No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ZANE D. CROWDER,
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

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A. QUESTION PRESENTED FOR REVIEW

Whether the new evidence relied upon by the Petitioner – which admittedly is impeachment evidence – meets the gateway actual innocence standard set forth in *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

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, ZANE D. CROWDER, 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 April 21, 2022. (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. STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") gives a state prisoner one year to file a federal habeas petition, starting from "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Court held that actual innocence, if proved, can overcome AEDPA's one-year statute of limitations for filing habeas petitions, thereby allowing a district court to consider the merits of procedurally barred constitutional claims.

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

G. STATEMENT OF THE CASE

In 2011, the Petitioner was convicted of capital sexual battery and lewd or lascivious molestation. The state trial court sentenced the Petitioner to life imprisonment. The Petitioner appealed the judgment and the Florida First District Court of Appeal affirmed the convictions and sentence. *See Crowder v. State*, 78 So. 3d 537 (Fla. 1st DCA 2012).

The Petitioner subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In the rule 3.850 motion, the Petitioner raised a newly discovered evidence/"actual innocence" claim – to wit: that the forensic interviewer and case coordinator for the Child Protection Team in this case failed to follow established guidelines when conducting the interview of the alleged victim (i.e., an interview that was introduced as substantive evidence during the Petitioner's trial). On February 4, 2019, the state postconviction court summarily denied (i.e., without an evidentiary hearing) the Petitioner's rule 3.850 motion. On appeal, the Florida First District Court of Appeal affirmed the denial of the Petitioner's rule 3.850 motion. *See Crowder v. State*, 289 So. 3d 870 (Fla. 1st DCA 2019).

Thereafter, the Petitioner filed a petition pursuant to 28 U.S.C. § 2254. (A-50). The § 2254 petition was filed beyond the applicable statute of limitations, but in his § 2254 petition, the Petitioner raised his "actual innocence" claim as a gateway to the additional and otherwise-barred constitutional ineffective assistance of counsel claims

that were raised in the petition.[2] On July 15, 2021, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be dismissed. (A-7). Then, on August 31, 2021, the district court adopted the magistrate judge's report and recommendation and dismissed the Petitioner's § 2254 petition. (A-4 & A-6).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On April 21, 2022, a single circuit judge denied a certificate of appealability, simply stating that the Petitioner "failed to make the requisite showing." (A-3).

[2] In the § 2254 petition, the Petitioner raised the following Sixth Amendment ineffective assistance of counsel claims: (1) defense counsel rendered ineffective assistance of counsel by failing to object when the state trial court allowed the video of the Child Protection Team interview to go to the jury room during deliberations and (2) defense counsel rendered ineffective assistance of counsel by failing to present an expert at trial to explain to the jury that the Child Protection Team interview conducted in this case was improper and therefore unreliable.

H. REASON FOR GRANTING THE WRIT

The question presented is important.

In his § 2254 petition, the Petitioner raised an "actual innocence" claim. Specifically, the Petitioner explained that Linda Khal was the forensic interviewer and case coordinator for the Child Protection Team in this case. Ms. Khal played an integral role in the case – she interviewed the alleged victim at the Gulf Coast Kid's House and her recorded interview was subsequently played for the jury as substantive evidence during the trial (pursuant to section 90.803(23), Florida Statutes). Ms. Khal's interview was the basis for the charges in this case.

In early 2017, the Petitioner was contacted by Donna Forbes. Ms. Forbes informed the Petitioner that her husband had previously been charged with capital sexual battery in Escambia County. Ms. Forbes further informed the Petitioner that (1) Ms. Khal was also the forensic interviewer of the alleged victim in her husband's case and (2) after her husband was charged, Ms. Khal was deposed and during her deposition, Ms. Khal admitted under oath that she did not always follow the guidelines in the handbook created by the Florida Department of Health for Child Protection Teams. Ms. Forbes told the Petitioner that it was learned in her husband's case that state funding for the Gulf Coast Kid's House is dependent upon interviewers following the guidelines in the Florida Department of Health handbook for Child Protection Teams. Finally, Ms. Forbes explained to the Petitioner that after it was revealed that Ms. Khal had failed to follow the required guidelines, the capital sexual battery charge pending against her husband was dropped. An affidavit from Ms. Forbes confirming

this information was attached to the Petitioner's state postconviction motion (and the Petitioner also attached other documents from the *Forbes* case to his state postconviction motion – i.e., the transcript of Ms. Khal's deposition and the North Florida Comprehensive Services for Children contract). (A-65-96).

