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

REPLY BRIEF IN SUPPORT OF CERTIORARI

THIS IS A CAPITAL CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

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The brief in opposition offers three "threshold" reasons to deny certiorari, but each is wrong and amounts to an excuse for ignoring the Eleventh Circuit's violation of the COA statute. It takes Respondent 17 pages—more than the length of the entire petition—to address the questions actually presented in the petition. Respondent then dodges and muddles those questions, buries Judge Jordan's dissent in a footnote, and provides an incoherent defense of the orders below. Respondent's lengthy arguments in this Court, which should have been litigated in a COA-certified appeal, actually bolster Petitioner's request for certiorari and remand to the Eleventh Circuit.

I. Respondent's "threshold" arguments were not accepted below and should not prevent this Court from reaching the questions presented

A. The district court's jurisdiction

First, Respondent argues that this Court should not consider the questions presented because Petitioner's Rule 60(b) motion was actually an unauthorized successive habeas petition over which the district court lacked jurisdiction—even though none of the judges below drew that conclusion. *See* BIO at 10, 12-14. Respondent acknowledges making the same argument in the district court, and that the district court did not accept it. *See id.* at 8; App. 8a-33a.[1] Respondent failed to make the argument in response to Petitioner's COA application in the Eleventh Circuit, and did not respond at all to Petitioner's motion for reconsideration in that

[1] The district court recognized that Petitioner addressed Rule 60(b) jurisdiction in his motion. *See* App. 16a. Petitioner's motion explained that it did not raise any unauthorized successive claim for constitutional relief; the motion properly alleged "extraordinary circumstances" justifying the reopening of his initial habeas claims.

court. *See* BIO at 8-9. Neither the original Eleventh Circuit judge who ruled on the COA application, nor the two additional judges on the reconsideration panel, found that the district court lacked jurisdiction over the Rule 60(b) motion. *See* App. 1a-7a. Respondent has resurrected its argument again for this Court, but the district court's jurisdiction to rule on Petitioner's motion has never been an issue in this case, and should not be an obstacle to this Court addressing the narrow questions presented.

B. The effect of the reconsideration panel majority's limited response to the dissent

Second, Respondent argues that this Court should not remand this case because Judge Luck's order denying Petitioner a COA, "for the same reasons the district court denied his amended Rule 60(b) motion," was obviated by the panel majority's opinion respecting the denial of reconsideration. *See* BIO at 10, 15. Based on the panel majority's opinion, which responded to one part of the dissent, Respondent invites this Court to avoid the merits of the first question presented in the petition, which focuses on Judge Luck's improper adoption of the district court's merits rulings as his own COA analysis. *See* Pet. at 5-10. Respondent reasons that a later appellate decision is "considered to have replaced the earlier decision entirely, unless explicitly noted otherwise," and therefore Judge Luck's order "is no longer in play." *Id.* at 15. This argument is mistaken, particularly in the Eleventh Circuit.

When the Eleventh Circuit intends to supplant or modify an earlier decision in the same case, including a COA case, it says so explicitly. *See, e.g.*, *Peoples v. Haley*, 227 F.3d 1342, 1343 (11th Cir. 2000) (noting, in a COA case, "[w]e vacate and

withdraw the previous opinion in this case . . . and substitute the following opinion.").[2] Here, the reconsideration panel majority's opinion suggested the opposite. The majority's opinion stated clearly: "We deny Jeffrey Glenn Hutchinson's motion for reconsideration of [Judge Luck's order] *and write briefly to respond to the dissenting opinion*." App. 1a (emphasis added).

In addition, the panel majority's response only addressed one of the grounds upon which Judge Jordan said he would have granted Petitioner a COA. The majority recognized that Judge Jordan would have granted a COA based on *McQuiggin* "and other circumstances," but the majority only addressed the *McQuiggin* issue. *See* App. 1a-5a, 6a. Respondent's own brief accurately recognizes that "[t]he panel wrote briefly to respond to the dissent regarding granting a COA on the gateway claim of actual innocence based on *McQuiggin* . . . ." BIO at 11.

