CAPITAL CASE

No. 21-5778

In the Supreme Court of the United States

JEFFREY GLENN HUTCHINSON,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether a court of appeals violates the statute governing appeals in habeas corpus proceedings, 28 U.S.C. § 2253(c), when it adopts the district court's ruling as its certificate of appealability analysis.

II. Whether a court of appeals may deny a certificate of appealability on an issue based on controlling circuit precedent, despite the existence of a circuit split on the underlying issue.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Eleventh Circuit's denial of a certificate of appealability (COA) is an unpublished order. App. at 1a.

JURISDICTION

On March 24, 2021, a single judge of the Eleventh Circuit denied a COA. App. at 7a. Hutchinson filed a motion for rehearing. On April 29, 2021, a three-judge panel of the Eleventh Circuit denied the rehearing. App. at 1a. On September 21, 2021, Hutchinson filed a petition for a writ of certiorari in this Court. The petition was

timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[1] This Court has jurisdiction. *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appeals in habeas corpus proceedings statute, 28 U.S.C. § 2253(c), provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

[1] This Court extended the deadline to timely file a petition for writ of certiorari from 90 days to 150 days due to COVID-19. *See* Order of March 19, 2020. The expanded time frame remained in place until July 19, 2021.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition seeks review of a decision from the Eleventh Circuit denying a certificate of appealability (COA) regarding the district court's denial of a Rule 60(b)(6) motion to reopen raising a gateway claim of actual innocence based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), to lift the time bar in his original habeas petition. Fed. R. Civ. P. 60(b)(6).

Facts of the murders and procedural history in state court

Hutchinson murdered his ex-live-in girlfriend, Renee Flaherty, and her three young children: Logan, Amanda, and Geoffrey. *Hutchinson v. State*, 882 So.2d 943, 948-49 (Fla. 2004). Hutchinson shot the four victims with his pistol-grip Mossberg shotgun, which was found inside the home on the kitchen counter. *Id.* at 948.

The jury convicted Hutchinson of four counts of first-degree murder with a firearm. *Hutchinson*, 882 So.2d at 948. Hutchinson waived his right to a penalty phase jury but presented mitigation to the trial judge at a bench penalty phase. *Id.* The trial court found two aggravating circumstances for the murders of Logan and Amanda: 1) previously convicted of another capital felony for the other murders of the other children, and 2) the victims were less than 12 years of age, but found three aggravating circumstances for the murder of Geoffrey Flaherty: 1) previously convicted of another capital felony for the other murders of the other children; 2) the victim was less than 12 years of age; and 3) the murder was heinous, atrocious, and cruel (HAC). *Id.* at 959. Hutchinson was sentenced to life imprisonment for the murder of the mother and to death for the murder of each child. *Id.* at 949.

The Florida Supreme Court affirmed the four convictions for first-degree murder and affirmed the sentences including the three death sentences in the direct appeal.

Hutchinson, 882 So.2d at 961. Hutchinson did not file a petition for writ of certiorari for the direct appeal in this Court.

In 2005, Hutchinson filed an initial 3.851 motion for postconviction relief in the state trial court. *Hutchinson v. State*, 17 So.3d 696, 699 (Fla. 2009). Following an evidentiary hearing on some of the claims, trial court denied the motion for postconviction relief. *State v. Hutchinson*, 2008 WL 8948638 (Fla. Cir. Ct. Jan. 3, 2008). The Florida Supreme Court affirmed the denial of postconviction relief. *Hutchinson*, 17 So.3d at 700.

In 2017, Hutchinson filed a successive 3.851 motion in the state trial court raising one claim based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), in the state trial court. The State filed an answer to the successive motion asserting that, under the Florida Supreme Court's controlling precedent of *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), *Hurst v. State* did not apply to Hutchinson because he waived his penalty phase jury. The state postconviction court summarily denied the successive postconviciton motion. The Florida Supreme Court affirmed the postconviction court's summary denial of the *Hurst* claim based on the waiver of the penalty phase jury. *Hutchinson v. State*, 243 So.3d 880, 881, 883 (Fla. 2018), *cert. denied*, *Hutchinson v. Florida*, 139 S.Ct. 261 (2018).

The issue of the Federal Bureau of Investigation's file that is the basis for the federal gateway claim of innocence being raised in this Court is also currently pending in the Florida Supreme Court. *Hutchinson v. State*, SC21-18.

Initial federal habeas proceedings

In 2010, Hutchinson's initial habeas petition was dismissed as untimely by the federal district court. *Hutchinson v. Florida*, 5:09-CV-261-RS, 2010 WL 3833921 (N.D.

Fla. Sept. 28, 2010). In 2012, the Eleventh Circuit affirmed the dismissal of the first habeas petition as untimely. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012) (refusing to apply equitable tolling based on attorney error).

Recent proceedings in the federal district court

On March 21, 2013, Hutchinson filed a *pro se* Rule 60(b)(6) motion to reopen his initial federal habeas case. (*Hutchinson v. State*, 3:13-cv-128-MW (N.D. Fla. Doc. #3). Five days later, on March 26, 2013, Respondent filed a motion to dismiss for lack of jurisdiction asserting the Rule 60(b)(6) motion was an unauthorized successive federal habeas petition. (Doc. #2). The federal district court originally dismissed the case for lack of jurisdiction. (Doc. #7).

On September 29, 2014, Hutchinson filed a motion for the appointment of counsel which Respondent filed a motion in support of, noting that Petitioner was entitled to federal habeas counsel under 18 U.S.C. § 3599 in this capital case. (Docs. #17, #18). On December 11, 2014, the district court appointed the Capital Habeas Unit of the Federal Public Defender of the Northern District of Florida (CHU-N) as federal habeas counsel to represent Hutchinson in federal court. (Doc. #23).