Just as in the case involving Ms. Forbes' husband, Ms. Khal failed to follow the required guidelines when interviewing the alleged victim in the Petitioner's case. The Petitioner, however, was unaware of Ms. Khal's failure to follow the required guidelines prior to being contacted by Ms. Forbes. If the Petitioner had been aware of this information prior to trial, he would have taken the same steps pursued by Ms. Forbes' husband and he submits that just like that case, the charges in his case would have been dropped. Alternatively, had the Petitioner been aware of this information prior to trial, the Petitioner would have used this information to exclude the admission of Ms. Khal's child hearsay evidence and/or used the information to impeach her testimony (and had the child hearsay been excluded and/or had Ms. Khal been impeached, there is a reasonable probability that the jury would have returned not guilty verdicts).[3]

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[3] It is well-documented that improper interview techniques can lead to false accusations. For example, in *Why Children's Suggestibility Remains a Serious Concern*, the authors state the following:

> Given the difficulties of identifying particularly suggestible children and of training children to resist suggestive influences, it is important for interviewers to avoid the use of suggestive techniques. Although this seems obvious, the interviewers studied in many different countries tend to over-use closed-ended, specific, and potentially leading questions and other "risky" practices. For example, one study examined seventy-two

In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), this Court held that a petitioner who satisfies the actual innocence gateway standard may have otherwise time-barred claims heard on the merits. For the reasons set forth above, the Petitioner meets the *McQuiggin* "actual innocence" standard, and therefore he requested the district court to consider the merits of the ineffective assistance of counsel claims raised in his § 2254 petition.

> interviews conducted by experienced interviewers in Sweden. Despite universal recommendations to begin interviews with general, open-ended or "invitational" questions that promote fairly spontaneous, narrative responses, thirty-five of these interviews (forty-nine percent) began with a suggestive question. Throughout the interviews, the interviewers relied on suggestive and "option-posing" (forced-choice) questions, which accounted for fifty-three percent of the interviewers' utterances, and elicited fifty-seven percent of the information from children. Similarly, fifty three percent of the utterances of a comparison sample of United States interviewers and thirty-five percent of Israeli interviewers' utterances were suggestive or option-posing. Only six percent of the Swedish interviewers' utterances were invitational. Corresponding figures for Israeli and United States interviewers were similar, at two percent and five percent, indicating remarkable consistency across cultures with different interview selection and training procedures. Other studies of United States interviewers have documented similar problems. An analysis of forty-two United States sexual abuse interviews found that general, open-ended questions account for ten percent or fewer of all interviewer questions, and that specific, yes-or-no-format questions account for two-thirds of all questions. In addition, interviewers sometimes (twenty-nine percent of the time) completely fail to establish rapport and often (seventy-one percent of the time) fail to establish interview ground rules by telling children that they should feel free to correct the interviewers and to answer that they do not remember or do not understand questions.

Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 Law and Contemporary Problems 127-148, 144-145 (Winter 2002) available at: https://scholarship.law.duke.edu/lcp/vol65/iss1/5 (footnotes omitted).

In the report and recommendation (which was adopted by the district court), the magistrate judge concluded that "Crowder has failed to show that it is more likely than not that any reasonable juror would have had reasonable doubt about Crowder's guilt if the jury had been presented with the 'newly discovered' impeachment evidence." (A-46). Undersigned counsel respectfully disagrees. Undersigned counsel recognizes that in *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992), this Court stated that newly discovered impeachment evidence will seldom establish actual innocence. But the Petitioner asserts that the impeachment evidence in this case is the rare exception.

