

Q Do you recall whether that occurred five or six times during her testimony?

A That sounds consistent.
Q The record would --
A Yes, the record would reveal that, but that rings a bell.
Q And so you objected. Now, let's back up a minute. When you say she was present when the judge entered the order, did the judge basically tell her don't refer to Willie Ponder, don't do that, if you recall?
A That I don't specifically recall, but it would have been in the transcript.
Q All right. So, she starts talking about Willie Ponder and word on the street again repeatedly, is that right?
A Correct.
Q And what do you do at that point in time?
A We objected. We renewed the objection that the Court had previously sustained.
Q And what happened?
A At first, I believe that Judge Hankinson sustained our renewed objection. Ultimately, he overruled it.
Q And did at some point in time you recall him saying there's no objection?
A That was in a sidebar conference, I believe.
Q Once that was done and there were repeated, continued references to Willie Ponder and word on the street, did you file any other objections?

A I believe once he overruled an objection, I became frustrated and I didn't want the jury to see me object and continue to get overruled on the same issue, so I abandoned that.

Q Did you ask for a continuing objection either in front of the jury or sidebar?

A I don't recall. The transcript would reveal that.

Q Would you agree that the -- or do you have an opinion as to whether or not the repeated references to Willie Ponder by this witness, as well as word on the street, was damaging to your case?

A It absolutely was.

Q Were you able in any way to confront the rumors or the word on the street?

A No.

Q Did you have any source that you could call to testify at trial to either confirm or rebut this, quote, word on the street?

A No.

Well, let me back up. We had alibi witnesses that could rebut or attempt to rebut that word on the street.

Q In what way?

A The word on the street that was received in evidence was that Mr. Ponder was the shooter. The alibi witnesses were prepared to testify that he was not there.

try to say that he just wanted somebody caught, he didn't necessarily know who it was, but since so many people were telling him it was Mr. Ponder, that it had to have been Mr. Ponder.

Q Right. So if Mr. Gardner would have testified at the beginning of the trial and Ms. Morgan much later in the trial, then --

A Then it must have been part of my strategy.

Q Okay. And would that have reworked, I guess, hand-in-glove with your strategy if your -- and I understand your strategy to be the ID was faulty, therefore, it couldn't have been Mr. Ponder who did the shooting?

A Our theory of the case was that this was a case of mistaken identity.

Q And so the fact how they had come up with both identifying Mr. Ponder on separate days and separate times, not in the presence of each other --

A It would have been explained by word on the street.

Q So, that evidence was actually helpful to your defense as opposed to hurtful to your defense?

A That was the way that we were looking at it, yes.

Q Now, you indicated that if you had to do it over again, you might not allow it to come in now.

A Correct.

Q But, is that kind of looking at this case in

Ponder 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. (TR II, pgs. 207, 208) However, she did not recall specific details of the night of the shooting. (TR II, pg. 217)

Marquis Davis, an eight-time convicted felon, testified that he saw the group of people involved in the altercation and that Ponder was not one of them. (TR II, pg. 224) 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. (TR II, pg. 225) 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. (TR II, pgs. 228, 229)

Tyranney Scott and Darius Nelson testified that they were at a cookout nearby when they heard gunfire. (TR II, pgs. 232-233, 239) 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. (TR II, pg. 233) Scott, a twice-convicted felon, described a person that was at least six feet tall[2], wore dark colored clothes, and carried a gun. (TR II, pg. 240) During cross-examination, Nelson acknowledged that he never reported this information to law

[2] Ponder is 5'6". (R 9)

enforcement (TR II, pg. 234) and Scott reported the information five months before the trial. (TR II, pg. 242) Ponder did not testify. (TR II, pgs. 200-202)

In the County Court
Leon County, Florida

FAR

STATE OF FLORIDA
vs.

Willie E. Ponder **COMPLAINT**

LKA 1616 McCaskill Ave #305
Tallahassee, FL 32310

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IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

SPIN # 177959
REF # 2535
Warrant # 2009CF3864A1
Agency Case # 09-35617
Officer I.D. # TL630
Charge: Attempted 1st. Degree Murder
Degree of Charge: 1F
Statute Nos.: 782.04(1)(a)(1)
DOB: 04/20/1987
Sex: Male
Race: Black
Height: 5'6"
Weight: 145
Hair: Black
Eyes: Brown
SSN: 593-48-1346

Before me, the undersigned authority, personally appeared **Investigator A. Booth #630**, who, being first duly sworn says that on the 17th day of November, 2009, in Leon County, Florida, the aforesaid defendant did unlawfully attempt to kill a human being, **Jamil Gardner**, by **shooting Gardner with a firearm**, and the attempted killing was perpetrated from or with a premeditated design or intent to effect the death of **Jamil Gardner**,

: contrary to Section., **782.04(1)(a)(1)** F.S.

contrary to the statute, rule, regulation or other provision of law in such case made and provided, and against the peace and dignity of the State of Florida.

#630

Investigator A. Booth #630
Complainant

Tallahassee Police Department
234 E. 7th Ave. Tallahassee, FL 32303
Address

Sworn to and subscribed before me this 20th day of November, 2009.

665

Judge, Assistant State Attorney or Notary Public

FILED
09 NOV 20 PM 3:46
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

SEAL