No. 20-5837 ORIGINAL

IN THE
Supreme Court of the United States

In re EDWARD D. OBERWISE, Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

Edward D. Oberwise
Fla. DOC # T67476
Taylor Correctional Inst.
8515 Hampton Springs Rd.
Perry, Florida 32348.

QUESTIONS PRESENTED

1. Should this Court use its power to grant a writ of habeas corpus to a non-capital state court defendant who has no other available forum to raise a compelling claim of actual innocence?

2. Whether the Circuit Court of Appeals implicit rejection for leave to the District Court for adjudication of actual innocence claims was contrary to the interpretation of 28 U.S.C. § 2244(b)(2)(B)(ii)?

3. Whether the state courts' denial of new claims as untimely is contary to the AEDPA standards setforth in McQuiggin v. Perkins, 133 S.Ct. 1924 (2013)?

4. Whether a Teague claim filed after a Petitioner's initial habeas proceeding was previously unavailable for the purposes of 28 U.S.C. § 2244(b)(2)(A)

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Petitioner Edward D. Oberwise is a Florida prisoner in custody of Mark S. Inch, Secretary of the Florida Department of Corrections. Mr. Oberwise has previously filed a Fed. R. Civ. P. 60(b)(2), (6) that is currently pending before the Tampa [M.D.] District Court.

PETITION FOR A WRIT OF HABEAS CORPUS

Edward D. Oberwise respectfully petitions for a writ of habeas corpus.

DECISION BELOW

This petition for a writ of habeas corpus is an original proceeding in this Court, but relates to a decision of the Eleventh Circuit denying leave to file a successive 28 U.S.C. § 2254 petition in the district court. Petitioner has filed numerious applications for leave since 2017. The most recent decision is available in the Appendix (App.) at 1a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to its authority under 28 U.S.C. §§ 2241 and 2254 to grant a writ of habeas corpus, as well as pursuant to Rule 20.4 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651(a). See Felker v. Turpin, 518 U.S. 651 (1996).

STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

Rule 20.4 requires an original petition for writ of habeas corpus by a state prisoner (1) to "comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the appellant is held'"; (2) to "set out specifically how and where the petitioner has exhausted available remedies in the state courts"; (3) to "show that exceptional circumstances warrant the exercise of the Court's discretionary powers"; and (4) to show "that adequate relief cannot be obtained in any other form or from any other court." Mr. Oberwise meets these requirements.

(1) On April 15th, 2017, Mr. Oberwise filed a second § 2254 petition in the district court re-raising his "waiver" claim as to the first issue raised

on direct appeal. The district court issued an order stating that it was without authority to consider Mr. Oberwise's claim without approval from the Eleventh Circuit because the petition was second or successive.

Inbetween May 2017 to March 2018, Mr. Oberwise filed several more unsuccessful applications in the Eleventh Circuit for leave to file his "waiver" claim as a second or successive habeas corpus petition in the district court.

Mr. Oberwise found his "new claims" through similar cases the Eleventh Circuit quoted within it's May 31st, 2017 order in Case No.: 17-11985 e.g., Lambrix 776 F.3d 789, 793 (11th Cir. 2015) and Mills, 101 F.3d 1369, 1371 (11th Cir. 1996) that cited Brady and Giglio to dismiss his application for leave to file a second petition. Mr. Oberwise discovered the "factual predicate" of his "new facts" on March 31st, 2018 by reviewing several prior unsuccessful applications for leave and applying the Brady principles against the trial record to learn that exculpatory testimony from the state's key witness had been withheld from his trial.

On or about April 2018 to January 10th, 2019 several more unsuccessful applications for leave were filed in the Eleventh Circuit. See In re Edward Oberwise, 2018 U.S. App. Lexis 21508 (11th Cir. 2018)(dismissing Brady and Giglio under actual innocence).

(2) Mr. Oberwise filed a post-conviction motion in the Florida state courts' raising the same substantive issue presented here. The Florida courts' refused to review the merits of the claim under Florida law that forecloses such review.

(3) Exceptional circumstances warrant the exercise of this Court's discretionary power to issue a writ of habeas corpus for the reasons set forth, infra, in the Statement of Facts and Part I of the Reasons for Granting the Writ.

(4) Unless the Federal court grants the pending Rule 60(b)(2), (6) motion, then "adequate relief cannot be obtained in any other form or from any other court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the following provisions of the United States Constitution:

Article I, Section 9, Clause 2, of the United States Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Section 2244(b), Title 28 of the U.S.C. Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

(1) A claim presented in a second or successive habeas corpus application under Section-2254 that was presented in a prior application shall be dismissed.
(2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless —
(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

3(C) The court of appeals may authorize the filing of a second or successive

application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§2244(b)].

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

I. Introduction

Petitioner Edward D. Oberwise is a non-capitol state prisoner who has been wrongly convicted of crimes inwhich he did not committ. Absent this court's intervention, Mr. Oberwise stands convicted without any court having considered the merits of his claims. His attempts to be heard have been rebuffed by the Florida Thirteenth Judicial Circuit, Florida District Court of Appeal for the Second District, the Florida Supreme Court, the United States District Court for the Middle District of Florida, and by the United States Court of Appeals for the Eleventh Circuit Court. This petition invokes the extraordinary jurisdiction of this court because all other traditional avenues for relief have thus far been foreclosed.