In *Calderon v. Thompson*, 523 U.S. 538, 563 (1998), the Court described two circumstances in which new evidence, although removed from the crime and tending only to impeach, may nonetheless demonstrate a miscarriage of justice:

> we should have to assume, first that there was little evidence of rape apart from the informants' testimony, and second, that the jury accepted the informants' testimony without reservation. The former assumption is belied by the evidence recited above. The latter one is belied by the substantial impeachment evidence Thompson's attorney did introduce.

In contrast to *Thompson*, in the instant case, there was – in fact – *no evidence* of a crime apart from the alleged victim's testimony.

In this case, the alleged victim's testimony was presented to the jury several times pursuant to Florida's child hearsay statute. As explained below, the most important of these recitations was Ms. Khal's testimony to the jury regarding the alleged victim's allegations. Notably, if this case had involved an alleged adult victim, *none* of the hearsay statements would have been admissible. In *Barnes v. State*, 576 So. 2d 439, 439 (Fla. 4th DCA 1991), the Florida appellate court explained the danger

of allowing child hearsay to be presented through law enforcement officials:

> A witness's prior consistent statement may not be used to bolster his trial testimony. The rationale prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility" on the witness's testimony. When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, *the danger of improperly influencing the jury becomes particularly grave.*

(Emphasis added) (citations omitted). As in *Barnes*, Ms. Khal was viewed by the jury as "disinterested and objective and therefore highly credible." Thus, her testimony was the most impactful testimony presented to the jury. The magistrate judge overlooked this point in the report and recommendation.

In support of his argument, the Petitioner relies on *Kopko v. State*, 577 So. 2d 956, 960-961 (Fla. 5th DCA 1991), wherein the state appellate court recognized the danger in allowing child hearsay statements to be repeated by more than one witness:

> [Section 90.803(23), Florida Statutes,] itself suggests at least one repetition is permissible by providing that the victim's hearsay statements are admissible if the child testifies. By having the child testify *and then by routing the child's words through respected adult witnesses, such as doctors, psychologists, CPT specialists, police and the like, with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony*. It is worrying to see, in a case such as this one, with virtually no evidence to corroborate the testimony of either the alleged victim or the alleged abuser, that only the victim's version of events is allowed to be repeated *through different (professional) witnesses.*

(Emphasis added) (citations omitted) (footnote omitted). Ms. Khal was the forensic interviewer and case coordinator for the Child Protection Team in this case. Thus, she

is the *exact* type of witness (i.e., "CPT specialists") referenced in the *Kopko* opinion.[4]

As argued in his § 2254 pleadings, had the Petitioner known about the new evidence concerning Ms. Khal's failure to follow the required guidelines when conducting the interview of the alleged victim, the Petitioner would have used this information to exclude the admission of Ms. Khal's child hearsay evidence and/or used the information to impeach her testimony (and had the child hearsay been excluded and/or had Ms. Khal been impeached, there is a reasonable probability that the jury would have returned not guilty verdicts). Notably, in *United States v. Bagley*, 473 U.S. 667, 676 (1985), this Court held that "[i]mpeachment evidence, however, as well as exculpatory evidence, falls within the *Brady*[5] rule," as such evidence is "evidence favorable to an accused, … so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." (footnote added). The Petitioner maintains that the new evidence in this case fundamentally call into question the reliability of his conviction.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to further clarify the standard for determining whether new evidence – which admittedly is impeachment evidence – satisfies the gateway actual innocence standard set forth in *McQuiggin*. The issue in this case is important and has

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[4] Consistent with the reasoning in *Kopko* – and contrary to the magistrate judge's conclusion (A-46) – Ms. Khal's testimony was far more prejudicial than the child hearsay testimony provided by Terrie Webb and Abe Levi.

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

the potential to affect numerous federal habeas cases nationwide. Accordingly, for the reasons set forth above, the Petitioner asks the 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 (pursuant to the applicable certificate of appealability standard). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

I. CONCLUSION

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

Respectfully Submitted,

/s/ Michael Ufferman

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