No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ISHMAEL ANTHONY PETERS,
Petitioner,

v.

RICKY D. DIXON,
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
(850) 386-2345
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that the state court's denial of his ineffective assistance of counsel claims – premised on a finding that the Petitioner was not prejudiced by the ineffectiveness – was based on an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

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

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

A. QUESTIONS PRESENTED FOR REVIEW ii

B. PARTIES INVOLVED iii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iv

1. Table of Contents iv

2. Table of Cited Authorities v

D. CITATION TO OPINION BELOW 1

E. BASIS FOR JURISDICTION 1

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

G. STATEMENT OF THE CASE 2

H. REASON FOR GRANTING THE WRIT 4

The questions presented are important 4

I. CONCLUSION 32

J. APPENDIX

2. TABLE OF CITED AUTHORITIES

a. Cases

Baker v. Yates, 339 Fed. Appx. 690 (9th Cir. 2009) 24-25

Bell v. Miller, 500 F.3d 149 (2d Cir. 2007) 22-23

Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996) 22

Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987) 14

Campbell v. State, 247 So. 3d 102 (Fla. 2d DCA 2018) 17

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) 24-25

Chambers v. Mississippi, 410 U.S. 284 (1973) 19

Collins v. Sec'y, Dep't of Corr., case number 3:14-cv-47-TJC-PDB (M.D. Fla.) 26

Cunningham v. District Attorney's Office for Escambia County, 592 F.3d 1237 (11th Cir. 2010) 25

Davis v. Alaska, 415 U.S. 308 (1974) 15

Dist. Attorney's Office v. Osborne, 557 U.S. 52 (2009) 25

Ex parte Yerger, 8 Wall. 85, 75 U.S. 85 (1868) 1, 31

Fletcher v. State, 177 So. 3d 1010 (Fla. 5th DCA 2015) 18-19

Harris v. Nelson, 394 U.S. 286 (1969) 2, 31-32

Herrera v. Collins, 506 U.S. 390 (1993) 25-26

Higgins v. Renico, 470 F.3d 624 (6th Cir. 2006) 21-24

Holmes v. South Carolina, 547 U.S. 319 (2006) 19

House v. Bell, 547 U.S. 518 (2006) 24

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000) 25

Jackson v. State, 707 So. 2d 412 (Fla. 5th DCA 1998) 19

Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351 (11th Cir. 2007) 25

Kelly v. State, 198 So. 3d 1077 (Fla. 5th DCA 2016) 18

Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001) 13-14

Malone v. Walls, 538 F.3d 744 (7th Cir. 2008) 22

McMann v. Richardson, 397 U.S. 759 (1970) 1, 13

McQuiggin v. Perkins, 569 U.S. 383 (2013) 25

Miller-El v. Cockrell, 537 U.S. 322 (2003). 24

Osborne v. District Atty's Office for Third Judicial Dist.,
521 F.3d 1118 (9th Cir. 2008) 24-25

Payne v. State, 74 So. 3d 550 (Fla. 5th DCA 2011)) 30-31

Peters v. State, 147 So. 3d 1079 (Fla. 5th DCA 2014). 2, 7

Peters v. State, 323 So. 3d 737 (Fla. 5th DCA 2021). 3

Sierra v. State, 230 So. 3d 48 (Fla. 2d DCA 2017) 16

State v. Gates, 826 So. 2d 1064 (Fla. 2d DCA 2002). 20

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . *passim*

White v. Keane, 51 F. Supp. 2d 495 (S.D.N.Y. 1999) 26

Wright v. Smeal, No. 08-2073, 2009 WL 5033967 (E.D. Pa. Dec. 23, 2009) 26

b. Statutes

28 U.S.C. § 1254. 1

28 U.S.C. § 2253(c). . . . . ii, 4

28 U.S.C. § 2254 . . . . . *passim*

c. Other Authority

Fla. R. Crim. P. 3.850. . . . . 2-3, 7

U.S. Const. amend. VI 1, 13

The Petitioner, ISHMAEL ANTHONY PETERS, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on October 24, 2024. (A-3). [1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

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

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

28 U.S.C. section 2254 authorizes "an application for a writ of habeas corpus on 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).

---

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

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

In 2013, the Petitioner was convicted (following a second jury trial) in Orange County, Florida, of first-degree murder, burglary of a dwelling with an assault or battery, and home invasion robbery. The trial court sentenced the Petitioner to life imprisonment. The Petitioner appealed the judgment and the Florida Fifth District Court of Appeal affirmed the convictions and sentence. *See Peters v. State*, 147 So. 3d 1079 (Fla. 5th DCA 2014).