On January 7, 2015, the CHU-N filed a motion to amend the *pro se* Rule 60(b)(6) motion. (Doc. #25). The district court granted the motion to amend and held the case in abeyance to allow counsel to evaluate the case and motion. (Doc. #26). The district court set a deadline of December 17, 2015, for counsel to file any amended Rule 60(b)(6) motion. (Doc. #41). The district court then extended the deadline for counsel to file the amended motion until April 12, 2016. (Doc. #45). The CHU-N then moved for yet another extension of time to file the amended motion to reopen in federal court, which Respondent opposed. (Docs. #48, #49). The district court granted an indefinite extension until the CHU-N received public records from the State of Florida. (Doc.

#59). On June 23, 2016, the CHU-N filed a motion to compel production of Hutchinson's medical records from the Department of Veterans Affairs, which the district court granted. (Docs. #60, #61).

On January 31, 2017, the CHU-N filed a motion for authorization to appear in state court to file a successive state postconviction motion raising a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). (Doc. #65). On February 15, 2017, Respondent filed an objection to federal habeas counsel appearing in state court as state postconviction counsel relying on *Harbison v. Bell*, 556 U.S. 180 (2009). (Doc. #68). The State also pointed out that any *Hurst* claim was entirely meritless because Hutchinson had waived the penalty phase jury thereby waiving any Sixth Amendment right to any type of jury findings and that the Florida Supreme Court had consistently rejected *Hurst* claims when the defendant had waived a jury. (Doc. #68 at 2). On March 2, 2017, the district court granted the motion authorizing the CHU-N to appear in state court and stayed the case. (Doc. #69).

Then, nearly a year after the Florida Supreme Court had denied him any *Hurst* relief based on his waiver of a penalty phase jury, on April 24, 2019, the federal district court ordered CHU-N to file a status report. (Doc. #72).[2] Then, nine months later, on February 7, 2020, the district court ordered yet another status report. (Doc. #75). On February 25, 2020, the district court lifted the stay and allowed CHU-N three additional months, until May 26, 2020, to file the amended 60(b)(6) motion. (Doc. #77).

On May 26, 2020, over five years after being appointed, the CHU-N filed the amended Rule 60(b)(6) motion. (Doc. #78). The amended Rule 60(b)(6) motion asserted a claim based on *Martinez v. Ryan*, 566 U.S. 1 (2012), asserting that prior federal habeas counsel's ineffectiveness resulted in unfairness in the initial habeas

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[2] The Florida Supreme Court issued its mandate from its decision denying Hutchinson *Hurst* relief on May 14, 2018, and this Court denied the petition for writ of certiorari review on October 1, 2018.

proceedings, the missed the AEDPA deadline due to state postconviction counsel's negligence, the "constitutional doubt" from the Florida Supreme Court denying Hutchinson *Hurst* relief due to his waiver of a penalty phase jury were extraordinary circumstances under Rule 60(b).

The amended Rule 60(b)(6) motion also asserted a gateway claim of innocence claim based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), asserting that *McQuiggin v. Perkins* also applied to motions to reopen under Rule 60(b) rather than only initial habeas petitions citing a Third Circuit case. (Doc. #78 at 22-24 citing *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152 (3d Cir. 2017)). The amended Rule 60(b)(6) motion then recited the evidence of innocence. (Doc. #78 at 26-36). The gateway claim of innocence relied mainly on a FBI investigation file regarding a bank robbery that occurred in a nearby town about a month before these murders, which was obtained by CHU-N via Freedom of Information Act requests made in 2017. (Doc. #78 at 27, 31). But that bank robbery evidence was mainly argued in the motion to reopen as impeachment of the State's voice identification witnesses at trial, Mr. and Mrs. Adams, rather than used to establish actual innocence. In one paragraph in the motion to reopen, there was a short, vague argument about innocence based on the FBI file notation regarding the bank tellers' description of the bank robbers, which was that they were both wearing ski masks and one had a shotgun, which was somewhat similar to Hutchinson's description of the two masked intruders who he asserted murdered the four victims as one of his defenses at trial. (Doc. #78 at 31). The gateway innocence claim also referred to the DNA tests admitted at trial but then listed various items from the scene that were not DNA tested but did not refer to any new actual DNA test results. (Doc. #78 at 32-35). CHU-N argued that the Rule 60(b)(6) motion was not a successive habeas petition because it did not raise any constitutional claims, despite the motion's heavy reliance on *Hurst* for over than twenty pages. (Doc. #78 at 64-65). The CHU-N also

asserted that the *pro se* Rule 60(b)(6) motion, which was filed over a year after *McQuiggin v. Perkins* was decided, and the amended Rule 60(b)(6) motion, which was filed nearly six years after the appointment of counsel, were filed within a reasonable time. (Doc. #78 at 65-67).

Seventeen days later, on June 12, 2020, the Secretary filed a response to the amended Rule 60(b)(6) motion. (Doc. #79). The Secretary argued: 1) the district court lacked jurisdiction over the case because the amended Rule 60(b)(6) motion was actually a successive habeas petition and that any claim of innocence based on *McQuiggin v. Perkins,* raised after the original habeas case was closed, must be raised in an authorized successive habeas petition, not in a Rule 60(b)(6) motion; 2) that the Rule 60(b)(6) motion was untimely because it was not filed within 90 days of the new decision; 3) that *Martinez v. Ryan* was not an extraordinary circumstance warranting reopening a closed habeas case under the controlling Eleventh Circuit precedent citing *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014); and 4) the claim of innocence was meritless, after detailing the evidence of Hutchinson's guilt. The CHU-N filed a reply. (Doc. #81). Nearly seven months after the reply, on January15, 2021, the district court denied the amended Rule 60(b)(6) motion and also denied a COA. (Doc. #82); App. at 8a. While the district court discussed the law of Rule 60(b) motions and successive habeas petitions, the district court did not address its jurisdiction, despite the Respondent's assertion that the district court lacked jurisdiction.

