No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

ALBON DIAMOND,
*Petitioner*,
v.

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

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

# PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN*
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
FL Bar No. 114227

MARK V. MURRAY
Law Office of Mark V. Murray
317 East Park Avenue
Tallahassee, Florida 32301
FL Bar No. 182168

COUNSEL FOR THE PETITIONER

* Counsel of record

## A. QUESTIONS PRESENTED FOR REVIEW

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

## B. PARTIES INVOLVED

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

## C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

### 1. TABLE OF CONTENTS

## 2. TABLE OF CITED AUTHORITIES

### a. Cases

**b. Statutes**

The Petitioner, ALBON DIAMOND, requests the Court to issue a writ of certiorari to review the order of the Eleventh Circuit Court of Appeals entered in this case on February 11, 2021. (A-4).[1]

## D. CITATION TO OPINION BELOW

The order of the Eleventh Circuit Court of Appeals was not reported.

## E. BASIS FOR JURISDICTION

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

---

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

## F. STATUTORY PROVISION INVOLVED

28 U.S.C. section 2254 authorizes "an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . ." "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Court stated the following regarding the "great writ":

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

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

(Citation omitted).

**G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

In 2009, the Petitioner was charged with engaging in sexual activity with his stepdaughter's son – activity that allegedly occurred in 2007 after the Petitioner had suffered a severe stroke. Following a jury trial, the Petitioner was convicted and sentenced to life imprisonment. Notably, at trial, no expert testimony was presented regarding the Petitioner's medical condition at the time of the purported offenses and the impact his condition would have had on his ability to engage in the conduct that was alleged by the child. However, following his conviction, a doctor –

who was found credible by the trial court – opined that it was medically impossible for the Petitioner to have engaged in the alleged conduct – evidence that establishes the Petitioner's actual innocence. The issue in this case is whether a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding.

The Petitioner was born in 1952. During his career, the Petitioner was a commissioned officer in the Navy. He started as a Surface Warfare Officer with the bridge team on the aircraft carrier U.S.S. John F. Kennedy. He eventually transferred to duty as a Special Duty Public Affairs Officer. He ultimately acted as the Public Affairs Officer for all three admirals with the U.S. Navy Reserve Force, Naval Air, and the Naval Surface Reserve. In addition, he was the Public Affairs Officer for the Multi-National

Peacekeeping Force in Beirut in 1983. He was retired at the time of the trial in this case.

At some point in time, the Petitioner married a woman and adopted his wife's daughter. The stepdaughter grew up, married, and had four children, including R.J.A.[2] who was born in 1998.

In February 2007, the Petitioner lived in Pensacola, Florida. He was approximately 56 years old. That month (February), he suffered a major brain stem stroke. He spent over a month in the hospital and rehabilitation center before being released to complete his rehabilitation and recovery at home.

The Petitioner's natural daughter (Arwen Thames) moved in with the Petitioner in order to help with his recovery. She observed that the Petitioner

---

[2] Only the initials of the alleged victim (and other minor witnesses) will be used in this petition.

was extremely weak while recovering from his stroke. The Petitioner had trouble walking, he often had to "somewhat drag his left leg," he did not have control of his left arm "all that much," and he needed help getting up and down the stairs. His left side was "pretty much dead," and he "was very, very weak."

The Petitioner later testified that due to the stroke:

> I lost my entire left side. I spent a month or so in the hospital going through rehab learning how to re-walk, how to basically regain the use of my side. I lost motor control. I had I guess what you call tactic, where I could feel things touching the skin and I could identify, but I couldn't control my muscles, and, basically, had to start all over again learning how to move my feet, move my hands. During that time I was also told that I have hypertension and I'm a diabetic.

(A-18).

In April 2007, the Petitioner's stepdaughter, her husband, and her four children moved to a house about half of a mile away from the Petitioner's residence to assist the Petitioner with his recovery. R.J.A. was approximately eight years old at the time.

At trial, R.J.A. testified that he occasionally spent the night at the Petitioner's house in 2007, and he claimed that one day, the Petitioner told him to pull down his pants, that the Petitioner started touching him around his penis area, and that the Petitioner put R.J.A.'s penis in his mouth. (A-21-23). R.J.A. testified that he and the Petitioner then engaged in a variety of sexual activities with each other over the period when "school was just ending." (A-34). R.J.A. testified that he and the Petitioner performed oral and anal sex upon each other and that the Petitioner had ejaculated in both his mouth and anus. (A-23-35).

During the state court postconviction evidentiary hearing, the Petitioner presented Dr. David Bear as a witness. Dr. Bear testified that he was a neurologist who practiced in Pensacola, Florida, and he had been practicing there in 2007. (A-36 & A-68). He was board certified in neurology, neurophysiology, sleep medicine, and headache medicine. (A-39). The court recognized Dr. Bear as an expert in neurology. (A-43-44).