Following the direct appeal, the Petitioner filed a state court postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850, raising claims of ineffective assistance of counsel and newly discovered evidence. After conducting an evidentiary hearing, the state postconviction court denied the rule 3.850 motion. Notably, the *state postconviction court found that the Petitioner's defense counsel was,*

in fact, ineffective at trial – but the court concluded that the Petitioner was not prejudiced by the ineffectiveness. On appeal, the Florida Fifth District Court of Appeal affirmed the denial of the rule 3.850 motion. *See Peters v. State*, 323 So. 3d 737 (Fla. 5th DCA 2021).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254 – reasserting his claims of ineffective assistance of counsel and newly discovered evidence. On October 18, 2023, the district court denied the § 2254 petition. (A-6). The Petitioner appealed the denial of his § 2254 motion. On October 24, 2024, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 petition. (A-3).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

1. The court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c).

In October 2012, the Petitioner was charged by indictment with first-degree murder, burglary of a dwelling with an assault or battery, burglary of a dwelling with an assault or battery while armed, and home invasion robbery. The State endeavored to prove that on July 1, 2012, three men – Andrew Kramer, Robert Harrington, and the Petitioner – entered Joshua Gutierrez's house and tied up him and his friend Jacob Davis. Gutierrez was a drug dealer who had sold drugs to Kramer's friend Danae Craig. It was Craig who gave Kramer the idea to rob Gutierrez after she told Kramer that she herself had robbed Gutierrez a few weeks earlier and that Gutierrez kept his money and drugs in a safe. Brandon Taylor, Kramer's roommate, also sold drugs for Gutierrez.

When Gutierrez refused to tell the home invaders where his safe was located, the situation turned violent. Gutierrez was shot and killed. The men fled, but the investigation eventually led the police to Craig. Craig gave multiple sworn statements to lead Detective Dillon that Kramer admitted to her that *he* shot Gutierrez. The investigation then led to Herrington. Taylor left town before the police could interview him. It was Kramer's sister, who was not an eyewitness, who told Detective Dillon that the Petitioner was also involved. It is clear she was only relaying what she heard from Kramer and attempting to help him cooperate with police to lessen his exposure.

Kramer and Herrington began cooperating and the Petitioner was eventually arrested. The Petitioner denied to Detective Dillon that he had any involvement in the crime. While there was plenty of evidence linking Kramer and Herrington to the crime scene, there was *no evidence* placing the Petitioner at the scene other than the uncorroborated statements of Kramer and Herrington. According to Craig, Kramer never mentioned the Petitioner. *Most notably*, Craig indicated that *Kramer told her his (i.e., Kramer's) relative was the third perpetrator.*[2] Although Kramer and Herrington claimed the Petitioner was the third perpetrator (an allegation that was not made by Kramer or Herrington when they were initially interviewed), there was no connection linking the Petitioner to the crime scene. In fact, there was no proof of communications between the Petitioner and Kramer/Herrington that day, no placement of the Petitioner's cell phone near Kramer's car or the crime scene, or connection to the 9 mm gun the State claimed shot the fatal shot.

The Petitioner went to trial in March of 2013. The jury failed to reach a verdict and the state trial court declared a mistrial. The second trial began on May 20, 2013, before a different judge. The defense's theory was that the Petitioner was not at the scene of the crime and that Kramer and Herrington (who were desperate to cooperate with the State) were covering for a third person when they named the Petitioner and needed somebody else to implicate. Crucial to proving this theory was evidence of Kramer's and Herrington's false and discredited statements and inconsistencies

[2] The Petitioner is *not* a relative of Kramer.

regarding their testimony and prior statements and other unassailable proof. Most of the evidence necessary to discredit them was turned over by the State in discovery and readily available to trial counsel. Some of it was even used by defense counsel during the first trial.

For example, within days of the crime, Kramer admitted to Craig that *he* shot Gutierrez, making no mention of the Petitioner's supposed involvement. In turn, Craig swore under oath to Detective Dillon, unequivocally, that Kramer made this admission and also told her that a white boy (Herrington) and *someone from Kramer's family* were the other two participants in the crime. Detective Dillon included this in his 29-page report. Craig was also the crime line tipster who identified "Drew" (Kramer's nickname) as the shooter. The tip also contained other critical details of the crime. In addition, Kramer and Herrington's phone records dispute their testimony that they each spoke to the Petitioner by phone on the morning of the home invasion in order to coordinate their getting together, as there were no listed calls between Kramer and the Petitioner or Herrington and the Petitioner contained on their respective telephone records.[3]

---

[3] The State only obtained and provided to the defense Kramer's and Herrington's phone records, which contained no calls with the Petitioner on the day in question. Inexplicably, the State never sought or obtained the Petitioner's phone records or cellular site tower records, which could have proven where he was at the time of the incident. The Petitioner claimed in his state postconviction motion that defense counsel was ineffective for failing to subpoena that information himself. Prior to the state court postconviction evidentiary hearing, the Petitioner attempted to subpoena the records from the phone provider, but was informed that they were no longer available. As such, the state postconviction court ruled that the evidence was speculative. However, the state postconviction court failed to draw any conclusions or

In the first trial, (1) the jury heard Kramer's admission that he was the shooter and that the third participant was his relative and (2) the jury was provided the phone records – and ultimately the jury hung. In the second trial, the jury did not hear *any of this evidence*. As a result, at the conclusion of the second trial, the Petitioner was convicted on all counts. On direct appeal, the state appellate court affirmed the Petitioner's convictions:

> without prejudice to Appellant filing an appropriate post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850 that addresses trial counsel's examination of witness Danae Craig.