Recent proceedings in the Eleventh Circuit regarding the COA

On March 2, 2021, Petitioner Hutchinson, represented by CHU-N, filed an application for a COA. On March 4, 2021, the Secretary responded arguing that a COA should be denied because: 1) the Rule 60(b)(6) motion was untimely and opposing counsel was not diligent in obtaining the FBI file that was the basis for the gateway

claim of innocence; and 2) the gateway claim of innocence was meritless. On March 24, 2021, a single judge of the Eleventh Circuit denied a COA. App. at 7a.

On April 4, 2021, the CHU-N filed a motion for reconsideration of the order arguing the single-judge order violated *Buck v. Davis*, 137 S.Ct. 759 (2017). The motion for reconsideration relied on *Wainwright v. Sec'y, Fla. Dep't of Corr.*, No. 20-13639 (11th Cir. Mar. 29, 2021), which had granted a COA on a claim of innocence and the Third Circuit case of *Satterfield v. Dist. Att'y of Phila.*, 872 F.3d 152, 162 (3d Cir. 2017), in support of an argument that the issue was debatable. The motion also sought to have a three-judge panel hear the motion for reconsideration of the COA citing *Hodges v. Att'y Gen. of Fla.*, 506 F.3d 1337, 1339 (11th Cir. 2007), and Rule 27-1(d). The motion for reconsideration, however, did not address the Secretary's assertion in response to the application for a COA regarding the untimeliness of the Rule 60(b)(6) motion in any manner. Nor did the motion for reconsideration address the massive evidence of Hutchinson's guilt including his taped confession to the 911 operator or explain how the "new" evidence regarding the earlier bank robbery undermined any of that evidence. On April 29, 2021, a three-judge panel of the Eleventh Circuit denied the motion for reconsideration and denied a COA. App. at 1a.

Current petition in this Court

On September 21, 2021, Hutchinson, represented by CHU-N, filed a petition for a writ of certiorari in this Court raising a gateway claim of innocence based on a FBI file of a bank robbery that occurred approximately a month prior to the murders in this case.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER A COURT OF APPEALS VIOLATES THE STATUTE GOVERNING APPEALS IN HABEAS CORPUS PROCEEDINGS, 28 U.S.C. § 2253(c), WHEN IT ADOPTS THE DISTRICT COURT'S RULING AS ITS OWN CERTIFICATE OF APPEALABILITY ANALYSIS.

Petitioner Hutchinson asserts the Eleventh Circuit violated the statute governing appeals in habeas corpus proceedings, § 2253(c), when it adopted the district court's order, including the district court's merits ruling, as the reason for denying a certificate of appealability (COA). Pet. at 5. There are three threshold issues. The first threshold issue is whether the district court had jurisdiction to rule on the Rule 60(b)(6) motion or to rule on the COA. Hutchinson filed a Rule 60(b)(6) motion seeking to reopen his initial habeas proceedings that had been closed over a decade before raising two claims including a gateway claim of actual innocence based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013). But the Rule 60(b)(6) motion was an unauthorized successive habeas petition over which the district court lacked jurisdiction. Once the initial habeas review is closed, any claim of innocence cannot be raised as a gateway claim. Instead, at that point, any innocence claim must be raised in an authorized successive habeas petition under 28 U.S.C. § 2244(b)(2)(B). In other words, a gateway claim of innocence may not be raised in a Rule 60(b)(6) motion. The second threshold issue is whether the single judge's order denying the COA was replaced by the three-judge panel's order denying a COA. The adoption of a merits analysis that Petitioner points to as the error, occurred in the single judge's order, not in the panel's order. But contrary to that view, the single judge's order was not somehow incorporated *sub silentio* into the subsequent three-judge panel's order. The third threshold issue is the timeliness of the Rule 60(b)(6) motion. The motion was not filed within a reasonable time as required by the applicable rule and this Court's decision *Gonzalez v. Crosby*, 545 U.S. 524 (2005). The motion to reopen was filed many years after *McQuiggin v. Perkins* was

decided as well as years after the appointment of new federal habeas counsel. Furthermore, there is no conflict between this Court's COA jurisprudence and the panel's order denying COA. There is also no conflict among the circuits courts. This Court should deny review of this claim.

The Eleventh Circuit's denial of COA

A single judge of the Eleventh Circuit denied a COA "for the same reason the district court denied his amended Rule 60(b) motion and motion for a COA in its thorough and detailed twenty-six page order." App. at 7a. It is this statement from the single-judge order that opposing counsel raises as error in the petition. Pet. at 5-6.

Then, a three-judge panel of the Eleventh Circuit denied the motion for rehearing and refused to grant a COA. App. at 1a. The panel wrote briefly to respond to the dissent regarding granting a COA on the gateway claim of actual innocence based on *McQuiggin v. Perkins*, concluding that the district court's denial of the actual innocence claim was "not debatable" and did not "deserve further encouragement." *Id.* at 1. The panel noted that under this Court's and Eleventh Circuit's precedent, a change in decisional law is normally insufficient to create the extraordinary circumstances warranting reopening a closed case under Rule 60(b)(6). *Id.* at 2 (citing *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014), and *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (noting that a motion to reopen a closed federal habeas case under Rule 60(b)(6), which requires a showing of extraordinary circumstances, "will rarely occur in the habeas context")). The panel acknowledged the Third Circuit's decision disagreeing with the Eleventh Circuit's decision in *Arthur* but noted that their own precedent was the "binding precedent" in their circuit. The panel also noted that under Eleventh Circuit precedent, no COA should issue where the claim is foreclosed by existing circuit precedent because reasonable jurists will follow the existing precedent. *Id.* at 2 (citing

Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015), and *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)).