The panel majority's response could not have fully supplanted Judge Luck's order because it was only a response to the dissent, and only with respect to one of the issues rejected by Judge Luck's order. At a minimum, Judge Luck's order still governs the COA grounds not addressed by the majority's *McQuiggin* response.

Moreover, if the reconsideration panel's majority, which included Judge Luck himself, had intended to modify or replace the original order, it would have almost certainly *granted* some form of reconsideration to do so, not denied reconsideration

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[2] *See also, e.g.*, *Senter v. United States*, 983 F.3d 1289, 1290 n.1 (11th Cir. 2020); *In re Williams*, 898 F.3d 1098 (11th Cir. 2018); *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1042 (11th Cir. 2017); *United States v. Trejo*, 551 F. App'x 565, 566 (11th Cir. 2014) (noting substitution or modification of prior orders in other contexts).

with an appended "response" to the dissent on just one of the issues. *Cf. Rozier v. Sec'y, Fla. Dep't of Corr.*, 775 F. App'x 1005 (11th Cir. 2019) (granting rehearing to replace prior opinion); 11th Cir. R. 35-10 (providing that panel decisions are vacated upon grants of motions for en banc rehearing).

The panel majority's limited response to Judge Jordan's dissent does not insulate Judge Luck's order from this Court's review. Respondent's misguided view of this issue should not prevent the Court from reaching the first question presented.

C. The Rule 60(b) motion's timeliness

Third, Respondent argues that the Court should not address the questions presented because Petitioner's Rule 60(b) motion was untimely in the district court—even though, again, none of the courts below agreed with that argument. *See* BIO at 10, 15-17. Respondent acknowledges making the same argument in the district court and Eleventh Circuit, and that neither court accepted it. *See id.* at 8-9, 17. The district court's order denying relief acknowledged the timeliness rules governing Rule 60(b)(6) motions, App. 13a, and did not make any finding that Petitioner's motion was untimely. As with Respondent's jurisdictional argument, the Rule 60(b) motion's timeliness in the district court has never been an issue in this case.

Respondent's briefing in this Court is also misleading because it repeatedly creates the false impression that Petitioner's Rule 60(b) motion was filed in the district court in 2020, rather than in 2014. *See, e.g.*, BIO at 10-11 ("The motion to reopen was filed *many years* after *McQuiggin v. Perkins* [2013] was decided . . . .") (emphasis added); 16 ("[W]hen a Rule 60(b)(6) motion is based on a new Supreme

Court decision, it must be filed within a few months of that decision, *not years later*.") (emphasis added); *id.* ("This Court decided *McQuiggin v. Perkins* on May 28, 2013, yet [Petitioner] waited until May 26, 2020, to file the amended motion . . . Seven years is not a reasonable time to wait to file a Rule 60(b)(6) motion."); *id.* ("[C]ounsel still waited over five years after their appointment to file the motion to reopen.").

In fact, Petitioner filed his motion, pro se, in 2014, the year after *McQuiggin* was decided, and within a reasonable time with respect to his other arguments. *See Hutchinson v. Crews*, N.D Fla. No. 3:13-cv-128, ECF No. 17. The pro se motion was then stayed by the district court until counsel was appointed and permitted time to investigate and amend the motion. *See id.*, ECF No. 77 (order lifting stay). Respondent makes one passing reference to the 2014 pro se motion in the procedural history section of his brief, *see* BIO at 7-8, but never mentions it again. Because Petitioner's pro se motion was stayed from 2014 until counsel's 2020 amendment, any timeliness analysis, even if it were relevant in this Court, would run from the date the pro se motion was filed, not when counsel's amendment was filed.

D. The Court should address the questions presented

This Court does not need to address Respondent's "threshold" arguments to reverse the Eleventh Circuit's violation of the COA statute and remand for reconsideration of Petitioner's COA application under the correct standard. The brief in opposition strengthens Petitioner's request for that remedy because the very issues Respondent says are "threshold" in this Court could have been litigated in the Eleventh Circuit if that court had applied the correct COA standard and allowed an

appeal. Respondent's extensive briefing of the issues in this Court shows why a COA should have been granted in the first place. This Court should reject Respondent's "threshold" arguments and address the questions actually presented in the petition.