Peters v. State, 147 So. 3d 1079, 1080 (Fla. 5th DCA 2014). Pursuant to the state appellate court's invitation, the Petitioner timely filed a state postconviction motion.

In his state postconviction motion, the Petitioner made several allegations of ineffective assistance of counsel – as summarized below:

> A. Defense counsel provided ineffective assistance of counsel during the second trial in his "examination" of Craig, and in his inability to competently argue to the state trial court the admissibility of her highly exculpatory testimony that Kramer admitted that he, in fact, killed Gutierrez, and that the third participant was his relative.
>
> B. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to recall Detective Dillon to introduce the highly exculpatory Craig evidence through other avenues of admissibility. When defense counsel was unable to obtain the admission of the highly exculpatory testimony through Craig due to the "ambiguity" of her proffer, he could have called Detective Dillon back to the stand to introduce Craig's statement to him wherein she was very clear as to Kramer's third party admission that he killed the victim.

---

make factual findings on the argument that defense counsel should have, at the very least, argued that the State's failure to seek the Petitioner's phone records or cellular site records constituted an omission of evidence creating reasonable doubt.

C. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to call a records custodian as a witness in order to introduce the highly exculpatory phone records and in his inability to competently argue to the state trial court the admissibility of the highly exculpatory phone record evidence. Detective Dillon reviewed Kramer's telephone records. When defense counsel inquired whether Kramer's telephone records indicated any phone calls between Kramer and Peters on the day of the incident, the State objected on hearsay grounds. The state trial court sustained the objection, precluding what would have been critically exculpatory. Defense counsel's failure to competently argue to the state trial court that the phone records were not hearsay or otherwise be prepared to call a records custodian to ensure the admission of the critical evidence, as any competent lawyer would have done, was deficient and prejudicial.[4]

D. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to obtain a copy of the first trial transcript to assist him in examining witnesses, and to assist him in arguing to the court points of law that had been previously ruled upon by the prior trial judge, especially given the state trial court's indication of its intention to follow the first trial judge's rulings. Here, Judge Wooten (the second trial judge) made it clear he was going to conduct the trial in a manner that was consistent with Judge Lauten's (the first trial judge) rulings, yet defense counsel did not have the trial transcript from the first trial and thus could not point out to Judge Wooten where Judge Lauten had admitted Craig's statements and the phone records in the first trial.

E. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to effectively cross-examine critical witness Detective Dillon. During Dillon's cross-examination, a sidebar discussion occurred where both the state trial court and prosecutor indicated how confused they were with the "who knew what, when and where" of the cross-examination questioning. A trial lawyer whose cross-examination questions would elicit both the judge and prosecutor to state how confused they were could not be effectively persuading the jury as to his theory of the case. Since the case amounted to nothing more than a big "he said she said" kind of case, where even the prosecutor admitted this case "was not about [reliable evidence such as] forensics or DNA," the cross-examination of Detective Dillon needed to help point out the key

[4] The State had also turned over a business records certificate which counsel could have used to introduce the phone records.

issues that created reasonable doubt including that Kramer told Craig he was the shooter.

F. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to investigate and seek to introduce highly exculpatory evidence that he had been provided in discovery of a tip that confirmed Kramer was the killer, contrary to the State's theory of prosecution.

G. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to investigate, seek to compel, or to subpoena Mr. Peters telephone records or cellular site tower records, potentially leading to an alibi defense. The State provided information in discovery, including the copy of law enforcement subpoenas, indicating it had sought certain phone records from the time of the murder apparently of multiple subjects other than Mr. Peters. Mr. Peters telephone records would have confirmed no contact between him and Kramer or Herrington. They could also have demonstrated Mr. Peters was not anywhere near the crime scene.

H. Defense counsel provided ineffective assistance of counsel during the second trial in his failure to investigate, seek to compel, or to subpoena jail telephone recordings of Kramer, mental health records of Kramer, or to challenge Kramer's competence as a witness. Kramer was in custody throughout the period after his arrest and leading up to Mr. Peters' trial. His phone calls from the jail were monitored and recorded and showed Kramer discussing how he was undergoing psychological treatment because of "the demon" that was making him "blank out" and that his sister (who is the one that gave Detective Dillon Peters' name) was telling him what to say.

Incorporated into each of these allegations was a thorough explanation as to how counsel's assistance was ineffective and how counsel's failings prejudiced the Petitioner. The Petitioner also included argument and case law which supported his allegations that the evidence defense counsel failed to introduce was admissible under a number of theories and through different avenues.

During the state postconviction evidentiary hearing, the Petitioner called

Detective Dillon for the purpose of admitting Craig's sworn statements.[5] The Petitioner also called Kramer, who admitted he sought psychological care and was receiving medication prior to the Petitioner's trial. Kramer also acknowledged that prior to the Petitioner's' trial, he made jail phone calls in which he admitted being treated and medicated for psychological issues whereby he stated he had a "demon" in his head, had episodes where he would "blank out," had no memory of the events in the case, and that he was being told what to say.[6] Kramer's testimony ended with an interesting exchange between him and the state postconviction court during which the court asked Kramer if it would be his testimony "today" that the Petitioner did the shooting, and Kramer responded "*I don't know, man.*" (emphasis added). The following makes clear that Kramer's demeanor and response did not sit well with the state postconviction court:

> MR. ALTMAN [the prosecutor]: Well, he's going to get in a lot – I mean, look, I know he's been threatened in jail, I know he's been attacked in jail. Whatever he were to say today is really not relevant to the issues at this hearing.
>
> THE COURT: Maybe just for once I'd like to know that I'm hearing the truth.
>
> MR. ALTMAN: He has testified to the truth twice. He testified in the first hearing, he testified in the second hearing. He gave sworn statements to Detective Dillon.