Regarding the gateway claim of innocence, the panel also concluded that given the "overwhelming evidence" their confidence in the outcome of the trial was "solid and not debatable." App. at 1a at 2-3. The panel then recounted the facts of the four murders and the evidence of guilt presented at trial. *Id.* at 3-4 (quoting *Hutchinson v. State*, 17 So.3d 696, 698 (Fla. 2009)). The panel noted that Hutchinson's shotgun was the murder weapon; he had gunshot residue on his hands; the remains of little Geoffrey on his leg; and he was still connected to the 911 call when the deputies arrived shortly after confessing to the 911 operator that he murdered the family. *Id.* at 4. The panel then discussed the new evidence of innocence consisting of evidence that Hutchinson's friends robbed a bank with masks and a shotgun, concluding it was "not strong" evidence of innocence. *Id.* The panel concluded that Hutchinson had "not made a debatable showing of actual innocence" and was not entitled to a COA. *Id.* at 5.[3]

Threshold issues

There are three threshold issues. The first threshold issue is jurisdictional. The Secretary in the response to the Rule 60(b)(6) motion to reopen filed in the district court asserted that the district court lacked jurisdiction over the case. (Doc. #79 at 38-40). The Secretary argued that both the claim based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and the gateway claim of innocence based on *McQuiggin v. Perkins* were improperly being raised in a Rule 60(b)(6) motion instead of properly being raised in

[3] There was a dissent from the panel's decision denying rehearing. Judge Jordan would have granted a COA based on a circuit split, not on the facts of Hutchinson's innocence claim. App. at 6a (citing *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152 (3d Cir. 2017)). There was no discussion at all of the strength of the innocence claim in the dissent. So far, a state trial court judge, a federal district judge, and two appellate court judges, for a total of four judges, have all rejected the innocence claim on the merits. And the issue is currently pending before the Florida Supreme Court. *Hutchinson v. State*, SC21-18.

an authorized successive habeas petition. Hutchinson filed both his *Martinez v. Ryan* claim and his *McQuiggin v. Perkins* claim in the district court without first obtaining authorization from the Eleventh Circuit to file a successive habeas petition. 28 U.S.C. § 2244(b)(3)(A). Without such authorization, the district court lacks subject matter jurisdiction over the claim. *Burton v. Stewart*, 549 U.S. 147, 157 (2007) (holding that a district court must dismiss a petition for lack of jurisdiction, if the habeas petitioner has not received authorization from the court of appeals before filing a second or successive petition in the district court); *Bowles v. Sec'y, Fla. Dep't of Corr.*, 935 F.3d 1176, 1180 (11th Cir. 2019) (affirming the district court's dismissal of an unauthorized successive habeas petition for lack of jurisdiction citing *Burton*), *cert. denied*, *Bowles v. Inch*, 140 S.Ct. 26 (2019) (No. 19-5672); *cf. United States v. Lee*, 792 F.3d 1021, 1023 (8th Cir. 2015) (holding a Rule 60(b) motion raising a claim based on *Martinez v. Ryan* was an unauthorized successive habeas petition).

Once the initial habeas case is closed, any gateway claim of innocence under *McQuiggin v. Perkins* cannot be raised in a Rule 60(b)(6) motion. Rather, at that point, any innocence claim must be raised in an authorized successive habeas petition under § 2244(b)(2)(B). The statute requires both diligence and new facts of innocence that "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." § 2244(b)(2)(B)(ii). *McQuiggin v. Perkins* simply does not apply once the initial habeas case is closed, only § 2244(b)(2)(B) applies. The case of *McQuiggin v. Perkins* was an initial habeas petition, not a Rule 60(b)(6) motion to reopen. Allowing a gateway claim of innocence under *McQuiggin v. Perkins* claim to be raised years after the initial habeas petition was ruled upon undermines the prohibition on successive habeas petitions and the AEDPA statute of limitations and sometimes the law of the case

doctrine. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012) (affirming the dismissal of the initial habeas petition as untimely and refusing to apply equitable tolling). The gate for a gateway claim of innocence is closed once the initial habeas case is closed. Hutchinson must meet the requirements of § 2244(b)(3)(A) and § 2244(b)(2)(B), not the requirements of *McQuiggin v. Perkins* and Rule 60(b)(6). And without prior authorization, a district court lacks jurisdiction to rule on any innocence claim or on a COA.

Contrary to this Court's precedent, the district court seems to have just assumed its jurisdiction for the sake of convenience. But this Court has explicitly rejected the concept of "hypothetical jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998); *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1288-89 (11th Cir. 2012) (dismissing the petition for lack of jurisdiction noting that this Court has "explicitly rejected the theory of 'hypothetical jurisdiction'" citing *Steel Co.*). The district court was not entitled to just assume jurisdiction.[4]

This Court would have to decide whether the Rule 60(b)(6) motion was a successive habeas petition over which the district court lacked jurisdiction to rule upon. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts."); Fed. R. Civ. P. 12(h)(3) (providing: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). This Court would have to determine whether the district court even had jurisdiction over the *McQuiggin v. Perkins* claim or jurisdiction to rule on the COA. Jurisdiction is a threshold issue in this case.