II. Petitioner's Trial and Conviction

The state's sole evidence against the Petitioner consisted of four controlled phone calls inbetween it's key witness, Olivia, and Petitioner during his August 27th, 2009 [Bench] trial. Although the state had several other recorded tape recording and transcripts of the witness and Petitioner, the summation of Petitioner's incriminating statements was the only evidence produced to the defense.

At trial, there were two victims and three detectives (Hollis, Bashner, and Raschke) who testified for the state. As to the Petitioner, a Child Protective Service employee (Sandra Shulman) who examined Olivia, and a DNA expert (Benjamin Brooks) testified for the defense. There was no direct or physical evidence of

sexual conduct and the state's case rested entirely on Olivia's credibility to find Petitioner guilty as to five counts of lewd and lasicious battery in violation of §800.04(4) Fla.Stat.

The detectives testified to recording four controlled phone calls inbetween Olivia and Petitioner during the police investigation. When the four CDs of the calls were introduced in evidence defense counsel said:

> "There have been transcripts made of the phone calls. I have listened to them with defendant present. They accurately depict the conversations of the phone calls. Rather than the court listening to the phone calls I have no objection to the court having the transcripts."

In the state's case, Olivia had testified to sexual contact with the Petitioner. As to the defense case, detective Raschke testified that nothing sexual occurred and Petitioner denied having any sexual contact with both girls. A Child Protective Service employee Shulman testified that she examined Olivia but found no evidence of sexual activity. DNA expert Brook's checked Olivia's jacket to see if he could find any DNA evidence. Olivia told police, Petitioner ejaculated in her mouth and she wiped her mouth on her sleeve. Brook's found nothing on the jacket.

The court noted" that Petitioner had stipulated that the transcripts of the phone calls were accurate and asked whether some conversations had been left out of the transcripts." Petitioner replied: "I don't think they are complete because the detective left things out on the transcripts"... There are things that I said or the girls said that were left out. The court finished its questioning and said "I want to listen to the tape". A CD of four recorded calls was played and when the CD finished playing, the court said "so far I haven't heard anything that's on these transcripts." I heard what appears to be "intercepted telephone conversation number four."

The court moved into chambers, and noted counsel for both sides were present. After conversation number two and three finished playing, the court

asked defense counsel if he was "waiving his client's presence for this"; Counsel replied: "Yes your honor." He said "he was ok sitting out in the courtroom."

The following occurred after the CDs finished playing:

THE COURT: Okay, do you have any other recordings?

MR. DURAN [the state]: I have the other phone calls.

MR. FUTERMAN [defense counsel]: You didn't want to hear the other phone calls, did you, Judge?

THE COURT: I want to hear everything he said because he said there were things he said that were not in the transcripts.

MR. FUTERMAN: I know what he is referring to. He is not talking about the validity of these cassettes. He is talking about the phone calls that were not recorded. He believes there were more controlled phone calls that have not been taped.

THE COURT: Okay. That's what he believes, not the veracity of those statements.

MR. DURAN: I can get detective Raschke on the phone.

THE COURT: He is telling me what his client thinks. That's attorney and judge talking. He has already made his point there were things said that were not on the tape. That concludes the hearing in-chambers. (Proceedings in-chambers were concluded).

THE COURT: For the record I listened to tapes [CDs] two and three in-chambers. In the courtroom I heard number four and agreed there was no need for me to listen to number one or the statement that was made by defendant so I did not listen to those.

III. Procedural History --

A. Mr. Oberwise's Criminal Sentence and Prior Litigation.

In 2009, Mr. Oberwise was convicted on all five counts of the second-degree in the circuit court of the Thirteenth Judicial Circuit. See Hillsborough County Case No.: 08-CF-000699-A.

On October 28th, 2009 the trial court imposed a sentence of 20 years in the Florida Department of Corrections; 15 years concurrent on counts one through four and five years imprisonment on count five, followed by ten years probation.

On appeal, Appellate counsel raised the following two issues:

1.) "Fundamental error occurred in this Bench trial when the trial court heard evidence in-chambers without Appellant being present and without ensuring that the Appellant personally waived his presence."

2.) "Fundamental error occurred when the trial court considered what it perceived to be Appellant's lack of remorse when fashioning the sentence."

On February 18th, 2011, the Appellate court per-curiam affirmed the "waiver" claim [without jurisdiction] as to the first issue raised on appeal. 2009-5332; Oberwise v. State, 57 So.3d 857 (Fla. 2nd DCA 2011). Certiorari review was dismissed. Oberwise v. State, 61 So.3d 750 (Fla. 2011).

On May 20th, 2011, Mr. Oberwise filed a petition for federal habeas corpus relief under 28 U.S.C. § 2254 re-raising the same two issues raised on appeal in the Middle District of Tampa, Florida. see Case No.: 8:11-cv-01124-JSM-TGW. On February 17th, 2012 the District court dismissed ground one based on a procedural default and denied ground two for lack of merit. On March 5th, 2012 Application for "COA was filed in the Eleventh Circuit, case no.: 12-11188-E and reconsideration denied on December 26th, 2012. Certiorari was denied by this court on July 22nd, 2013.