II. Respondent's answer to the first question presented relies entirely on its misguided "threshold" argument that the Eleventh Circuit's order denying a COA "is no longer in play"

In the first question presented, Petitioner asked this Court to clarify that a court of appeals violates the threshold COA standard when it adopts the district court's underlying merits rulings as its own COA analysis. *See* Pet. at 5-10. Petitioner's argument centered on the Eleventh Circuit's March 24, 2021 order, issued by Judge Luck alone, denying Petitioner a COA on all grounds "for the same reasons the district court denied his amended Rule 60(b) motion and motion for COA in its thorough and detailed twenty-six page order." App. 7a. Petitioner argued that the March 24 order violated this Court's prohibition against COA rulings that are "coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Respondent's brief acknowledges the favorable *Buck* standard and makes no attempt to distinguish the Fifth Circuit's improper COA denial in that case from the Eleventh Circuit's COA denial in this case. *See* Pet. at 7. In fact, Respondent barely defends the Eleventh Circuit's March 24 order at all. Respondent says only this:

> 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.

BIO at 17-18. Though barebones, this argument might make sense in some cases, where it is less clear that the COA analysis was coextensive with a merits analysis.

But here, the Eleventh Circuit made it explicit. The March 24 order stated that its own COA analysis consisted of the "same" reasons the district court denied relief on the merits of the Rule 60(b) motion. Respondent cannot defend the order under *Buck*.

Instead, Respondent argues that the March 24 order must be ignored because it was replaced by the reconsideration panel majority's limited response to the dissent, even though the panel majority, which included Judge Luck, said explicitly that it was writing only to respond to the dissent, and only as to one of the grounds upon which the dissent said it would grant Petitioner a COA. *See* App. 1a. Petitioner described above why that "threshold" argument cannot be correct. *See supra*, at 2-4.

Because the March 24 order is not insulated from this Court's review by the reconsideration panel majority's limited response to the dissent, this Court should grant certiorari and remand for application of the correct COA standard.[3]

III. Respondent's answer to the second question presented involves downplaying the dissent below and defending the Eleventh Circuit's categorical COA bar against petitioners challenging circuit precedent

In the second question presented, Petitioner asked this Court to invalidate categorical rules that forbid granting a COA to any petitioner who challenges existing circuit precedent, even where there is an unresolved circuit split on the issue the petitioner seeks to appeal. *See* Pet. at 10-16. Petitioner's argument centered on the Eleventh Circuit's *Hamilton* rule, which prohibits courts from granting a COA to any

[3] The brief in opposition at times conflates the first question presented with the second, which involves Petitioner's *McQuiggin* arguments. *See, e.g.*, BIO at 18-19. This Court should not be misled by Respondent's conflation of the two questions. This Court can answer the first question presented and remand for application of the correct COA standard without reaching any issue involving *McQuiggin*.

habeas petitioner who challenges existing circuit precedent, regardless of whether contrary precedent from other circuits supports the petitioner's arguments. *See Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

In Petitioner's case, to the extent that the reconsideration panel majority's limited response to the dissent affected the March 24 order denying a COA, it modified it to apply the *Hamilton* rule to deny a COA on Petitioner's *McQuiggin* arguments. The panel majority found a COA barred on those arguments even though the "existing circuit precedent" it identified was both distinguishable from Petitioner's case and at odds with contrary precedent in the Third Circuit. *See* App. 2a. The majority also applied the *Hamilton* bar despite the dissent of Judge Jordan, whose opinion the brief in opposition relegates to a single footnote, BIO at 12 n.3.

