No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

QINARD COLLINS,
Petitioner,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether – in a case where (1) the prosecution's theory was based on "shaken baby syndrome" but (2) there has now been a sea change in the medical community, which now questions the reliability of "shaken baby syndrome" – a freestanding claim of actual innocence is cognizable in a 28 U.S.C. § 2254 proceeding.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, QINARD COLLINS, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on April 22, 2020 (A-4)[1] (rehearing *en banc* denied on June 25, 2020). (A-3).

D. CITATION TO OPINION BELOW

Collins v. Sec'y, Fla. Dep't of Corr., 809 Fed. Appx. 694 (11th Cir. 2020).

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. STATUTORY PROVISION INVOLVED

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

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of

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

> 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

On April 2, 2001, the Petitioner called 911 to report that he found his ten-month-old son face down between the mattress and the crib gasping for air. The Petitioner promptly began CPR until paramedics and police arrived and took over the scene. Upon arrival the paramedics found the child was not breathing and had no pulse. CPR was continued, an IV was started, and the child was transported to Flagler Hospital in St. Augustine, Florida. Shortly thereafter, the child was pronounced dead.

The Petitioner was subsequently charged with first-degree murder and aggravated child abuse of his son. Pursuant to the medical examiner's conclusion, the prosecution alleged that the child died as a result of "shaken baby syndrome."[2] The prosecution gave its notice of intent to seek the death penalty, but on August 8, 2003,

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[2] During his deposition, the medical examiner stated that "the head injury in this case and the eye injury is . . . classic for shaken baby syndrome." (A-231). The indictment alleged that the child died as a result of "hitting and/or shaking and/or striking." (A-94).

the Petitioner – pursuant to a plea deal – entered a plea of *nolo contendere* to a lesser-included offense of second-degree murder and was sentenced to thirty years' imprisonment. (A-15). Notably, during the sentencing hearing, both a mitigation expert and the Petitioner himself told the court that the Petitioner did not commit any intentional act to hurt his child (i.e., the plea agreement in this case was a "best interest" plea because defense counsel told the Petitioner that he did not have any defense at trial – but the Petitioner did not admit guilt). (A-150, A-157-158).

Following the conviction in this case, the Petitioner began to research the basis for the medical examiner's conclusion regarding the cause of death in this case. The Petitioner – from prison – reached out to several medical experts to ascertain the validity of "shaken baby syndrome" (hereinafter "SBS"). In 2009 and 2010, the Petitioner received reports from several of these medical experts[3] who confirmed that the child's death was misdiagnosed as SBS. Specifically, the medical experts explained that between the time of the child's autopsy in 2001 and the medical experts' reports in 2009 and 2010, the medical community "shifted" away from the school of thought that a child's symptoms of brain swelling and bleeding to the retina and surface of the brain, such as those exhibited in the case, was automatic evidence of SBS, and the medical community now recognizes that there can be other causes or explanations for those symptoms unrelated to SBS. In this case, the medical experts opined that the

[3] Dr. Harold Buttram, Dr. Michael Innis, Dr. Robert Mendelsohn, and Dr. Peter Stephens (hereinafter "medical experts").

child's injuries and death were the result of complications of the child's prematurity, including short bowel disease and a vitamin K deficiency[4] – and were *not* the result of any intentional acts committed by the Petitioner. (A-20).

After learning of this new evidence/development in medical science, the Petitioner sought postconviction relief in state court, but his state postconviction motion was denied as untimely. (A-18). The Petitioner then filed a § 2254 petition. (A-81). In his § 2254 petition, the Petitioner sought to present a "freestanding" claim of "actual innocence."

On June 6, 2017, the district court held an oral argument on the Petitioner's § 2254 petition. (A-25).[5] Following the oral argument, the district court issued an order dismissing the Petitioner's § 2254 petition. (A-15).

The Eleventh Circuit Court of Appeals subsequently granted a certificate of appealability on the following issues:

> 1. Whether Mr. Collins has made sufficient showing of actual innocence to overcome any procedural bar to his § 2254 petition, and, if so, whether this Court should remand for an evidentiary hearing or decide the question on the record as it stands;

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[4] The record establishes that the child was extremely sick from the moment he was born. In fact, the child lived for 305 days, and 277 of those days were spent in the hospital. (A-32).