---

[5] Craig was unavailable to testify at any of the scheduled hearings because she was undergoing cancer treatment. The State conceded that her testimony was not required to prove the Petitioner's claim.

[6] Jail medical records introduced at the evidentiary hearing confirm Kramer's diagnosis, treatment, and medication.

THE COURT: *Then why do I feel funny about that?*

(Emphasis added). Kramer left the courtroom, but asked to return to say something else. When he returned, he said he did not want to do this again (meaning testify about the crime) and added "*It was an accident, all right? Yeah, it was an accident, though.*" (Emphasis added).

During the evidentiary hearing, the Petitioner's trial counsel (Allan Holland) testified for the State. Holland explained his strategy at trial was to catch the State with its "pants down" and he discussed with the Petitioner not waiving his speedy trial rights. This discussion and the admonition from the state trial court was focused on Holland not taking depositions before starting the first trial. There was no such colloquy prior to the second trial.

Following Mr. Holland's testimony, the Petitioner's postconviction counsel argued that Holland failed to give any strategic decision for his failings, that his inability to properly cross-examine Craig and Dillon or introduce the necessary evidence to discredit Kramer and Herrington was not the result of a lack of time to prepare – but rather a lack of competence. Notably, *the state postconviction court agreed that Holland provided ineffective assistance of counsel as to all of the ineffective assistance claims*, save one.[7]

Nevertheless, after summarizing the extensive testimony heard at the

[7] The state postconviction court found that Holland was not ineffective for failing to obtain Kramer's jail calls and psychological status because he had no reason to believe his competency was at issue.

evidentiary hearing and concluding that Holland "rendered deficient performance," the state postconviction court found that there was no reasonable probability that the outcome of the trial would have been different but for counsel's ineffectiveness. Although there was no explicit finding that the Petitioner's decision not to waive his speedy trial rights affected Holland's ability to properly cross-examine witnesses or introduce evidence he already possessed, the state postconviction court felt it necessary to dedicate a page and ½ to its determination that the Petitioner understood he was waiving his right to any further investigation.[8]

Next, the state postconviction court determined that there was no reasonable probability of a different outcome "given the evidence that was introduced at trial." To this end, the state postconviction court summarized the trial testimony of Kramer's sister, Kramer, Herrington, Taylor, and Detective Dillon. The state postconviction court acknowledged there were many inconsistencies, but determined that each witness' testimony corroborated the others. As to the crime line tip, the state postconviction court found that it was inadmissible hearsay and therefore would not have been admitted. The allegation that the Petitioner's cell phone records would have demonstrated he was not present was determined to be speculative because those records are no longer available. Finally, the state postconviction court concluded that

[8] This is an area of factual findings with which the Petitioner disagrees. The only evidence presented by the State on this issue was a transcript of a hearing before the *first* trial. At that point, the state trial court asked the Petitioner if he understood no additional depositions would be taken. The Petitioner certainly did not agree that his counsel should not prepare for trial or fail to use or introduce obviously exculpatory evidence he already possessed.

the Petitioner was not prejudiced because even if the evidence showed he was not the shooter, he could still be convicted as a principal (despite that his defense was he was not there and was in no way involved which was consistent with the utter lack of unassailable, forensic, or documentary proof).

The Petitioner submits that he was prejudiced as a result of his attorney's ineffectiveness. Stated another way, the state court's denial of the Petitioner's ineffective assistance of counsel claims – based on a finding that the Petitioner was not prejudiced – was based on an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984)).

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). The test established by this Court in *Strickland* for 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, 466 U.S. at 687. As specifically found by the state postconviction court, defense counsel in this case rendered ineffective assistance of counsel (i.e., the Petitioner satisfies the first prong of the *Strickland* standard). *See, e.g., Lindstadt v.*

Keane, 239 F.3d 191, 204 (2d Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness"); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987) (finding deficient performance where counsel failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness's] testimony was the only plausible hope [the defendant] had for acquittal"). Thus, the question in the instant case is *solely* whether the Petitioner was prejudiced by defense counsel's ineffectiveness.

Regarding the prejudice prong of the *Strickland* standard, this Court clarified that a petitioner need not demonstrate it is "more likely than not, or prove by a preponderance of evidence," that counsel's errors affected the outcome. *Strickland*, 466 U.S. at 693-694. Instead:

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In making this determination:

> a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. *Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture*, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the

> record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . . *[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.*

Id. at 695-696 (emphasis added).