A second threshold issue concerns which order denying COA is actually at issue. Opposing counsel is seeking review of the single judge's original denial of COA which

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[4] Theoretically, the Eleventh Circuit panel had jurisdiction over the case if it treated the Rule 60(b)(6) motion as an application for authorization to file a successive habeas petition and then turned the gateway claim of innocence into a § 2244(b)(2)(B) claim of innocence. But the panel did not do so.

contained the language adopting the district court's "thorough and detailed" order, not review of the three-judge panel's denial of COA, which did not contain such language. The petition states that the three-judge panel's order "did not amend or replace" the original single judge's order. Pet. at 5. Typically, a subsequent decision by a larger number of judges is considered to have replaced the earlier decision entirely, unless explicitly noted otherwise. The panel's order denying COA in this case certainly did not explicitly adopt the earlier single-judge order. The petition does not cite anything in support of the notion that the reasoning of a single judge order is incorporated *sub silentio* into a subsequent three-judge panel's order. Petitioner is seeking review in this Court of an order that is no longer in play. This Court would have to determine if the panel's order denying a COA incorporated the prior single judge's order in any manner or entirely replaced that prior order.

The third threshold issue is the timeliness of the Rule 60(b)(6) motion. While none of the lower courts addressed the timeliness of the Rule 60(b)(6) motion in their respective COA analysis, Respondent asserted in both the district court and the Eleventh Circuit that the Rule 60(b)(6) motion to reopen was untimely. A Rule 60(b)(6) motion must be filed within a "reasonable" time. Fed. R. Civ. P. 60(c)(1). This Court has emphasized the importance of filing Rule 60(b) motions within a "reasonable" time in federal habeas cases to prevent the federal courts from being faced with "an avalanche of frivolous postjudgment motions." *Gonzalez v. Crosby*, 545 U.S. 524, 534-35 (2005). This Court encouraged district courts to strictly enforce the time limits on filing Rule 60(b)(6) motions to reopen in federal habeas cases to prevent that avalanche undermining the AEDPA's goal of finality. *see also Christeson v. Roper*, 574 U.S. 373, 380 (2015) (noting to obtain relief based on a Rule 60(b) motion, a habeas petitioner "must" demonstrate the motion's timeliness).

A motion to reopen a closed habeas case based on a new decision from this Court should be filed within approximately three months of that new decision. *Ryan v. Schad*, 570 U.S. 521, 523 n.2, 526 n.3 (2013) (concluding that a motion to vacate an appellate decision based on *Martinez v. Ryan* which had been decided approximately four months before the motion was filed, was dilatory and was not filed within a reasonable time absent an explanation for the delay). Several circuits have held that when a Rule 60(b)(6) motion is based on a new Supreme Court decision, it must be filed within a few months of that new decision, not years later.[5]

This Court decided *McQuiggin v. Perkins* on May 28, 2013, yet the CHU-N waited until May 26, 2020, to file the amended Rule 60(b)(6) motion in this case. (Doc. #78). Seven years is not a reasonable time to wait to file a Rule 60(b)(6) motion, as required by Rule 60(c)(1). And, while federal habeas counsel was not appointed until 2014, shortly after *McQuiggin v. Perkins* was decided, federal habeas counsel still waited over five years after their appointment to file the motion to reopen. Using either starting date, the Rule 60(6)(b) motion was filed late.

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[5] *See Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016) (concluding that a Rule 60(b)(6) motion filed 2½ years after the new Supreme Court decision was untimely); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (concluding a Rule 60(b)(6) motion based on a new Supreme Court decision was not brought within a "reasonable time" because it was filed nearly 8 months after the new decision); *Pruett v. Stephens*, 608 Fed. Appx. 182, 186 (5th Cir. 2015) (concluding a Rule 60(b)(6) motion based on a new Supreme Court decision that was filed more than 19 months after the new decision was untimely); *Clark v. Davis*, 850 F.3d 770, 782 (5th Cir. 2017) (concluding a Rule 60(b)(6) motion based on a new Supreme Court decision that was filed nearly 16 months after the new decision was untimely); *Beatty v. Davis*, 755 Fed. Appx. 343, 346 (5th Cir. 2018) (concluding a Rule 60(b)(6) motion based on a new Supreme Court decision that was filed nearly 29 months after the new decision was untimely); *Williams v. Kelley*, 854 F.3d 1002, 1009 (8th Cir. 2017) (concluding a Rule 60(b)(6) motion based on a new Supreme Court decision that was filed years after the new decision and on the eve of an execution was untimely); *cf. Cox v. Horn*, 757 F.3d 113, 116 (3d Cir. 2014) (observing that a Rule 60(b)(6) motion based on a new Supreme Court decision, that was filed roughly 90 days after the new decision was filed within a reasonable time); *but see Bynoe v. Baca*, 966 F.3d 972, 986 (9th Cir. 2020) (concluding a Rule 60(b)(6) motion based on a new decision of the Ninth Circuit that was filed within a year of the new decision was timely and finding the petitioner was diligent). Unfortunately, the Eleventh Circuit does not seem to enforce any time limits on filing Rule 60(b)(6) motions based on new Supreme Court decisions despite this Court urging lower courts to do so in *Gonzalez*.

There is no point discussing the propriety of issuing a COA regarding a clearly untimely Rule 60(b)(6) motion. Because the Rule 60(b)(6) motion was itself untimely, all of the other underlying and associated issues, including these COA issues, are purely theoretical. While the panel did not address the timeliness of the Rule 60(b)(6) motion, this Court would have to do so.

In light of these three threshold issues, including a jurisdictional one, this Court should deny the petition.