[5] The district court explained that it granted oral argument "[b]ecause Petitioner's actual innocence claim appeared to have arguable substance, and to allow Petitioner to develop the record for appellate review . . . ." (A-16).

> 2. Whether a freestanding claim of actual innocence is cognizable in a § 2254 proceeding; and
>
> 3. Whether Mr. Collins in entitled to relief on his claim of actual innocence or, in the alternative, a remand to the District Court for an evidentiary hearing.

(A-13). However, the Eleventh Circuit ultimately affirmed the dismissal of the Petitioner's § 2254 petition based on circuit precedent that freestanding claims of actual innocence are not cognizable in § 2254 proceedings:

> Collins concedes that the district court was bound by our precedent holding that a freestanding actual innocence claim in a non-capital § 2254 petition is not cognizable. So are we. "[O]ur precedent forecloses habeas relief based on a prisoner's assertion that he is actually innocent of the crime of conviction 'absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" *Raulerson* [*v. Warden*], 928 F.3d [987,] 1004 [(11th Cir. 2019)] (quoting *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002)); *see also Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1272 (11th Cir. 2010) ("[T]his Court's own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases."); *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("[O]ur precedent forbids granting habeas relief based upon a claim of actual innocence, anyway, at least in non-capital cases."). Because Collins did not allege an independent constitutional claim, his freestanding actual innocence claim is not cognizable and the district court properly denied it.

(A-7-8). On June 25, 2020, the Eleventh Circuit denied the Petitioner's rehearing *en banc*. (A-3).

H. REASON FOR GRANTING THE WRIT

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

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

> Baker asserts a freestanding claim of actual innocence. The Supreme Court has left open the question of whether such a claim is cognizable under federal law and, if so, whether the claim may be raised in a non-capital case. *See House v. Bell*, 547 U.S. 518, 554-555 (2006). *We have assumed that freestanding innocence claims are cognizable* and have held that "'a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.'" *Osborne v. District Atty's Office for Third Judicial Dist.*, 521 F.3d 1118, 1130-1131 (9th Cir. 2008) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (*en banc*)).

(Emphasis added).

In contrast, in *Cunningham v. District Attorney's Office for Escambia County*, 592 F.3d 1237, 1272 (11th Cir. 2010), the Eleventh Circuit Court of Appeals stated that "this Court's own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases." (citing *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007)). In the instant case, the Eleventh Circuit relied on this precedent and affirmed the dismissal of 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).[6]

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 the district court below during the June 6, 2017, oral argument, 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

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

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.

(A-63-64). 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 light of the medical community's complete shift regarding the validity of SBS, the Petitioner has made a sufficient showing of actual innocence. In support of his argument, the Petitioner relies on *Del Prete v. Thompson*, 10 F. Supp. 3d 907 (N.D. Ill. 2014). In *Del Prete*, the defendant was convicted of murder in state court based on the prosecution's SBS theory. The defendant subsequently sought federal habeas relief arguing that he was "actually innocent," relying on new evidence relating to SBS. The district court granted an evidentiary hearing and thereafter granted relief:

> The Court evaluates the new evidence together with the evidence presented at Del Prete's trial and the other evidence presented at the evidentiary hearing to determine whether any reasonable juror who heard all of it could find Del Prete guilty beyond a reasonable doubt. The

answer to that question is a rather resounding no.

The prosecution relied heavily on Dr. Flaherty's expert testimony to convict Del Prete, and the trial court cited to Flaherty's conclusions several times in denying Del Prete's motion for acquittal notwithstanding the verdict. At trial, Flaherty opined that I.Z.'s injuries were unequivocally the result of abusive head trauma and that the onset of her symptoms would have occurred immediately following the abuse. It was undisputed that Del Prete was the only adult at the daycare when I.Z. collapsed, and thus Flaherty's testimony led to only one possible perpetrator of I.Z.'s injuries: Del Prete. At the evidentiary hearing, however, experts for both sides flatly rejected various aspects of Flaherty's testimony and undercut her conclusions regarding I.Z.'s collapse and eventual death.