Applying this standard to the Petitioner's case, the Petitioner has established that the fundamental fairness of his trial has been called into question due to counsel's ineffectiveness. In this country's adversarial system of justice, a defendant's right to cross-examination is an essential safeguard of fact-finding accuracy – it is "the principal means by which the believability of a witness and the truth of h[er] testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). In the instant case, the Petitioner was denied his right to this "essential safeguard" because defense counsel was unable to effectively cross-examine or impeach Kramer.

In this case, there was no proof of communications between the Petitioner and Kramer/Herrington on the day of the crime, no placement of the Petitioner's cell phone near Kramer's car or the crime scene, or connection to the 9 mm gun the State claimed shot the fatal shot. Rather, only Kramer and Herrington put the Petitioner inside the home and it was Kramer who provided a description of how the Petitioner allegedly shot Gutierrez while Herrington was in the other room. Both were cooperating with the State to reduce their exposure from life to substantially lesser terms. Because the State's entire case came from Kramer's and Herrington's mouths, it was absolutely

crucial that counsel attack the details of their stories, large and small, and use all of the evidence at his disposal – including Craig's statements and the phone records – to do so. *See, e.g., Sierra v. State*, 230 So. 3d 48, 52 (Fla. 2d DCA 2017) (finding defendant was prejudiced because "[t]he credibility of the victims was the pivotal issue" in the case). The state postconviction court recognized that counsel did not act reasonably in this regard. And, it questioned Kramer's credibility at the state court postconviction evidentiary hearing. Yet, the state postconviction court concluded that the Petitioner was not prejudiced and that the result of the trial would not have been different but for counsel's ineffectiveness.

This conclusion begs the question – how could it not have been different? A simple comparison of the cross-examinations of lead Detective Dillon as conducted during the state court postconviction evidentiary hearing and defense counsel's performance at the second trial shatters the legitimacy of the state postconviction court's errant "no prejudice" conclusion. The smooth introduction during the state court postconviction evidentiary hearing of all the exculpatory evidence and careful confrontation and exploitation of the gaps in the State's "he said, she said" case (which at one point led the state postconviction judge to exclaim that he had "doubts" about the Petitioner's guilt) dispels any doubt that the result of the trial would have been different had counsel acted competently.

Unlike at the trial, evidence at the state court postconviction evidentiary hearing revealed that within days of the robbery, and without any prodding, Craig swore under oath that Kramer told her that *he* shot Gutierrez and that he committed

the crime with a white boy (Herrington) *and a family member*. The Petitioner was never mentioned. This is a very different story than the one told to the jury. Craig's statements to Detective Dillon about Kramer's admissions were unequivocal, but the jury never heard them. Had the jury heard the evidence as it was elicited at the state court postconviction evidentiary hearing, there is more than a reasonable probability that it would not have believed Kramer's testimony that the Petitioner was the third person involved. Indeed, the question is not whether the state postconviction court "believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it." *Campbell v. State*, 247 So. 3d 102, 108 (Fla. 2d DCA 2018) (internal citation omitted).

The fact that Herrington also named the Petitioner does not reduce the significance of Kramer's admissions to Craig. Herrington and Kramer were life-long friends and defense counsel argued that the two were protecting Kramer's family member (as the third perpetrator) by falsely implicating the Petitioner. However, defense counsel just could not figure out how to introduce the evidence available to him to establish that defense in order to discredit Herrington and Kramer.

Critical to the discrediting of both Herrington and Kramer was their testimony that there were telephone calls between both of them and the Petitioner to make arrangements to go to Gutierrez's house, which was false because their phone records did not contain evidence of those calls. While the first jury (that hung) saw that evidence (in fact they felt it so important they requested to see it again in a jury note),

the convicting jury did not see the discrediting phone records evidence because defense counsel failed to have a records custodian at trial and (incredibly) failed to use the business records certificate the State provided him in discovery (which he admitted he was not even aware they provided him).

Putting in front of the jury the cell phone records – i.e. unimpeachable evidence that showed no such calls were made – would have gone a long way in showing that both Herrington and Kramer were testifying falsely. It would have also revealed that they coordinated their false narrative – bolstering defense counsel's attempted argument that the two were working together to cover for Kramer's relative[9] and falsely implicate the Petitioner. In a case in which the State's evidence boiled down to the word of two cooperating witnesses, and no other evidence, it is substantially likely that proof that they both lied on the witness stand regarding a highly material matter would affect the outcome. The state postconviction court's conclusion that introduction of the exculpatory Craig testimony and telephone records would not change the outcome was error. *See Kelly v. State*, 198 So. 3d 1077, 1079 (Fla. 5th DCA 2016) (granting relief and noting that "[t]he lower court did not explain how it could accurately predict what impact admissible, but unpresented, evidence might have on the jury's decision"); *Fletcher v. State*, 177 So. 3d 1010, 1014 (Fla. 5th DCA 2015) (finding the court "was essentially substituting its own conclusions for possible

[9] There was evidence in the record yet not introduced that Kramer had told Craig he was scared of his relative who was dangerous and had killed before, thus establishing a motive for them to make their false implication of the Petitioner to protect the relative.

conclusions that could have been reached by the jury" and noting there is "no way of knowing how the jurors would have reacted if they had been presented with evidence supporting the defendant's claim that the victim's mother was motivated to persuade the victim to make false allegations based on her desire to be with Baldwin").