No conflict with this Court's COA jurisprudence

There is no conflict between this Court's reading of § 2253(c) and the Eleventh Circuit's panel order denying a COA in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

In *Buck v. Davis*, 137 S.Ct. 759 (2017), this Court held that Fifth Circuit exceeded the limited scope of a proper COA analysis by engaging in a full consideration of the merits of the claim before denying a COA. The *Buck* Court discussed the COA standard. *Id.* at 772-75. The *Buck* Court stated that the COA inquiry "is not coextensive with a merits analysis." *Id.* at 773. At the COA stage, the only question is whether jurists of reason could disagree or conclude the issue deserves encouragement. This "threshold question should be decided without 'full consideration'" of the factual or legal bases of the claims. *Id.* A court making a COA determination must make only "an initial determination whether a claim is reasonably debatable." *Id.* at 774. There should only be a threshold inquiry into the underlying merits of the claim.

Opposing counsel trumpets the statement in *Buck* that a COA inquiry "is not coextensive with a merits analysis," as the core of his argument and the basis of his claim of error. Pet. at 5, 8. But coextensive means corresponding exactly. While a

COA analysis does not correspond "exactly" with a merits analysis, there is obviously substantial overlap with the two types of analyses because the same legal question is at issue and the same facts are involved. And that observation regarding the substantial overlap of any COA inquiry with a merits analysis is particularly true of a gateway claim of actual innocence under *McQuiggin v. Perkins*. There is simply no means of analyzing a claim of actual innocence, including a gateway claim of innocence, without comparing the evidence of guilt presented at trial in some detail with the new evidence of innocence, as both the district court did and the appellate panel did in this case. *House v. Bell*, 547 U.S. 518, 537 (2006) (explaining to be credible a gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial" quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). A preliminary COA inquiry into a gateway claim of innocence has to address the strength of the claim of innocence. Any *preliminary* analysis of an innocence claim will inevitably look much like a final conclusion regarding innocence.

The panel's merits analysis of the innocence claim does not conflict with *Buck*. There is no conflict between this Court's jurisprudence regarding COAs and the Eleventh Circuit's panel decision denying COA in this case.

No conflict with any other federal circuit court's COA jurisprudence

There is no conflict between the Eleventh Circuit panel's decision denying a COA in this case and that of any federal appellate court. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*,

500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no federal circuit court case holding analyzing a gateway claim of innocence by comparing the new evidence of innocence to the evidence of guilt presented at trial is a violation of *Buck*. Even the Third Circuit which allows *McQuiggin v. Perkins* gateway claims to be raised in Rule 60(b)(6) motions and which is the same circuit that opposing counsel relies upon to establish conflict, does not grant a COA when there has been no showing of innocence. *Miller v. Superintendent Frackville SCI*, 2019 WL 11813601, *1 (3d Cir. Jan. 23, 2019) (denying COA because petitioner "made no showing whatever that, 'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt'" citing *Schlup*, 513 U.S. at 329), *cert. denied*, *Miller v. Brittain*, 140 S.Ct. 465 (2019) (No. 19-5740). Hutchinson also has made no showing whatsoever that the earlier bank robbery, which his two friends were likely involved in, makes him innocent of these murders. The Paxton bank teller's description of the two bank robbers as wearing masks and having a shotgun is not even marginally relevant in a case with DNA evidence tying Hutchinson to the murders; Hutchinson's recorded confession to the 911 operator that he shot the family which was made within minutes of the murders; and Hutchinson's shotgun being definitively identified as the murder weapon.

The Third Circuit and the Eleventh Circuit do not disagree on whether a COA is warranted regarding a claim of innocence when there has been no showing of innocence.

There is no conflict between the Eleventh Circuit's decision denying COA and that of any federal circuit court of appeals. Because there is no conflict among the federal

circuit courts regarding a COA when there has been no showing of innocence, review should be denied.

COA grant rates in the circuits

Hutchinson's reliance on a study regarding the Eleventh Circuit's frequency of granting COAs in federal habeas cases is seriously misplaced. Pet. at 10 n.3 (citing Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 213 & n.198 (2021) (citing, in a footnote, Julia Udell, *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study* 7 (Dec. 24, 2019) (B.A. study, Columbia College), https://ssrn.com/abstract=3506320)). The study of COA grant rates compared the rate at which the Eleventh Circuit granted COAs with the rate at which the First Circuit granted COAs over a year and half time period from January 1, 2018, and September 30, 2019. The study found that the Eleventh Circuit granted a COA in 8.44% of non-capital habeas cases; whereas, the First Circuit granted a COA in 14.29% of all habeas cases. The study is comparing apples and oranges because it is comparing the grant rate in non-capital habeas cases, not all habeas cases, in one circuit with the grant rate of all habeas cases in another circuit.

The study, however, also noted that the Eleventh Circuit granted a COA in 58.3% of capital habeas cases. And the nearly 60% figure for grants of COAs in capital cases in the Eleventh Circuit, no doubt, includes cases where the capital habeas petitioner is seeking a COA regarding a successive habeas petition when he has already had initial habeas review or seeking a COA involving a Rule 60(b)(6) motion to reopen his initial petition, such as this case. It is quite natural for the grant rate to be lower in those types of cases, even in capital cases. If the COA grant rate excluded those types of cases and considered only the COA grant rate in initial capital habeas petition cases, the Eleventh Circuit's grant rate would be significantly higher than the 58% grant rate

for all capital habeas cases. The Eleventh Circuit's grant rate for COAs in initial habeas petition capital cases may well be over 90%.