Dr. Bear testified that he had reviewed the Petitioner's medical records relating to his 2007 stroke and his subsequent rehabilitation. (A-44). He reviewed objective tests such as MRIs and lab notes. (A-45). He opined that the Petitioner suffered a brain stem ischemia, a type of stroke that can cause devastating physical damage. (A-46). He opined that in February 2007, the Petitioner had significant motor

weakness, and required assistance to walk. (A-49-51). The Petitioner's upper extremity weakness was even greater than the weakness in the lower extremities to the point that the Petitioner could not move his arm against the force of gravity. (A-49). He needed help moving from bed to chair to wheelchair. (A-49-50). In March 2007, the Petitioner could not walk 12 steps without assistance. (A-51-52). By April 2007, the Petitioner's left arm was still severely impaired, where he could move against gravity but could not move against any resistance whatsoever. (A-53-56). The Petitioner's wrist was still abnormal. (A-57-58). Notably, *Dr. Bear testified that it would have been physically impossible for the Petitioner to get on his hands and knees to engage in sexual activity during the months in question.* (A-62-64). Dr. Bear also noted the diagnoses of stroke, diabetes, hypertension, peripheral

neuropathy, all of which were consistent with – but not medically conclusive concerning – the Petitioner's claims of impotence. (A-64-65). He testified that the Petitioner could not have faked his stroke, hypertension, or diabetes. (A-65-66).

On cross-examination, Dr. Bear testified that the Petitioner could touch a person in a sexual manner with his right hand only. (A-70-71). The Petitioner could place his mouth on a penis. (A-72-73). It was not medically impossible that the Petitioner could achieve an erection and ejaculate or throw ejaculate with his right hand, but it was impossible for him to sexually perform as described in the trial testimony, which he had reviewed. (A-74-75). He opined that any physician would express the same opinions that he was expressing. (A-81-82).

The state trial court subsequently entered an

order denying the Petitioner's state postconviction motion. The state trial court found Dr. Bear's testimony to be credible. The state trial court did note the findings of physical weakness and Dr. Bear's opinion that the Petitioner could not hold himself up on his hands and his knees. But the state trial court agreed with the State's characterization of the testimony that Dr. Bear had opined that the Petitioner, despite his diagnoses, "would have been able to commit all of the crimes with which Defendant was charged."

The Petitioner subsequently filed a 28 U.S.C. § 2254 petition. In his § 2254 petition, the Petitioner sought to present a freestanding claim of actual innocence. On July 2, 2020, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be dismissed due to circuit precedent that freestanding claims of actual

innocence in non-capital cases are not cognizable in § 2254 proceedings. On August 8, 2020, the district court issued an order adopting the report and recommendation and dismissing the Petitioner's § 2254 petition. On February 11, 2021, the Eleventh Circuit Court of Appeals denied the Petitioner's request for a certificate of appealability. (A-4).

## H. REASON FOR GRANTING THE WRIT

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

In *Baker v. Yates*, 339 Fed. Appx. 690, 692 (9th Cir. 2009), the Ninth Circuit Court of Appeals recognized that a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding:

> Baker asserts a freestanding claim of actual innocence. The Supreme Court has left open the question of whether such a claim is cognizable under federal law and, if so, whether the claim may be raised in a non-capital case. *See House v. Bell*, 547 U.S. 518, 554-555 (2006). *We have assumed that freestanding innocence claims are cognizable* and have held that "'a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.'" *Osborne v. District Atty's Office for Third Judicial Dist.*, 521 F.3d 1118, 1130-1131 (9th Cir. 2008) (quoting *Carriger v. Stewart*, 132

F.3d 463, 476 (9th Cir. 1997) (*en banc*)).

(Emphasis added).

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

In 2013, the Court stated that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual

innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). *See also Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.") (citations omitted).[3]

---

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

By granting the petition in the instant case, the Court will have the opportunity to resolve this circuit split and clarify whether a freestanding claim of actual innocence is cognizable in a § 2254 proceeding. As suggested by at least one district court, it is counterintuitive to allow "gateway" actual innocence claims but prohibit "freestanding" actual innocence claims:

> And so one of the things – if you were to ask somebody that wasn't a lawyer – if it turns out that we were wrong and that the person is actually innocent of the crime that they're currently serving time for, is it the State of Florida's position or the Secretary's position that in the federal habeas context – if that's all we know, that there's no underlying claim, that federal habeas relief isn't available?
>
> . . . .
>
> We all get so used to talking about this stuff, actual innocence is a gateway to something else, which has always

> seemed kind of interesting to me. Why would you need – why would you need to prove you're actually innocent in order to actually assert something else? I never have quite understood that.