As to the state postconviction court's finding that the crime line tip would have had no effect because it was inadmissible hearsay, the finding is incorrect. The state postconviction court relied on *Jackson v. State*, 707 So. 2d 412 (Fla. 5th DCA 1998), for this conclusion. In that case, the court found that the admission of an officer's testimony regarding the content of an anonymous tip was reversible error. However, the tip incriminated the *defendant* and the court held that where "the inescapable inference from testimony [concerning a tip received by police] 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." *Id*. at 414. Here, the crime line tip was exculpatory evidence as to the Petitioner – not incriminating evidence. The Petitioner also would have been the one seeking its admission. Moreover, the tip evidence (like the Craig testimony) was constitutionally admissible as a third party admission of guilt under *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). It is certainly a statement against penal interest as to Kramer. It could have also been introduced under a theory that it is not hearsay and admissible as impeachment by a prior inconsistent statement or otherwise. Admission of the crime line tip through Craig (who made the tip) or

through Detective Dillon (who was aware Craig made the tip and that it was consistent with her sworn statement that Kramer admitted to the shooting with a white boy and a relative and never mentioned the Petitioner) would have been justified and exculpatory. It would have provided additional proof that Kramer told Craig *he* shot Gutierrez, that he concocted the story that the Petitioner was there, and it would have severely handicapped the State's theory of prosecution and Dillon's investigation.[10]

Finally, the state postconviction court's ultimate conclusion in denying relief was that defense counsel's multi-faceted "deficient" incompetence nevertheless would not have altered the outcome because the Petitioner could be convicted as a principal. This conclusion completely misses the mark, as the whole point of the Petitioner's defense was that he *was not there at all* and the admission of the exculpatory Craig testimony, tip evidence, phone records, Kramer jail calls and mental health records, and an effective confrontation of Detective Dillon (as occurred at the state court postconviction evidentiary hearing) would have thoroughly discredited the State's case that the Petitioner was there, thus rendering"principle" *a non issue.*[11] If the third participant

---

[10] Shockingly, defense counsel admitted that he was unaware of the tip evidence or that it was contained in discovery. However, it was clearly made part of discovery.

[11] The State never charged the Petitioner with being a principal, never argued principle as an alternative theory of prosecution, or requested a lesser included offense based upon him being a principal. It is doubtful the State could, upon retrial, charge the Petitioner with being a principle as opposed to being the shooter. Putting aside the deficit in credibility, such a changed allegation would create such a radical alteration of its argument and would likely be prohibited. *See, e.g., State v. Gates*, 826 So. 2d 1064, 1069 (Fla. 2d DCA 2002) (affirming trial court's order precluding the State from arguing inconsistent theories of guilt against as it "is fundamentally unfair").

was Kramer's relative and not the Petitioner, *then the Petitioner could not be guilty as a principal.*

If the jury had heard, in a clear manner, that there was a version of events that contradicted Kramer's and Herrington's (cooperation induced) testimony, it would have cast a long shadow of doubt on their testimony. Likewise, if it had heard that version of events, with exculpatory evidence supporting it, coupled with the utter dearth of physical evidence or other unassailable corroboration linking the Petitioner to the crime scene, there is a reasonable probability that the Petitioner would not have been convicted.[12]

In support of his argument, the Petitioner relies on *Higgins v. Renico*, 470 F.3d 624, 635-636 (6th Cir. 2006) – where the Sixth Circuit Court of Appeals held that the state court's denial of the petitioner's ineffectiveness claim for failing to cross-examine and impeach a key prosecution witness was based on an unreasonable application of the prejudice prong of the *Strickland* standard:

> Higgins was not required to demonstrate how he "would probably have won." *He simply needed to present the factual basis for his contention that confidence in the outcome of his case was undermined by his counsel's deficient performance. Higgins did just that.*
>
> Higgins identified for the state appellate court the one critical error made by his attorney, and he identified some-albeit few-record facts to support his claim of prejudice. Specifically, he stated that his attorney failed to cross-examine the "key witness, Mr. Young, [] the person who made the identification of [M]r. Higgins as the shooter." Supp. J.A. at 135. Higgins went on to state that, by failing to cross-examine Young, his attorney left the jury "with essentially unrebutted, and untested,

[12] It is notable, and surely not a coincidence, that admission of the cell phone records and evidence of Kramer's admission in the first trial *resulted in a hung jury*.