Thereafter, Petitioner filed several other unsuccessful petitions and motions in state and federal court re-raising the "waiver" claim as to his first ground raised on direct appeal.

B. Mr. Oberwise's Newly Discovered Evidence

On January 22nd, 2019, Mr. Oberwise filed a successive motion for state post-conviction relief raising Brady and Giglio claims as newly discovered evidence. On June 27th, 2019 the trial court denied the claims because defendant was privy to what was said in the phone calls and was aware that there were recorded phone calls that may not have been transcribed or taped. The trial court believed defendant could have exercised due diligence and filed a rule 3.850 motion asserting Brady and Giglio claims within two years of April 13th, 2011, the date his judgment and sentence became final, rather then waiting well over 5 years to do so.

After the motion was denied on June 27th, 2019 Petitioner filed for rehearing arguing that it was impossible to have exercised due diligence because the relevant transcript was omitted from his criminal discovery similar to State v. Higgins, 788 So.2d 238, 241-43 (Fla. 2001) and he was actually innocence under this court's standard articulated in McQuiggin v. Perkins, 133 S.Ct 1924 (2013) and Schlup v. Delo, 513 U.S. 298 (1995) and had the authority to correct a manifest injustice. The trial court denied relief. On August 2nd, 2019 the clerk for Florida's Second District Court of Appeal opened a new case. 2019-2939.

While the Appellate proceeding were pending, Petitioner filed a motion to the trial court on January 29th, 2020 for the state to produce the transcript of exculpatory information. On March 13th, 2020 the state released phone calls one, two and three along with transcripts disclosed in the criminal discovery. On April 13th 2020 the court ordered the state to produce this transcript of exculpatory information within 45 days.

After the 45 days expired, Petitioner filed a Motion for Default on June 9, 2020 for the state not producing the transcript to what the trial court believed to be phone call four. On July 30th, 2020 the trial court held a telefonic hearing where the state failed to produce the relevant transcript and the court did not

enter a final order finding the state in default. The Second District Court of Appeal affirmed and rehearing/enbanc was denied on July 24th, 2020. A Notice to Invoke Discretionary Review was filed in the Florida Supreme Court and a mandate issued on August 12th, 2020. On August 18th, 2020, Certiorari was dismissed.

C. Petitioner's Application For Leave To File A Successive Petition Under 28 U.S.C. § 2244

On or about March 5th, 2017, Mr. Oberwise filed a federal habeas petition in the United States District Court for the Middle District of Florida. On April 21st, 2017, the district court issued an order finding that Mr. Oberwise petition was second or successive, and that it therefore lacked the jurisdiction to hear it without prier authorization from the Eleventh Circuit.

From May 2017 to March 31st, 2018 several unsuccessful applications for leave to file a second or successive habeas corpus petition were filed in the Eleventh Circuit. Petitioner found his new claims through similar cases the Eleventh Circuit had quoted within it's May 31st, 2017 order [see Case No.: 17-11985] e.g., Lambrix, 776 F.3d 789, 793 (11th Cir. 2015) and Mills, 101 F.3d 1369, 1371 (11th Cir. 1996) that cited Brady and Giglio to dismiss his application for leave to file a second or successive petition.

Petitioner discovered the "factual predicate" of his "new facts" [newly discovered evidence] in March 2018 by reviewing several prior unsuccessful applications for leave and applying the Brady principles against the trial record to learn that exculpatory testimony in a transcript had been withheld from his trial.

From March 31st, 2018 to approximately November 15th, 2019 several more unsuccessful applications for leave were filed in the Eleventh Circuit. e.g., In re Edward Oberwise, 2018 U.S. App. Lexis 21508 (11th Cir. 2018)(dismissing claims of actual innocence).

On December 12th, 2019 the Eleventh Circuit dismissed Mr. Oberwise's successor application finding that Mr. Oberwise previously relied on retroactive case of Teague v. Lane, 489 U.S. 288 (1989) and claims of actual innocence under Brady and Giglio that were presented in a prior application. 28 U.S.C. § 2244(b)(1).

D. The Eleventh Circuit Rulings Below

On December 12th, 2019, the Eleventh Circuit dismissed Mr. Oberwise's successor application in Case No.: 19-14593. The court found that Mr. Oberwise previously relied on Teague v. Lane, 489 U.S. 288 (1989) in his August 2018 application which was dismissed. The court also rejected Mr. Oberwise's Brady/Giglio claims of actual innocence he raised in several other prior applications that were either denied or dismissed.

The court relied on the statutory text of Section 2244(b)(1) that provides "a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. 28 U.S.C. § 2244(b)(1)."

On May 31st, 2017, in a concurring opinion, Judge Rosenbaum wrote separately because he continues to believe that the interpretation in re Baptiste, 828 F.3d 1337 (11th Cir. 2016) prohibits the panel from considering a successive request for authorization to file a second or successive collateral claim even when a prior request for authorization raising the same claim was denied, is incorrect as a matter of law. See In re Jones, 830 F.3d 1295 (11th Cir. 2016)(Rosenbaum and Jill Pryor, JJ., concurring).