Significantly, a majority of both sides' experts opined that I.Z. had injuries that existed prior to her collapse on December 27, 2002. Barnes and Hedlund agreed that I.Z. had subdural chronic collections that were at least two to four weeks old as of December 27, and perhaps older. Other witnesses on both sides agreed. The only witness who disputed the existence of the chronic subdural collections was Dr. Rorke-Adams, who said there were none. Her testimony in this regard was not credible or persuasive. It would require a finding that all of the radiologists (experts for both sides, as well as treaters) who saw those collections were dead wrong. Rorke-Adams waved away all of this evidence with a sweep of her hand. Her explanation for doing so did not hold water, and her credibility was otherwise severely damaged by her erroneous claim, previously discussed, that I.Z.'s brain had contusions and lacerations. Just as importantly, the testimony of the other witnesses who testified about the chronic collections was credible and persuasive.

If I.Z.'s chronic subdural hemorrhage was caused by earlier abusive trauma, as respondent's experts Jenny and Hedlund opined, this evidence points away from Del Prete as the perpetrator. There is no evidence in the record, old or new, to suggest that she was in any way responsible for any prior abusive trauma or that even that she had any prior opportunity to abuse I.Z. Among other things, there was no evidence that Del Prete had been alone with I.Z. prior to December 27, a date on which daycare center owner Gleanne Kehr was out of town. Thus the testimony of Jenny and Hedlund directly undercuts Dr. Flaherty's statement at the criminal trial that Del Prete was the perpetrator.

In addition, the testimony by Dr. Jenny and others, including Dr. Harkey at the reopened hearing, regarding lucid intervals travels in tandem with the testimony regarding I.Z.'s chronic subdural hemorrhage and further points away from Del Prete as a perpetrator of abusive trauma. These witnesses testified that an infant victim of head trauma

can have a lucid interval after being subjected to head trauma. Though Jenny added that the victim would not appear "normal," that is contradicted to some extent by her own testimony that I.Z. had, in fact, suffered abusive trauma weeks earlier, when considered in light of the relative absence that I.Z. displayed symptoms of significant neurological problems in the period preceding December 27. And even if one disregards this, there is evidence of behavior by I.Z. at the daycare center that would suggest that whatever trauma she experienced came earlier and from elsewhere.

One way or another, however, the evidence regarding lucid intervals directly undercuts the prosecution's theory at Del Prete's criminal trial. At that trial, Dr. Flaherty testified that because I.Z. was conscious and responsive on the morning of December 27, she must have been neurologically intact at that time. She concluded from this that I.Z.'s collapse had to have been the result of abusive head trauma inflicted later that day, during a period when Del Prete was her only caregiver. This conclusion is unsupportable, given the testimony regarding lucid intervals. Indeed, Dr. Jenny went one step further, stating directly that one can no longer assume that the last caregiver with an infant who dies of abusive head trauma must have been the perpetrator. Dr. Harkey's testimony at the reopened hearing was of similar import.

In sum, this evidence, considered as a whole, undercuts Dr. Flaherty's testimony that Del Prete was the perpetrator of abusive head trauma. And Dr. Flaherty aside, the testimony of respondent's own experts at the hearing points away from Del Prete as having criminal responsibility for I.Z.'s death. That is so given Jenny and Hedlund's testimony about prior abusive head trauma; the absence of evidence of a prior opportunity by Del Prete to inflict such trauma; the existence of evidence of other possible perpetrators; and the evidence regarding lucid intervals, all of which the Court has already discussed. This evidence gives rise to abundant doubt, not merely reasonable doubt, regarding Del Prete's guilt. Finally, even if one were to disregard all of this, the testimony indicating that even minor trauma could have caused bleeding from I.Z.'s chronic subdural hemorrhage and further injury would undermine a claim of criminal responsibility on Del Prete's part and further give rise to reasonable doubt regarding her guilt.

For these reasons, in light of the all of the evidence presented at Del Prete's trial and at the evidentiary hearing before this Court, the Court finds that Del Prete has established that it is more likely than not that no reasonable juror would have found her guilty of murder beyond a reasonable doubt.

The evidence offered by Del Prete's experts goes well beyond the

reasonable and logical inferences from the testimony by respondent's experts that the Court has discussed; it points to a cause for I.Z.'s death unrelated to any abuse by anyone. As should be clear from the preceding discussion, the Court need not adopt this testimony as persuasive in order to find in Del Prete's favor on her miscarriage-of-justice claim. That said, this testimony further reinforces the Court's determination that no reasonable juror who heard all of the evidence could find Del Prete guilty of murder beyond a reasonable doubt.