> testimony that Mr. Higgins had the gun and shot the victim." *Id.* at 137. He pointed out that "[t]he evidence of Mr. Higgins' guilt was not overwhelming, and consisted of the testimony of Mr. Young;" and he argued that his "[c]ounsel 'dropped the ball' when it really mattered," *id.*, in effect providing Higgins with no defense at all. Higgins concluded his argument with the statement: "[T]he prejudice to this defendant is obvious." *Id.*; *see Berryman* [*v. Morton*], 100 F.3d [1089,] 1102 [(3d Cir. 1996)] (finding prejudice to the defendant "obvious" where defense counsel failed to cross-examine an identification witness whose inconsistent identification testimony from previous trials could have raised questions in the minds of the jurors regarding the witness's credibility and/or ability to identify the defendant).
>
> While Higgins presented his *Strickland* claim to the state appellate court in a skeletal manner, we think his presentation was sufficient to place the issue of prejudice squarely before that court. The state court nonetheless rejected Higgins's claim without discussion. As noted by the district court: "The State court of appeals' discussion of the prejudice prong of the *Strickland* test was truncated; that court simply stated that the petitioner failed to show prejudice." J.A. at 289. We assume, as did the district court, that the state court rejected – albeit in conclusory fashion – Higgins's prejudice claim on the merits. *Like the district court, we think this rejection represents an 'unreasonable application' of clearly established Supreme Court precedent. The state court may have correctly identified the governing legal principle from the Supreme Court's Strickland decision, but it unreasonably applied that principle to the facts of Higgins's case. Higgins is therefore entitled to conditional habeas relief.*

(Emphasis added). As in *Higgins*, in the instant case, the state court may have correctly identified the governing legal principle from *Strickland*, but it unreasonably applied that principle to the facts of the Petitioner's case. *See also Malone v. Walls*, 538 F.3d 744, 761 (7th Cir. 2008) ("Consequently, we must conclude that the state appellate court's determination that Mr. Malone was not prejudiced by his counsel's failure to call Villanueva was not a reasonable one."); *Bell v. Miller*, 500 F.3d 149, 155-156 (2d Cir. 2007) ("[T]here is a 'reasonable probability' that had trial counsel consulted with a medical expert,]the result of the proceeding would have been

different.' The prosecution's case against Bell was thin – there was no eyewitness other than Moriah . . . . Impeaching Moriah's memory was therefore all in all for the defense. Armed with the insight and advice of a medical expert, a lawyer could have vastly increased the opportunity to cast doubt on this critical evidence.") (citation omitted).

Accordingly, for all of the reasons set forth above, the Petitioner asserts that the state court's denial of his ineffectiveness claim was based on an unreasonable application of the prejudice prong of the *Strickland* standard.[13] The Petitioner has established that he was severely prejudiced by defense counsel's failure to introduce powerful evidence that would have impeached the prosecution's star witnesses. Defense counsel's ineffectiveness in this case had a "pervasive effect" on the "inferences" to be drawn from the evidence and indeed did "alter[] the evidentiary picture" – thereby undermining confidence in the outcome of this case as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 695-696. *See Higgins*, 470 F.3d at 635 ("He simply needed to present the factual basis for his contention that confidence in the outcome of his case was undermined by his counsel's deficient

[13] In its order denying this claim, the district court relied upon the same reasons that were relied upon by the state postconviction court. For instance, the district court stated that "given that the jury heard that Kramer admitted he lied multiple times, Craig's prior statement that Kramer told her he killed Gutierrez would not have significantly impacted Kramer's credibility." (A-15). The Petitioner maintains that the state court's denial of his ineffectiveness claim was based on an unreasonable application of the prejudice prong of the *Strickland* standard. If the jury had heard Kramer's admission that he *was the shooter* and that the third participant was his relative, there is a reasonable probability that the outcome of the second trial would have been different (as demonstrated by the result of the first trial).

performance. Higgins did just that."). The Petitioner should be afforded a new and fair trial – a trial where the jury hears (1) Kramer's admission that he was the shooter and that the third participant was his relative and (2) the phone record evidence contradicting Kramer's and Herrington's testimony.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion that the Petitioner was not prejudiced by defense counsel's ineffectiveness. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

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

In *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.

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

---

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

evidence/actual innocence claim. Specifically, he alleged:

> The Defendant Ishmael Peters was recently moved to CFRC East unit, an institution in the State Department of Corrections. The Defendant met an inmate there named Ryan Douglas, that had also recently been moved there. Peters had never previously met Douglas. During their sojourn at that facility, Douglas overheard Peters discussing his case. Aspects of Peters' case reminded Douglas of a conversation he had with another inmate at Avon Park, another DOC facility. That inmate turned out to be Robert Herrington, one of the co-Defendants in this case and one of the witnesses who testified against Peters. Douglas advised Peters that during the conversation with Herrington, Herrington admitted that he and another person falsely testified in a murder case against an innocent man to both protect another person and to gain cooperation credit for themselves. When Douglas overheard Peters story, and having confirmed that Herrington was the witness in Peters' case, Douglas understood that Peters was the innocent man that Herrington had admitted testifying falsely against. Douglas provided a written letter and an affidavit setting forth his observations. (*See,* Exhibit 5(a), Ryan Douglas Affidavit dated August 6, 2018, and 5(b), Ryan Douglas Letter dated January 21, 2018,attached hereto). Douglas is available and has agreed to testify on Peter's behalf at a hearing in this matter.