On April 13th, 2018 in a concurring opinion, Judge Martin describes Baptiste, 828 F.3d 1337 (11th Cir. 2016), which held that "the federal habeas statute requires us to dismiss a claim that has been presented in a prior application" to file a § 2255 motion. Id. at 1339. I have stated my view that Baptiste has no basis in the text of the habeas statute:

> Baptiste was construing . . . 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, § 2255 motions . . . are filed by federal prisoners and § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the Baptiste panel ruled that even though § 2244(b)(1) does not mention § 2255 motions, it applies to them anyway, since "it would be odd if Congress had intended to allow federal prisoners" to do something state prisoners can't do.

In re Clayton, 829 F.3d 1254, 1266 (11th Cir. 2016)(Martin, J., concurring). Here, Mr. Oberwise raises a claim under § 2254, not § 2255, which would seem to make Baptiste inapplicable. But the majority also relies on Baptiste for the proposition that § 2244(b)(1)'s requirement that claims presented "in a prior application" be dismissed includes both claims presented in prior motions for leave to file a second or successive application and claims presented in prior substantive habeas applications. As I've stated before:

> The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254 petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier request for certification filed in a court of appeals). Baptiste assumes that "motion" and "application" mean the same thing, even though Congress carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.

In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016)(Martin, J., dissenting). My colleagues have articulated other problems with Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016)(Rosenbaum and Jill Pryor, J.J., concurring).

I am concerned that Baptiste is blocking relief to prisoners who ask us to take a second look at their case after we get it wrong the first time. Nevertheless Baptiste is a binding precedent in this circuit, so Mr. Oberwise will not be allowed to present his case to a District Court for an examination of whether his sentence is legal.

REASONS FOR GRANTING THE WRIT

This case presents exceptionally rare circumstances that warrant the exercise of this Court's original habeas jurisdiction.

This Court's Rule 20.4(a) "delineates the standards under which" the Court will grant an original writ of habeas corpus, Felker v. Turpin, 518 U.S. 651, 665 (1996).

First, "the petitioner must show . . . that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). Second, "the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers." Id. (quoting 28 U.S.C. § 2242).[1]

This case satisfies both requirements.

I. Petitioner Cannot Obtain Adequate Relief In Any Other Form Or From Any Other Court.

AEDPA requires that a petitioner seeking to file a successive petition for a writ of habeas corpus first request authorization in the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A); see also 28 U.S.C. § 2244(b)(3)(B). Under § 2244(b)(3)(E), the denial of such authorization "shall not be the subject of a petition for rehearing or for a writ of certiorari." Thus, there is no way for Petitioner to ask the Eleventh Circuit to reconsider its order, nor is there any way for this Court to review the Eleventh Circuit's order by writ of certiorari.

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1 This Court's rules also require that the issuance of a writ "be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 20.1. There is no question that Petitioner's request for a writ of habeas corpus would be in exercise of this Court's appellate jurisdiction. See Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 100-01 (1807) (the Court's statutory authority to issue a writ of habeas corpus is "clearly appellate" because it involves "the revision of a decision of an inferior court"); Ex Parte Hung Hang, 108 U.S. 552, 553 (1883).

The aforementioned facts of this case indicate, Mr. Oberwise's evidence of actual innocence. His claims of actual innocence under Brady and Giglio have never been fairly adjudicated in state court and federal courts have refused to address it.

As this Court has recognized, however, § 2244(b)'s gatekeeping mechanism does not deprive this Court of its authority to entertain original habeas petitions. Felker, 518 U.S. at 660-61. The exercise of that authority provides the appropriate and the only avenue for resolving the case on the merits. Indeed as described above, this case presents the exceedingly rare circumstance in which there is no realistic possibility that this issue will arive at this court in any other posture (such as through appeal of an initial § 2254 petition), and this Court's habeas jurisdiction is thus the only way that the Court can correct the Eleventh Circuit's erroneous decision.

II. Exceptional Circumstances Warrant The Exercise Of This Court's Habeas Jurisdiction.

This case presents a rare confluence of circumstances surrounding Mr. Oberwise's convictions. This petition asks the Court to consider whether a prisoner's actual innocence or otherwise, satisfies the gatekeeping requirement of 28 U.S.C. § 2244(b)(2)(B)(ii) for filing of a second or successive petition for writ of habeas corpus, and thus whether AEDPA perserved the "miscarriage of justice" exception recognized in McQuiggin v. Perkins, 569 U.S. 383, 392-93 (2003) to excuse any potential procedural bar. Additionally, this petition asks the Court whether the petitioner's second or successive proceedings rendered the Teague claim previously unavailable for purposes of § 2244(b)(2)(A).[2]

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[2] This Court is not bound by the restrictions in U.S.C. § 2244(b)(1),(2) when exercising its habeas jurisdiction. Felker, 518 U.S. at 663 (leaving the question open and stating that the restrictions "certainly inform our consideration of original habeas petitions").

In the latter part of the petitioner's argument this petition asks the Court to consider whether the state's prior time bar ruling on newly discovered evidence was contrary to this Court's AEDPA standards under actual innocence. These questions along with recent and prior rulings of the State and Appellate panel for the Eleventh Circuit has resulted in conflict with the decisions of this Court.