In response to Petitioner's argument that the *Hamilton* bar conflicts with the COA standard, Respondent acknowledges that the bar exists and was applied to Petitioner's *McQuiggin* arguments, but hedges on whether the bar is truly categorical, even though nothing in *Hamilton* suggests there are any exceptions, and Respondent cites no case applying one. *See* BIO at 22, 24-25.

Respondent also inverts Petitioner's argument, emphasizing that "[t]his Court has never hinted, much less held, that a circuit split is automatically sufficient to establish that a COA should be granted," and that Petitioner "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." BIO at 22. This mischaracterizes Petitioner's actual argument, which is that the COA standard cannot tolerate a rule

requiring automatic *denial* of a COA when the petitioner seeks to challenge existing precedent. This Court need not decide that a COA was automatically warranted here, only that the Eleventh Circuit wrongly applied the *Hamilton* rule to bar one.

Respondent also defends the *Hamilton* bar as an application of the Eleventh Circuit's prior precedent rule, which binds future panels to the legal holdings of earlier panels confronting the same legal issue. *See* BIO at 23-24. But that rule makes sense in the COA context only where the prior decision's legal holding is truly dispositive, leaving no daylight for factual or procedural distinguishment. As the petition describes, the existing circuit precedent the panel majority identified to *Hamilton*-bar Petitioner's *McQuiggin* arguments, *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), was not even squarely on point. Reading *Arthur* as completely foreclosing Petitioner's arguments in a full appeal took more than a threshold analysis—it required full consideration of the factual and legal bases for Petitioner's appeal, in violation of the COA standard. *See* Pet. at 11-16.

Moreover, the general prior precedent rule leaves in place a mechanism for future reconsideration of panel precedent: en banc rehearing. There is no similar mechanism when it comes to the *Hamilton* bar. Because a habeas petitioner can never obtain a COA after adverse panel precedent is set, and the Eleventh Circuit does not allow petitioners to seek en banc rehearing from the denial of COA applications, the *Hamilton* bar effectively prevents misguided panel precedent from ever being reconsidered, even when other circuits disagree with the Eleventh Circuit's approach.

See id. In turn, this Court will only have the chance to intervene in misguided Eleventh Circuit precedent by reviewing *Hamilton*-based COA denials.

Respondent suggests that Eleventh Circuit petitioners must simply accept the "appellate reality" that their appeals would have never succeeded in the first place, and therefore it only makes sense to deny them a COA up front. *See* BIO at 23-24. It may be true that many such appeals would ultimately fail, but the COA standard is deliberately over inclusive. A COA does not "require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Respondent makes the same mistake as the Eleventh Circuit—inverting the statutory order of operations by first deciding the merits of an appeal, and then justifying the denial of a COA based on those merits conclusions. *See Buck*, 137 S. Ct. at 774.

Both Respondent and the reconsideration panel's majority discuss at length whether Petitioner can ultimately satisfy *McQuiggin*'s gateway standard in light of the current record. But this Court need not wade into that fact-bound analysis in order to enforce the procedural statute governing this appeal. Respondent's own brief recognizes that Judge Jordan, for instance, would grant a COA "based on a circuit split, not the facts of Hutchinson's innocence claim." BIO at 12 n.3. This Court should remand for application of the correct COA standard regardless of whether Petitioner's *McQuiggin* arguments are likely to succeed.

The second question presented asks this Court to reverse and remand on a narrow basis: the Eleventh Circuit's application of the *Hamilton* bar to reject

Petitioner's *McQuiggin* arguments violated the COA standard. Respondent's brief in opposition fails to explain how the *Hamilton* bar complies with the COA standard.

This Court should not encourage courts of appeals to adopt what is effectively an admonishment to litigants not to question the law. *Cf. United States v. Garza-De La Cruz*, 16 F.4th 1213 (5th Cir. 2021) (Costa and Ho, J.J., concurring) (declining to join admonitions against appellants challenging precedent). The Court should grant certiorari, reverse the Eleventh Circuit's orders, and clarify that courts cannot categorically withhold COAs from petitioners who challenge circuit precedent, especially when precedent from other circuits supports the petitioner's arguments.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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