Douglas testified during the state court postconviction evidentiary hearing. Douglas stated that Herrington spoke to him about the crime. Herrington told him the other participants were Kramer and Kramer's cousin (which was consistent with Craig's sworn statement that Kramer told her the third perpetrator was his relative). Douglas also testified that Herrington told him he entered into an agreement with the State to testify against the Petitioner. Herrington told him he lied about the Petitioner because Herrington and Kramer did not want to give up Kramer's cousin. Douglas also testified that he has not been offered anything, has not received anything for his testimony and has had no contact with the Petitioner. Douglas denied reviewing any police reports or documents related to the Petitioner's case. At the time of the hearing,

Douglas was serving a jail term (i.e. 364 days or less).

During the state court postconviction evidentiary hearing, the State called Herrington, who admitted rooming with Douglas and telling him that he was convicted of home invasion. He denied, however, that he gave him details or told him he testified against the Petitioner. Herrington advised that he did not have any of the paperwork from the case with him when he shared a cell with Douglas. Herrington also repeated his claim that he used his cell phone the day of the crime to call the Petitioner to make arrangements to pick him up (a call Herrington's phone records did not verify) and that he relayed this to law enforcement.

In its order denying relief, the state postconviction court determined that Douglas' testimony qualified as newly discovered evidence. However, the state postconviction court found that Douglas was not a credible witness because he had a number of prior felony convictions. The state postconviction court also found that there was nothing that Douglas testified to that could not have been found in the court file or through conversations with the Petitioner. Interestingly, the state postconviction court also found that Kramer's testimony at the state postconviction evidentiary hearing was consistent with his trial testimony, despite Kramer having indicated that he did not know if he would testify the same way "today" when questioned at the hearing. Thus, according to the state postconviction court, the newly discovered evidence was not of such a nature to require a new trial.

The state postconviction court's determination that Douglas' testimony was not of such a nature that it would have resulted in acquittal was erroneous for several

reasons. First, the state postconviction court's finding that Douglas was not credible is not supported by competent, substantial evidence. According to the state postconviction court, Douglas was not credible because he had prior convictions and he could have learned the details of the Petitioner's case from the court file. Yet, Douglas was forthcoming about his prior convictions[15] and testified that he was serving only a jail term. He was clear that he was not offered or promised anything and he had nothing to gain from testifying. In addition, he testified that he had not seen any of the court files, reviewed documents or learned the details from the Petitioner. This testimony was unrebutted and the state postconviction court's *assumption* that Douglas was not credible because he *could* have done those things to learn about the case is not supported by *any* evidence; rather it was just rank speculation.

Second, the state postconviction court's suggestion that Douglas is somehow less credible because Kramer's and Herrington's testimony was consistent from the first trial to the second trial is also unsupported by the record. Of course, the assertion that Kramer is credible runs counter to the state postconviction court's "funny" feeling about his testimony at the state court postconviction evidentiary hearing. Kramer testified that he "did not know" if his testimony about the Petitioner's involvement in the crime would be the same. He returned to say that "it was an accident," which marks yet another version of Gutierrez's murder. Kramer was hardly a credible or

[15] Kramer and Herrington are also convicted felons. They also have much more to lose if it is revealed that they lied about the Petitioner's involvement. There is no doubt Herrington would deny the allegation.

consistent witness.

Rather, Kramer and Herrington were felons convicted of murder who had a huge motivation to lie. Their freedom and life depended on cooperating with the State, providing it a third perpetrator (in this case a "fall guy") to prosecute, and supporting its prosecution narrative in every way. Without the Petitioner, they had nobody else to cooperate against. Taylor had left town and Kramer's cousin was a dangerous killer, according to Craig's sworn statements. They needed a patsy, and the Petitioner was it. Query, if the Petitioner was really involved, why wasn't there any evidentiary corroboration like there was against Kramer and Herrington?

Douglas, on the other hand, had nothing to gain by his testimony. Piecing his testimony with Craig's testimony, both of which were consistent with each other, together with the exculpatory telephone records which discredit Kramer and Herrington, would likely lead to exoneration.[16] The state postconviction court had no reason to discredit the unimpeached and unmotivated Douglas simply because he had (most if not all non violent) felonies, and credit the State's witness felons (both convicted of murder) who had been severely impeached and who were looking to save themselves by implicating the Petitioner. "Although credibility is an issue for the trial court, [a reviewing court is] not bound by credibility determinations that are not based

[16] Upon retrial, there would be no legal basis to exclude Douglas' testimony, which is consistent with Craig's testimony. Whether the state postconviction court credited him or not, the Douglas testimony is obviously relevant, exculpatory, and admissible and thus a jury should be given the opportunity to weigh it against the State's conflicting narrative.

on substantial, competent evidence." *Payne v. State*, 74 So. 3d 550, 555 (Fla. 5th DCA 2011).

Finally, the conclusion that Douglas' testimony would not result in acquittal because Kramer and Herrington were consistent in their testimony is equally flawed. Kramer's and Herrington's testimony places the Petitioner inside Gutierrez's house. Testimony from an unbiased witness that Herrington admitted they came up with the story to cover for Kramer's cousin is exactly the type of evidence that would show they could not be believed. And, coupled with the other exculpatory evidence that counsel ineffectively failed to use at the second trial, it is highly likely that the Petitioner would be acquitted.

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 his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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

COUNSEL FOR THE PETITIONER