If it were not for the application of Baptiste. Mr. Oberwise's violation of constitutional rights would have been fully explored and he would have been freed from custody. While other prisoners from all other circuits had a federal forum to resolve the merits of their case. Prisoners who like the Petitioner had the misfortune of being convicted without access to a federal forum, some will be forced to carry out their unconstitutional convictions and sentence. These exceptional circumstances warrant the exercise of this Court's appellate authority provided to it by Article III, §2 with respect to resolving these critical questions. See Felker, 518 U.S. at 661-62.

III. This Court Should Resolve the Issue of Whether 28 U.S.C. §2244(b)(2)(B)(ii) Permits a Habeas Petitioner to File a Successive Habeas Petition Based on a Claim of Actual Innocence

A. Uncertainty Among the Eleventh Circuit

Prior to AEDPA, it was clear to the circuit courts that a fundamental miscarriage of justice occurred when a petitioner was actually innocent of the crime, see Schlup v. Delo, 513 U.S. 298, 324-27 (1995). As for the latter, a petitioner needed to show that, "in light of new evidence no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928, 1935 (2013). Stated differently, actual innocence "means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998).

AEDPA's statutory language has since caused uncertainty among the Eleventh Circuit as to the continuing viability of McQuiggin. With regard to

second or successive petitions, 28 U.S.C. § 2244(b)(2)(B)(ii) states that "a claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (emphasis added).

1. This Court's Decision In McQuiggin

In McQuiggin this Court focused on the "fundamental miscarriage of justice" exception, a doctrine that had previously been applied to allow a habeas petitioner "to pursue his constitutional claims . . . on the merits not-withstanding the existence of a procedural bar to relief" where the petitioner makes "a credible showing of actual innocence." 133 S.Ct. at 1931; see also Schlup v. Delo, 513 U.S. 298, 316-17 (1995)(noting that a petitioner seeking habeas relief carry less of a burden when their convictions are the result of unfair proceedings and the actual innocence threshold standard applies than when they have been convicted after a fair trial). Because Mr. Oberwise's unpreserved "waiver" claim had been raised on appeal despite the placement of a procedural bar and new evidence of innocence shows the state withheld exculpatory testimony from it's key witness in a transcript from the defense support reasons why the actual innocence exception applies to this case. The gravity of these errors bears on the weight of his McQuiggin claim.

2. The New Evidence Collectively Establishes Mr. Oberwise's Actual Innocence.

Mr. Oberwise seeks an available remedy under McQuiggin to review his claim of actual innocence on the merits. He argues that his constitutional rights were violated when he was denied a Confrontation and Compulsory process for the production of exculpatory testimony where the omissions in a purported transcript demonstrates his actual innocence.

Mr. Oberwise asserts that a transcript to what the trial court believed

to be phone call four contained omissions of exculpatory testimony of the state's key witness, Olivia that was not available during the criminal proceedings. See Hillsborough County Case No.: 08-CF-000699-A. In January 2020 Mr. Oberwise filed a motion for the state produce records, specifically, what the trial court believed to be phone call four that was not part of the criminal discovery for review of exculpatory information. On or about March 13th, 2020 the trial court issued an order for the state to disclose the transcript within 45 days. On May 29th, 2020 the state defaulted in producing the relevant transcript of exculpatory information.

Had this particular transcript been available to the defense, Defense counsel would have called Detective Raschke as a material witness to give favorable testimony that nothing sexually occurred in between Olivia and Mr. Oberwise as to the exculpatory materials within Olivia's prior testimony in the transcript to the phone call he witnessed during his police investigation. The inability of the defense to call Raschke to give favorable testimony essentially denied the defense impeachment evidence and precluded Mr. Oberwise's fabrication or set-up defense where the progression of trial would have been different. Additionally, Olivia would have also given favorable testimony that nothing sexually transpired as to the exculpatory materials within her prior testimony and further details about the events that had unfolded, relevant evidence on what was said or missing in testimony where the factfinder could draw inferences regarding her credibility at trial. The factfinder did not consider the weight of the trial evidence and importance of Olivia's testimony to make any credibility determinations at trial. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Olivia's testimony was essential to the state's case. Without her testimony and given the trial evidence constitutes vital, powerful evidence as to her credibility.

Mr. Oberwise's new evidence namely Olivia's prior testimony omitted in a pre-trial transcript withheld facts that nothing sexually occurred and would have been deemed material as to guilt or innocence. The state's case rested entirely on Olivia's testimony to prove the elements of Mr. Oberwise's charges beyond a reasonable doubt. Jackson, 443 U.S. at 314-15. The state failed to establish through Olivia's testimony the element of penetration or union beyond a reasonable doubt. See § 800.04(4) Fla. Stat.; Ross v. Jones, 2016 U.S. Dist. Lexis

125868 (11th Cir. 2016).

The omissions of Olivia's prior testimony in the withheld transcript raises sufficient doubt about Mr. Oberwise's guilt to establish his innocence as would be required to grant habeas relief based on an actual innocence claim. Schlup, 513 U.S. at 314-15; see also United States v. Agurs, 427 U.S. 97, 108 (1976).

As to the latter part, Mr. Oberwise could not have been convicted without the assistance of counsel at a critical stage of trial, absent a valid waiver. United States v. Timmreck, 441 U.S. 780, 783 (1979) quoting Johnson v. Zerbst, 304 U.S. 458, 466-69 (1938).