Furthermore, the First Circuit's jurisdiction covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island, none of which have the death penalty. So, the only capital cases on the First Circuit's docket would be the rare Federal Death Penalty Act (FDPA) case. *See, e.g.*, *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020) (reversing, in a FDPA federal prosecution, the death sentence of the Boston Marathon Bomber based on pretrial publicity), *cert. granted*, 141 S.Ct. 1683 (2021). In contrast, the Eleventh Circuit's jurisdiction covers Alabama, Florida, and Georgia, all of which have the death penalty. Comparing the grant rate of a circuit court with a significant number of capital cases, such as the Eleventh Circuit, to a circuit court with a very modest number of capital cases, such as the First Circuit, is loading the dice. Capital cases require significantly more work for appellate courts due to the sheer size of the records involved. And, at least in the Eleventh Circuit, capital cases are more of a burden due to its policy of granting oral argument in nearly all initial review capital habeas cases. The Eleventh Circuit's grant rate should only be compared with other circuits with a similar number of capital cases. For these reasons, any reliance on such a study to support an argument that the Eleventh Circuit grants COAs significantly less than other circuits or less than Congress intended is misplaced.

There is no basis for granting certiorari review of this issue.

ISSUE II

WHETHER A COURT OF APPEALS MAY DENY A CERTIFICATE OF APPEALABILITY ON AN ISSUE BASED ON CONTROLLING CIRCUIT PRECEDENT DESPITE THE EXISTENCE OF A CIRCUIT SPLIT ON THE UNDERLYING ISSUE.

Petitioner Hutchinson asserts that a circuit court may not deny a COA if there is a circuit split on the underlying issue. Pet. at 10. There is no conflict between this Court's COA jurisprudence and the Eleventh Circuit's decision denying COA in this case. This Court has never hinted, much less held, that a circuit split is automatically sufficient to establish that a COA should be granted. Nor is there any conflict with any other federal appellate court. Opposing counsel cites to no circuit case holding that a COA is automatically warranted despite controlling circuit precedent on the underlying issue, based on a circuit split. Review should be denied.

Denial of a COA based on circuit precedent

The Eleventh Circuit caselaw holds that if there is binding circuit precedent on an issue, a COA should be denied.[6] The reasoning of the Eleventh Circuit is that reasonable Eleventh Circuit jurists will follow existing Eleventh Circuit precedent and therefore, the issue is not debatable. *Gordon*, 479 F.3d at 1300.

In *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), the Eleventh Circuit denied a capital habeas petitioner a COA. *Id.* at 1267. Hamilton's initial habeas petition was denied as untimely. *Id.* at 1263. Approximately five years

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[6] *Brooks v. United States*, 2019 WL 7167993 (11th Cir. Nov. 1, 2019), *cert. denied*, 140 S.Ct. 2743 (2020); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir. 2017) (denying a COA despite a circuit split); *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (denying COA on a Rule 60(b)(6) motion because "*Arthur* is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent"); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007) (explaining that if a position is foreclosed by a binding decision from this Court, then the attempted appeal does not present a substantial question, because reasonable jurists will follow controlling law and no COA should be granted citing *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005)).

later, he filed a Rule 60(b)(6) motion seeking to lift the original time bar relying on *Martinez v. Ryan*, 566 U.S. 1 (2012). *Id.* The Eleventh Circuit held that no COA should be issued because the underlying issue was "squarely foreclosed" by existing circuit precedent. *Hamilton*, 793 F.3d at 1266 (citing *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014)). The Eleventh Circuit explained that "no COA should issue where the claim is foreclosed by binding circuit precedent 'because reasonable jurists will follow controlling law.'" *Hamilton*, 793 F.3d at 1266 (citing *Gordon*, 479 F.3d at 1300). The Eleventh Circuit noted that the Third Circuit disagreed with their existing precedent on the underlying issue. *Id.* at 1266 (citing *Cox v. Horn*, 757 F.3d 113, 123-24 (3d Cir. 2014)). But, the Eleventh Circuit explained "we are bound by our Circuit precedent, not by Third Circuit precedent" and the existing Eleventh Circuit precedent was controlling and ended "any debate among reasonable jurists." *Hamilton*, 793 F.3d at 1266.

The Eleventh Circuit's view that COAs should be denied when there is controlling circuit precedent is reasonable in light of the Eleventh Circuit's prior precedent rule. *Anthony v. United States*, 822 Fed. Appx. 938, 940 (11th Cir. 2020) (explaining that, under the Eleventh Circuit' prior panel precedent rule, a panel is "bound" by a prior decision until the decision is overruled or abrogated by the Supreme Court or by the circuit court sitting en banc citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001)). For a habeas petitioner to prevail in the face of controlling circuit precedent in the Eleventh Circuit would be a three-step process. First, the case would go to a three-judge panel, that, under the Eleventh Circuit's prior precedent rule, would have to follow circuit precedent and deny the claim. The panel could, at most, advocate receding from that precedent. *See, e.g., Jimenez v. Sec'y, Fla. Dep't of Corr.*, 758 Fed. Appx. 682, 687 (11th Cir. 2018) (Rosenbaum, J., concurring) (expressing disagreement with controlling circuit precedent but acknowledging she was "nonetheless bound" by

that precedent). Second, a majority of active judges of the entire Eleventh Circuit would have to vote to grant en banc review of the issue. And then, third, a majority of the en banc court would have to agree to recede from the prior precedent for the petitioner to ultimately prevail. The Eleventh Circuit's cases stating a COA should not issue when binding circuit precedent forecloses a claim are merely recognizing this appellate reality.