Respondent argues that the opinions of certain of Del Prete's experts that I.Z.'s collapse and death did not result from abusive head trauma are unpersuasive in describing the events of December 27 and explaining I.Z.'s collapse and death. This argument fundamentally misunderstands the nature of the inquiry that the Court undertakes. Though the Court is not prepared to say that these experts' opinions describe what actually happened, that is not the question the Court is called upon to consider. As the Supreme Court has stated, "[t]he court's function is not to make an independent factual determination about what likely occurred"; rather, a court in this situation "assess[es] the likely impact of the evidence on reasonable jurors." *House [v. Bell*], 547 U.S. [518,] 538, 126 S. Ct. [2064,] 2077 [(2006)].

To be fair, the Court is unsure whether the causation testimony offered by Del Prete's experts would be sufficient to carry the day in a trial in which she bore the burden of proof.[FN10] But that is not the issue either. The inquiry that the Court undertakes takes into account the requirement of proof beyond a reasonable doubt. The applicable standard does not require Del Prete to prove her alternative theory by a preponderance of the evidence. Rather, it requires her to show by a preponderance that no reasonable juror, hearing all of the evidence both old and new and properly instructed on the prosecution's burden of proof, would have found her guilty beyond a reasonable doubt – "or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *Id.* The standard likewise does not require the Court to accept the credibility of the prosecution's witnesses at the underlying trial, *see id.* at 539-40, because a miscarriage-of-justice claim "requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *Id.* at 539. Given the applicable standard, the Court finds that the testimony by Del Prete's experts regarding an alternative cause for I.Z.'s collapse and death, though perhaps not altogether persuasive in its own right, reinforces to the determination the Court has made that no reasonable juror, hearing all of the evidence including that from Del Prete's experts, could find her guilty beyond a reasonable doubt.

[FN10: Among other things, the Court is not persuaded that the

> experimental testing cited by Dr. Prange definitively establishes that shaking alone cannot cause injuries of the type that I.Z. suffered. But it is at least equally important that, as respondent's expert Dr. Rangarajan testified, science cannot even yet establish an injury threshold. This, in addition to the other more recent developments in this area previously discussed, arguably suggests that a claim of shaken baby syndrome is more an article of faith than a proposition of science.]

Del Prete, 10 F. Supp. 3d at 955-958 (some footnotes omitted). In the order below, the district court cited *Del Prete* and "acknowledge[d] that federal courts are now being tasked with dealing with th[e] issue" of whether SBS has been debunked as a valid theory of prosecution. (A-20).

In the instant case, the Petitioner's plea of *nolo contendere*[7] was induced by a false theory of prosecution that has since been rejected by the medical community.[8] At the time of the child's death, the medical community believed that there was only one explanation for the types of symptoms suffered by the child in this case (i.e., intentional infliction of injury or death by SBS), but the medical community has now acknowledged that there are *many* explanations for these types of symptoms (such as preexisting conditions or illness or accidental falls) – many of which do not involve any intentional or criminal conduct.[9] In the context of a confession in a SBS prosecution,

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[7] The Petitioner was forced to enter the plea in this case in order to avoid the death penalty (for a crime he did not commit).

[8] *Cf. Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969) (holding that in order for a guilty plea to be valid, the plea must be knowing, intelligent, and voluntary).

[9] In 2001, the American Academy of Pediatrics published an official paper

Judge Posner has explained:

> Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. He had shaken Joshua, albeit gently; but if medical opinion excluded any other possible cause of the child's death, then, gentle as the shaking was, and innocently intended, it must have been the cause of death. Aleman had no rational basis, given his ignorance of medical science, to deny that he had to have been the cause.

Aleman v. Village of Hanover Park, 662 F.3d 897, 906 (7th Cir. 2011). Given the sea change that has occurred in the medical community, the Petitioner should be afforded an opportunity to present his "actual innocence" claim in federal court.

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

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

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stating that only SBS can explain the types of symptoms suffered by the child in this case. (A-32). Just eight years later – in 2009 – the American Academy of Pediatrics completely receded from the 2001 paper and acknowledged that there are many possible causes for the symptoms in question (i.e., causes that do not involve criminal conduct). (A-33).

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

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

I. CONCLUSION

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

Respectfully Submitted,

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