(*Collins v. Sec'y, Dep't of Corr.*, case number 3:14-cv-47-TJC-PDB (M.D. Fla.) (Doc 30 - Pgs 39-40). Federal judges in this country need guidance from this Court on this important question. *See White v. Keane*, 51 F. Supp. 2d 495, 504 (S.D.N.Y. 1999) (suggesting that a liberal reading of *Herrera* extends actual innocence claims to non-capital cases); *Wright v. Smeal*, No. 08-2073, 2009 WL 5033967 at *9-10 (E.D. Pa. Dec. 23, 2009) (addressing the merits of the petitioner's freestanding actual innocence claim in a non-capital case).

The Petitioner's case is the appropriate case to address the question presented. R.J.A.'s credibility was the lynchpin of the State's entire case. There was

no evidence against the Petitioner except for R.J.A.'s word that the abuse occurred. K.S. refuted R.J.A.'s testimony that they were abused together by the Petitioner, and the Petitioner adamantly denied that the abuse occurred. R.J.A.'s story was that the Petitioner did things of a sexual nature to and with him, but the testimony of the neurologist (Dr. Bear) during the state court postconviction evidentiary hearing was that it was *medically impossible* for the Petitioner to have done some of the things alleged by R.J.A. Such evidence destroys R.J.A.'s credibility. More importantly, such evidence demonstrates that the Petitioner is "actually innocent."

At trial, the State attempted to show, through argument and witnesses, that the Petitioner was healthy and that he committed sexual abuse upon R.J.A. in certain physical ways that were proven by Dr.

Bear at the evidentiary hearing below to be impossible. At the outset of the 2010 trial, the state trial court – at the State's request – asked the Petitioner to remove his cane from the defense table so that the jury could not see it. In opening statements at the trial, the State argued that after the Petitioner's stroke, he "didn't really need. . . help [from family]. He recovered quickly and was soon walking with a cane and driving and going about his daily activities." The Petitioner's stepdaughter testified that by April 2007, the Petitioner "moved around very well." She testified that he did not need her help. She testified that the Petitioner

> recuperated remarkably. He recuperated very well. He went back to an almost normal life. Minus the limp and using a cane to stable himself, he went back to doing almost everything that he normally did, in my opinion.

(A-16). During trial, R.J.A. testified that the

Petitioner and he had anal intercourse with each other that involved the person receiving anal sex being on his hands and knees and the other person "on back." In closing argument, the State again argued that the Petitioner

> suffered a stroke in February of 2007, and [R.J.A.'s family] came down supposedly to help him recover. When they got here, he didn't need their help. He was driving and going on about his daily activities within months, and most of the alleged incidents occurred towards the end of school and during the summertime after five months had past and the defendant had rehabilitated.
>
> The Defense is going to argue that he was not physically capable of conducting these offenses. Use your own assessment of the credibility of the witnesses and the likeliness of that argument when determining whether or not that's credible.

(A-19-20). In the defense closing argument, the Petitioner's trial counsel did indeed argue that the Petitioner was physically unable to do the things that

R.J.A. accused him of, stating:

> Mr. Diamond took the stand. He told you what you already heard, that indeed he had a stroke. He told that you he had diabetes. He told you that he had hypertension. He told you that he cannot perform sexually. He denied the allegations with everything that he has, and he told you that not only that he did not do this but he could not do this. So look for the evidence and consider it and consider the lack of the evidence.

(A-20). Unfortunately, the jury did exactly that: consider the lack of evidence. The Petitioner claimed physical infirmity, but R.J.A., Stepdaughter Atkinson, and the prosecutor all stated repeatedly that the Petitioner was rehabilitated by the time of the alleged offense. K.S., a boy whom R.J.A. said was abused in the same room with him, agreed with the Petitioner that the alleged abuse never occurred. Thus, the trial came down to a determination of credibility. The jury likely considered the lack of evidence put forth by the

defense that the Petitioner was incapable of doing what R.J.A. claimed.

During the state court postconviction evidentiary hearing, the Petitioner called Dr. Bear, who was *accepted as credible* by the state trial court. (A-44). Dr. Bear testified that he was a neurologist who practiced in Pensacola, Florida. (A-36 & A-68). He was board certified in neurology, neurophysiology, sleep medicine, and headache medicine. (A-39). He had never testified in a trial before. (A-40). The state trial court recognized Dr. Bear as an expert in neurology. (A-43-44). Dr. Bear testified that he had reviewed the Petitioner's medical records relating to his 2007 stroke and his subsequent rehabilitation. (A-44). He reviewed objective tests such as MRIs and lab notes. (A-45). He opined that the Petitioner suffered a brain stem ischemia, a type of stroke that can cause

devastating physical damage. (A-46). He opined that in February 2007, the Petitioner had significant motor weakness, and he required assistance to walk. (A-49-51). His upper extremity weakness was even greater than the weakness in the lower extremities to the point that the Petitioner could not move his arm against the force of gravity. (A-49). He needed help moving from bed to chair to wheelchair. (A-49-50). In March 2007, the Petitioner could not walk 12 steps without assistance. (A-51-52). By April 2007, the Petitioner's left arm was still severely impaired, where he could move against gravity but could not move against any resistance whatsoever. (A-53-56). His wrist was still abnormal. (A-57-58).