In sum, Mr. Oberwise would have been acquitted and at a retrial.

This Court should grant Mr. Oberwise's petition for writ of habeas corpus to decide whether a petitioner's innocence enables the petitioner to file a second or successive petition for relief on the basis of a constitutional claim that, "if proven and viewed in light of new evidence and evidence as a whole," § 2244(b)(2)(B)(ii), would establish such innocence.

3. The McQuiggin exception did not survive AEDPA

This Court can find that the non-disclosure in contravention of Brady v. Maryland, 373 U.S. 83, 87 (1963) and actual innocence claim is new evidence not raised or could have been raised in the original section 2254 motion before the district court and should not be barred under section 2244(b)(1).

Mr. Oberwise can not meet McQuiggins requirements of AEDPA because the Eleventh Circuit denied his application of actual innocence under Brady and Giglio in error. Since application and motion were misinterpreted to mean the same. Baptiste, 828 F.3d at 1339. The res-judicata rule is at odds with the application process. Felker, 518 U.S. at 654. So, Mr. Oberwise will not be permitted leave to present his new claims in the District Court for a determination on the merits.

The question is not whether the doctrine of stare decisis binds the Eleventh Circuits precedent conclusions on this point. But if it dictates a different result here.

In the past, there has other similarly situated prisoners' who faced great uncertainty as to the Baptiste ruling below:

United States v. St. Hubert, 918 F. 3d 1174, 1209 (11th Cir. 2019)
In re Willis, 2018 U.S. App. Lexis 11893 (11th Cir. 2018)
In re Spivey, 2018 U.S. App. Lexis 28150 (11th Cir. 2018)
In re Hudson, 2018 U.S. App. Lexis 26516 (11th Cir. 2018)
In re Evans, 2018 U.S. App. Lexis 22733 (11th Cir. 2018)(see Lexis 5-6)
In re Colley, 2018 U.S. App. Lexis 25747 (11th Cir. 2018)
In re Holiday, 2018 U.S. App. Lexis 23009 (11th Cir. 2018)
In re Odom, 2018 U.S. App. Lexis 28179 (11th Cir. 2018)
In re Parker, 832 F. 3d 1250-51 (11th Cir. 2016)
Mack v. United States, 2016 U.S. Dist. Lexis 121648 (11th Cir. 2016)(see Lexis 29-30)

In all of these above cases, prisoners' lack counsel to advise them on how to proceed with this procedural challenge. Do they file requests for authorization to file a successive motion in the Eleventh Circuit with full knowledge that they will be denied and they will be precluded for seeking rehearing. In some of these prior cases, prisoners may have been raising newly discovered evidence where state courts had refused to fairly adjudicate their claims resulting in a conviction. At this point, a typical pro-se petitioner is unaware of what remedies are available and a search of Baptiste reveals the ruling had never been challenged in this court. But even in considering that a pro-se prisoner was aware of this available remedy would he be able to overcome another procedural hurdle and effectively present his case? Mr. Oberwise believes there are even more unpublished cases of Baptiste on this controlling issue which has lingered for far too long, making this Court's intervention especially appropriate.

4. This Court Should Review the Question of Whether the State Courts Denial to New Claims of Innocence as Untimely was Contrary to the AEDPA Standards Setforth in McQuiggin v. Perkins

Under Federal law, a claim for actual innocence can be the basis for considering a claim that is time-barred or procedurally barred. Mc Quiggin, 569 U.S. at 386.

The trial court denied Mr. Oberwise post-conviction motion on the belief that he could have exercised due diligence and filed a rule 3.850 motion asserting his Brady and Giglio claims within two years of April 13th, 2011 the date his judgment and sentence became final, see Fla.R.Crim.P. 3.850, rather than waiting well over 5 years to do so.

This Court has emphasized that "a petitioner who asserts a convincing actual innocence claim does not have to prove diligence to cross the federal courts threshold. id. at 399.

In the Perkins case, the petitioner who waited nearly six years from the date of the 2002 affidavit to file his petition, maintained that an actual-innocence plea can overcome AEDPA's one-year limitations period. The Court's decision supported his view, and decided that the petitioner could have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. The Court also noted that it has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, as the court notes, "failure to observe state procedural rules, such as filing deadlines. This Court further stated that, "sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.

With regard to a delay in filing the petition, the Perkins court stated, "A federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown. A petitioner invoking the miscarriage of justice exception "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup, 513 U.S. at 327. Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requiste showing. Taking account of the delay in the context of the merits of a petitioner's actual-innocence claim, rather than treating timeliness as a thres-

hold inquiry, is tuned to the exception's underlying rationale of ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." Herrera v. Collins, 506 U.S. 390, 404 (1993).

In Floyd v. Vannoy, 887 F.3d 214 (5th Cir. 2018) the district court granted habeas relief finding that Floyd had established actual innocence to overcome the statute of limitations where the state withheld favorable, material evidence, in violation of Brady. The Fifth Circuit found the District Court correctly applied AEDPA in finding the state courts unreasonably applied clearly-established federal law in denying post-conviction relief.

Mr. Oberwise's position is substantially similar to that of Floyd's where the state courts found his actual innocence claims time-barred. The distinguishable factor in Floyd's case is that he had an available remedy to a federal forum for relief. While the state courts considered Mr. Oberwise's claims time-barred he is without a federal remedy for a determination on the merits.