But the capital defense bar does not acknowledge that appellate reality in their applications for COAs filed in the Eleventh Circuit. The capital defense bar does not engage with the Eleventh Circuit's en banc standard or survey all the circuits that have reached the issue in an attempt to show the Eleventh Circuit that their view is in the minority. 11th Cir. R. 35 (requiring the en banc question to be of "exceptional importance"). Instead, the capital defense bar in their applications for COA merely cite a case or two from one other circuit, even if that other circuit's view is the extreme minority view and the Eleventh Circuit's view is the majority view. Opposing counsel in his application for COA in this case, merely cited one or two cases from Third Circuit without acknowledging that the Third Circuit's view was an outlier and the vast majority of circuits share the view of the Eleventh Circuit on the underlying issue.[7]

In light of this, it is not accurate to characterize the Eleventh Circuit as having a "categorical" rule. Pet. at 10, 13, 16. If an application for COA acknowledged the

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[7] Below in the district court and in the Eleventh Circuit, opposing counsel focused more on the the *Martinez v. Ryan* claim and the conflict between the Eleventh Circuit's decision in *Arthur* and the Third Circuit's decision in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014). The majority of circuit courts, however, share the Eleventh Circuit's view that *Martinez v. Ryan* does not warrant reopening a closed habeas case under Rule 60(b)(6). *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012); *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750-51 (6th Cir. 2013); *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015); *but see Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014); *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015). Other circuits, such as the Tenth Circuit, have not reached the issue of raising a *Martinez v, Ryan* claim in a Rule 60(b)(6) motion yet. Now, in this Court, opposing counsel focuses only on the *McQuiggin v. Perkins* gateway innocence claim and the conflict between the Eleventh Circuit's decision in *Hamilton* and the Third Circuit's decision in *Satterfield v. Dist. Att'y of Phila.*, 872 F.3d 152, 160-61 (3d Cir. 2017).

prior precedent rule, discussed the en banc standard and how the particular issue meets that standard, as well as established the Eleventh Circuit existing precedent was in the minority among the circuits and that the majority's position was the better view, the Eleventh Circuit may well distinguish their holdings in *Hamilton* and *Gordon* and grant COA. But opposing counsel did not do any of that in the application for COA filed in the Eleventh Circuit in this case. Unless and until applications for COA actually address those matters the Eleventh Circuit's view is unknown. Until that time, it cannot be said that the Eleventh Circuit has a categorical rule regarding COAs and circuit precedent.

No conflict with this Court's COA jurisprudence

There is no conflict between this Court's COA jurisprudence and the Eleventh Circuit's decision denying a COA in this case. Sup. Ct. R. 10(c). This Court has never hinted, much less held, that a circuit court may not deny a COA based on circuit precedent or that the existence of a circuit split alone is sufficient to establish that a COA should be granted. Nor has this Court expressed any view on whether a COA should issue were the underlying circuit split is either shallow or lopsided. This Court often denies petitions for writ of certiorari when there is a circuit split but the split is shallow or lopsided. While a COA could certainly be warranted when the circuit split involves a split where numerous circuit courts have addressed the issue and that circuit's existing precedent is the extreme minority view, that is not the situation here. There is no conflict between this Court's expressed views regarding COAs and that of the Eleventh Circuit denying COAs based on controlling circuit precedent, despite a circuit split on the underlying issue.

No conflict with any other federal appellate court

There also is no conflict between Eleventh Circuit's decision denying a COA in this case and that of any other federal appellate court. Sup. Ct. R. 10(b); *Braxton*, 500 U.S. at 347; *Rockford Life Ins. Co.*, 482 U.S. at 184 n.3. Opposing counsel points to a conflict between the Eleventh Circuit and the Third Circuit on the issue of whether *McQuiggin v. Perkins* warrants Rule 60(b)(6) relief. Pet. at 13-14 (citing *Satterfield v. Dist. Att'y of Phila.*, 872 F.3d 152, 160-61 (3d Cir. 2017)). But very few circuits have reached the issue of whether *McQuiggin v. Perkins* warrants Rule 60(b)(6) relief and even fewer circuits have reached the issue of whether a COA should be denied based on existing circuit precedent despite a circuit split. The Eleventh Circuit seems to be the only circuit that has directly addressed the issue of denying a COA based on controlling circuit precedent, despite a circuit split on the underlying issue. The Third Circuit has not addressed the issue of whether a COA should be denied based on controlling circuit precedent, despite a circuit split on the underlying issue.

The Eleventh Circuit's decision in *Hamilton* and the Third Circuit's decision in *Satterfield* do not directly conflict because *Hamilton* addressed a COA and *Satterfield* addressed a Rule 60(b)(6) motion, not a COA. There is no circuit split on the COA issue. There is no conflict between the federal circuits and the Eleventh Circuit on the issue of denying a COA based on controlling precedent when there is a circuit split.[8]

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[8] Hutchinson also criticizes the Eleventh Circuit's rule prohibiting seeking rehearing en banc from a panel's denial of a COA. Pet. at 15 (citing 11th R. 22-1(c)). But this rule only prevents a fourth bite at the COA appeal. Hutchinson was denied a COA by the district court, then he was denied a COA by a single judge of the Eleventh Circuit and then he was denied a COA by a three-judge panel of the Eleventh Circuit and now he is asserting he should be entitled to a fourth attempt at a COA by the en banc court. Allowing en banc review of the denial of a COA by a panel would mean that it would be the third time a petitioner could seek a COA in the appellate court and would literally involve every active judge on the circuit. The COA statute, § 2253(c), was designed to streamline federal habeas appeals and limit the work of the federal appellate courts to only significant issues. *Lavin v. Rednour*, 641 F.3d 830, 833 (7th Cir. 2011). The Eleventh Circuit's rule prohibiting seeking en banc review of a denial of a COA from a panel furthers that congressional intent.

Because the petition presents an issue that does not involve any conflict with this Court or any other court, review of this issue should be denied.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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