Dr. Bear testified that Stepdaughter Atkinson's trial testimony that the Petitioner had largely recovered and barely had a limp in April 2007 was

incorrect. (A-60-62). In regard to R.J.A.'s claim that he and the Petitioner had anal intercourse with one another where they took turns getting on their hands and knees while the other person knelt and penetrated from "on back," *Dr. Bear testified that it would have been physically impossible for the Petitioner to get on his hands and knees to engage in sexual activity*. (A-62-64). Dr. Bear also noted the diagnoses of stroke, diabetes, hypertension, peripheral neuropathy, all of which were consistent with the Petitioner's claims of impotence. (A-64-65). Dr. Bear testified that it was possible that the Petitioner was lying and could actually achieve an erection and ejaculate, *but it was medically impossible for him to perform as described in the trial testimony*. (A-74-75). He testified that no one could fake a stroke, hypertension or diabetes. (A-65-66).

The state trial court denied the Petitioner's postconviction claim because it accepted the State's argument that it was dispositive that Dr. Bear could not promise that the Petitioner was not lying about being able to experience an erection and agreed that the Petitioner could move his right hand, could coerce someone to do something through speech, and could use his mouth to accept a penis into it. Thus, according to the state trial court, Dr. Bear's testimony did not serve to rebut the State's case in a way that gave rise to a reasonable probability that the Petitioner would have been acquitted. This was error (i.e., a finding that was based on an unreasonable determination of the facts in light of the evidence presented during the state court proceedings).

In focusing solely on the fact that Dr. Bear could not say with medial certainty that the Petitioner could

not achieve an erection in 2007, the state trial court completely missed the point. The point is that Dr. Bear's testimony was expert medical testimony – accepted as credible – that R.J.A. was *certainly lying* about giving and receiving anal sex with the Petitioner as they took turns getting onto their hands and knees. Dr. Bear's testimony showed that Stepdaughter Atkinson was *certainly lying or deeply mistaken* about the fact that the Petitioner was rehabilitated by April 2007, that he suffered from only a slight limp, and that he was physically capable of doing everything that R.J.A. alleged. Dr. Bear's testimony showed that the prosecutor was *incorrect* when he told the jury that the Petitioner was rehabilitated and fit enough to perform the acts in question.

The Petitioner could speak and move his right hand and coerce someone with words, but that is not

what R.J.A. alleged. He alleged acts that took physical exertion. Dr. Bear never once testified that the Petitioner was awkward or had to sit on the edge of a bed or asked R.J.A. to accommodate his near-paralysis. Dr. Bear's testimony shows that R.J.A. and his mother were, *in fact*, lying. The Petitioner could not have gotten on the floor and traded anal sex with the boy while getting on his hands and knees. It was *impossible* according to the credible medical testimony presented during the state postconviction evidentiary hearing. The Petitioner testified to that fact, but the jury did not believe him; they believed R.J.A., his mother, and the prosecutor. They believed the Petitioner could do it. The credible neurologist opined that he could *not* perform those actions – and that any doctor would agree with him on that point because these conclusions were based on objective medical

records.

Again, this case revolved solely around the credibility of R.J.A. versus the credibility of K.S. and the Petitioner. The testimony from Dr. Bear – a local, credible neurologist – that it was utterly *impossible* for the Petitioner to perform specific actions that R.J.A. claimed the Petitioner performed establishes that the Petitioner is "actually innocent" of the charges in this case. The Petitioner should be afforded an opportunity to present his "actual innocence" claim in federal court.

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Court

stated the following regarding the "great writ":

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

(Citation omitted). Concluding that a freestanding claim of actual innocence is cognizable in a § 2254 proceeding is consistent with the purpose of the "great writ."

By granting the petition in the instant case, the Court will have the opportunity to resolve the circuit split set forth above and clarify whether a freestanding

claim of actual innocence is cognizable in a § 2254 proceeding. The issue in this case is important and has the potential to impact numerous cases nationwide.

## I. CONCLUSION

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

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

MARK V. MURRAY
Law Offices of Mark V. Murray
317 East Park Avenue
Tallahassee, Florida 32301
(850) 907-3301
FL Bar No. 182168
Email: mvm@capitalcityattorney.com

COUNSEL FOR THE PETITIONER