Failure to exercise this Court's habeas petition in these circumstances would lead to an "anomalous result." In particular if McQuiggin v. Perkins, were debatable among the lower courts', this Court would plausibly grant Certiorari and hold that McQuiggin's change of law could serve the purposes of successive petitions or motions of time-barred claims in state court.

On the other hand, prisoners' denied under Baptiste where a change of law is uniformly accepted by the Eleventh Circuit would be unavailable on second or successive federal habeas petitions while other actual innocence claims with a more controversial basis become available on second or successive federal habeas petitions.

There is no reason to believe that Congress intended to create such an unusual system of collateral review. Thus, the exercise of habeas jurisdiction in this unique instance, is "far from interfering with the accomplishment of Congress's objectives in the AEDPA that would assist in effectuating in a sensible fashion the system of collateral review Congress created for all actually innocent persons.

Accordingly, an original petition is the best and only procedural posture

by which the Court may decide whether prisoners' denied under Baptiste are serving unconstitutional conviction[s] and entitled for review. Mr. Oberwise is actually innocent and the exercise of this Court's habeas jurisdiction is eminently justified in this rare circumstance.

IV. This Court Should Review the Question of Whether a Teague Claim Filed After a Petitioner's Initial Habeas Proceeding was Previously Unavailable for the Purposes of 28 U.S.C. § 2244(b)(2)(A)

Section 2244(b)(2)(A) permits the circuit courts to grant leave to file a successive petition where a new rule of constitutional law made retroactive by this Court was previously unavailable at the time of a petitioner's first federal petition. A split has developed within the circuits as to what circumstances, if any, may be taken into account when a new rule is announced during or before a petitioner's initial habeas petition. This has resulted in inconsistent conclusions about whether a Teague claim was previously unavailable to the petitioner at the time of his initial § 2254 petition.

1. "Previously unavailable" claims are only those depending on a new rule not announced at the time of the initial habeas proceeding

The Eleventh Circuit feasibility standard only applies where this Court announces a new rule during the pendency of the initial habeas proceedings. In that instance, the Eleventh Circuit's feasibility standard asks the petitioner "to demonstrate the infeasibility of amending a habeas petition that was pending when the new rule was announced." In re Hill, 113 F.3d 181, 183 (11th Cir. 1997); see also In re Everett, 797 F.3d 1282, 1288 (11th Cir. 2015) ("If the new rule was announced while the original § 2254 petition was pending, the applicant must demonstrate that it was not feasible to amend his pending petition to include the new claim").

This does not extend to new rules announced before the initial habeas petitions. As the Eleventh Circuit explained here, it looks only to whether a

claim would have been "cognizable" at the time of the initial habeas proceedings, which is true at the time a new rule is announced regardless of whether it could be meritorious.

2. Precedent from other circuits makes it unclear whether the "previously unavailable" clause applies where the new rule predated initial habeas proceedings

For example, the Fourth and the Tenth Circuits relied on pre-AEDPA doctrine to define "previously unavailable" with a different variation. The Fourth Circuit draws its definition from the abuse of the writ doctrine, which "considered whether the applicant's new claims were available at the time of the most recent federal proceedings." See In re Williams, 364 F.3d 235, 239-40 (4th Cir. 2004). Accordingly, it took the concept of "previously" to mean "a successive [authorization] motion must present claims that rely, at least in part, on evidence or Supreme Court decisions that the applicant could not have relied on in his last [authorization] motion."

The Tenth Circuit has determined the "previously unavailable" clause to replace the "narrow requirements of the old test for cause" in the cause and prejudice test. See Daniels v. United States, 254 F.3d 1180, 1197-98 (10th Cir. 2001). It then followed this Court's definition of cause in Reed v. Ross, 468 U.S. 1 (1984), to define unavailability as "a constitutional claim so novel that its legal basis is not reasonably available prior to a change in law." Daniels, 254 F.3d 1180 (citing Reed, 468 U.S. at 16).

3. This Court Should Resolve the Split in the Circuits

Because the circuit courts' varied definitions and factors regarding the "previously unavailable" clause have caused critical discrepancies for successor applicants, and because this question is beyond this Court's reach by certiorari or appeal, this Court should take this opportunity to address the issue and resolve the split in the circuits.

4. Whether Mr. Oberwise's Claim is Teague Barred

In Teague, this Court held that new constitutional rules are retroactively applicable to cases on collateral review if they fall within one of two exceptions. First, rules that are substantive in nature — such as those that "place 'certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe'" - apply retroactively. 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)); Beard v. Banks, 542 U.S. 406, 411 n.3 (2004) ("Rules that fall within what we have referred to as Teague's first exception 'are more accurately characterized as substantive rules not subject to [Teague]'s bar'"). Second, rules that are procedural in nature apply retroactively if they are a "watershed rule" of criminal procedure. Teague, 489 U.S. at 311.

In Bousley, the Court further expanded upon the first exception, providing for the retroactive application of substantive rules. There, the Court explained that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct," including the example given in Teague of "decisions placing conduct beyond the power of the criminal law-making authority to proscribe," always apply retroactively. 523 U.S. at 620 (quoting Teague, 389 U.S. at 311); see also id. (recognizing that Teague's general bar on retroactivity "by its terms applies only to procedural rules").

The Court reiterated this exception in Schriro v. Summerlin, 542 U.S. 348 (2004), which recognized that retroactive effect must be given to "new substantive rules including decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id. at 351-52. "Such rules apply retroactively," this Court explained, "because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him." Id. (quoting Bousley, 523 U.S. at 620).

In re Winship, 397 U.S. 358, 361-64 (1970) a rule was held retroactively that the due process clause protects an accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged. id. at 364. see also Sandstrom v. Montana, 442 U.S. 510 (1979). The state relied on Olivia's testimony to find the elements of

penetration or union beyond a reasonable doubt. § 800.04(4) Fla. Stat. Without the defense having a complete discovery or disclosure of this particular transcript denied Mr. Oberwise the right to expose his side of facts by offering evidence to the factfinder for the proper evaluation of his credibility at trial. The state's failure to comply with their discovery requirements impeded the defense their ability to investigate the case, offer evidence, confront the prosecution's evidence and present a complete defense. Absent the cross-examination requirement of the state's key witness [Olivia] or the defenses in-ability to call favorable witnesses, the factfinder never had the opportunity to see and hear testimony or arguements from the defense and note any testimony that was missing to make any credibility decisions during trial.

The error undoubtedly affected Mr. Oberwise's constitutional right to a proper jury verdict. Sullivan v. Louisana, 113 S.Ct 2078, 2080-81 (1993) (holding the Due Process Clause and Sixth Amendment require that the factfinder determine beyond a reasonable doubt the facts necessary to establish each element of the offense). This Court could find a fundamental or structural defect in allowing the factfinder to convict Mr. Oberwise of an offense for which it had no defination. id. at 2083 (deprivation of the "basic protection" of having a factfinder make the requisite finding of guilt "unquestionably qualifies as a structural defect under Arizonia v. Fulminante, 499 U.S. 279 (1991)). See Harmon v. Marshall, 69 F.3d 963, 966-67 (9th Cir. 1995) and Nutter v. White, 39 F.3d 1154, 1157-58 (11th Cir. 1994).

Additionally, the right to counsel is one of the most basic protections afforded to criminal defendants, and there can be little doubt that a rule mandating that all persons accused of serious crimes, regardless of their means, have the assistance of counsel in their defense constitutes a "new procedure" without which the likelihood of an accurate conviction is seriously dimished. Prevatte v. French, 459 F. Supp. 2d 1305, 1365-66 (11th Cir. 2006).

Without a valid "waiver" to counsel at a critical stage of [Confrontation] at trial, Mr. Oberwise's trial resulted in a fundamental defect. The witness testimony was critical to the state's case to find guilt beyond a reasonable doubt. At a retrial, the state is without the benefit of the witness testimony and transcript to the tape recording where this case inherently results in a complete fundamental

miscarriage of justice. United States v. Timmreck, 441 U.S. 780, 783 (1979) quoting Johnson v. Zerbst, 304 U.S. 458 (1938).

Under the second exception of Teague, the Court limited the scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished," noting that it was "unlikely that many such components of basic due process have yet to emerge." Teague, 489 U.S. at 313. In Brady v. Maryland, 373 U.S. 83, 87-88 (1963) this Court's concerned focus was to ensure that the judge or jury determinations of guilt beyond a reasonable doubt were not contrived through a prosecutor withholding of material information favorable to the defendant. Matthew v. Johnson, 201 F. 3d 353, 361-62 (5th Cir. 2000).

Given the expert testimony and trial evidence, the witness [Olivia's] prior testimony would have been different from her trial testimony to show that nothing sexually occurred between Olivia and Mr. Oberwise to demonstrate by clear and convincing evidence that Mr. Oberwise was actually innocent of his offenses. See Everett, 797 F. 3d at 1290. This Court can find that the witness prior testimony in the transcript "seriously diminished the likelihood of obtaining an accurate determination of guilt. Butler v. Mckellar, 494 U.S. 407, 416 (1990) (covering both the accuracy-enhancing procedural rules limiting the scope of the second exception). Without this particular transcript defense counsel had no questions to confront this witness or a favorable witness to call that would have enhounced the accuracy of trial. The witness [Olivia]'s prior testimony in the transcript denied Mr. Oberwise's right to be represented by counsel which this Court in Saffle v. Parks, 494 U.S. 484, 495 (1990) viewed as the paradigmatic example of a rule falling within Teague's second exception.

The transcript of Olivia's prior testimony was previously unavailable and is unavailable which can be considered as new evidence. Nevertheless, Mr. Oberwise's Teague argument was dismissed to the extent that it was raised in a prior successive application and barred by Baptiste, 828 F. 3d at 1339-40.

CONCLUSION

This petition for a writ of habeas corpus should be granted, or, alternatively, transferred to the district court for a hearing and determination.

If this Court finds the Petition insufficient for review than Mr. Oberwise respectfully requests to be represented by the "Appointment of Counsel" for a fair hearing and determination based on his "Actual Innocence."

Respectfully submitted,

/s/ Edward D. Oberwise

Edward D. Oberwise #T67476
Taylor Correctional Institution
8515 Hampton Springs Road
Perry, Florida 32348