CAPITAL CASE

No. 22-6015

In the Supreme Court of the United States

JEFFREY G. HUTCHINSON, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ASHLEY MOODY
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
capapp@myfloridalegal.com

CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim based on *Giglio v. United States*, 405 U.S. 150 (1972), as insufficiently pled, under state law, because the allegedly false testimony was not identified in the successive postconviction motion filed in the state trial court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

In the

Supreme Court of the United States

No. 22-6015

JEFFREY G. HUTCHINSON, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Hutchinson v. State*, 343 So.3d 50 (Fla. 2022) (SC21-18).

JURISDICTION

On January 6, 2021, Hutchinson, represented by the Capital Collateral Regional Counsel - North (CCRC-N), filed a notice of appeal of the trial court's summary denial of a successive postconviction motion in the Florida Supreme Court. On June 16, 2022, following full briefing, the Florida Supreme Court affirmed the state trial court's summary denial of the successive postconviction motion. *Hutchinson v. State*, 343 So.3d

50 (Fla. 2022) (SC21-18).[1] On June 30, 2022, Hutchinson filed a motion for rehearing in the Florida Supreme Court. On August 4, 2022, the Florida Supreme Court denied the rehearing. On November 2, 2022, 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). Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While opposing counsel relies on the Fifth Amendment and the Fourteenth Amendment in the petition, neither of those constitutional due process provisions applies because, as will be explained in greater detail, the issue being raised in the petition is solely a matter of state law. No federal constitutional provision is at issue.

---

[1] The Florida Supreme Court's docketing is available online under case number SC21-18.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Hutchinson was convicted of three counts of first-degree murder and sentenced to death for the murder of three young children. He was also convicted of murder and sentenced to life without parole for the murder of their mother.

Facts of the case

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). Logan was four years old, Amanda was seven years old, and Geoffrey was nine years old. Hutchinson shot the four victims with his pistol-grip Mossberg shotgun, which was found inside the home on the kitchen counter. *Id.* at 948. Hutchinson called 911 and told the operator, "I just shot my family." Deputies arrived within ten minutes of the 911 call and found Hutchinson on the ground in the garage of the house with the cordless phone nearby, which was still connected to the 911 operator. *Id.*

Procedural history

On January 18, 2001, 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 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 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.

On direct appeal to the Florida Supreme Court, Hutchinson raised ten issues. *Hutchinson v. State*, 882 So.2d 943 (Fla. 2004).[2] The Florida Supreme Court affirmed the four convictions of first-degree murder and affirmed the sentences, including the three death sentences. *Hutchinson*, 882 So.2d at 961. Hutchinson did not file a petition for writ of certiorari in the United States Supreme Court from his direct appeal.

In October of 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). A second amended initial postconviction motion was filed after Hutchinson's original postconviction counsel withdrew and the trial court appointed new postconviction counsel. *Id.* at 699. The second amended motion raised four claims and a claim of actual innocence. The trial court summarily denied the actual innocence claim and one of the four claims but held an evidentiary hearing on the three remaining claims. Following the evidentiary hearing, the trial court denied the motion for postconviction relief. *State v. Hutchinson*, 2008 WL 8948638 (Fla. Cir. Ct. Jan. 3, 2008).

In his initial postconviction appeal to the Florida Supreme Court, Hutchinson raised three issues: (1) trial counsel rendered ineffective assistance during the guilt

---

[2] The ten issues were: (1) whether the trial court improperly instructed the jury; (2) whether the trial court erred in admitting certain testimony as an excited utterance; (3) whether the trial court erred in repeatedly overruling objections to the State's closing argument; (4) whether the trial court erred in denying Hutchinson's motion for mistrial; (5) whether the trial court erred in denying Hutchinson's motion for judgment of acquittal; (6) whether the trial court erred in denying Hutchinson's motion for a new trial; (7) whether the trial court erred in considering section 921.141(5)(1), Florida Statutes (2000), as an aggravating circumstance; (8) whether the trial court erred in finding that Hutchinson committed the murder of the children during the course of an act of aggravated child abuse; (9) whether the trial court erred in finding heinous, atrocious, or cruel (HAC) as an aggravating circumstance in the murder of Geoffrey Flaherty; and (10) whether death is a proportional sentence. *Hutchinson v. State*, 17 So.3d 696, 699, n.2 (Fla. 2009) (listing the issues in a footnote).

phase by failing to present evidence to attempt to establish that it was not Hutchinson's voice on the 911 tape; (2) trial counsel rendered ineffective assistance during the guilt phase by failing to introduce into evidence the nylon stocking found at the crime scene; and (3) the trial court erred in summarily denying the claims of actual innocence and conflict of interest based on Hutchinson filing a complaint about his counsel with the Florida Bar. *Hutchinson v. State*, 17 So.3d 696, 700 (Fla. 2009). The Florida Supreme Court affirmed the denial of postconviction relief. *Hutchinson*, 17 So.3d at 704.

On July 24, 2009, Hutchinson filed a pro se federal habeas petition in the Northern District Court of Florida. (Doc. #1). On November 23, 2009, habeas counsel Todd Doss filed an amended federal habeas petition. (Doc. #19). The amended petition raised five grounds. On December 13, 2009, Respondent filed a motion to dismiss the petition as untimely under the AEDPA. The district court granted the motion and dismissed the amended petition as untimely. *Hutchinson v. Florida*, 2010 WL 3833921 (N.D. Fla. Sept. 28, 2010). The Eleventh Circuit affirmed the dismissal of Hutchinson's original habeas petition as untimely, finding that equitable tolling did not apply. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012).

Hutchinson then filed a petition for writ of certiorari in the United States Supreme Court raising three issues related to equitable tolling of his federal habeas petition. On October 9, 2012, the United States Supreme Court denied the petition. *Hutchinson v. Florida*, 568 U.S. 947 (2012) (No. 12-5582).

In 2014, Hutchinson filed a pro se Rule 60(b) motion to reopen his capital federal habeas case based on *Martinez v. Ryan*, 566 U.S. 1 (2012). Fed. R. Civ. P. 60(b). The federal district court then appointed the Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N) as federal habeas counsel and permitted the CHU-N to conduct discovery and then file an amended Rule 60(b)

motion.

On January 11, 2017, Hutchinson, represented by state postconviction counsel, registry counsel Clyde M. Taylor, filed a successive 3.851 motion 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. On January 27, 2017, 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 because Hutchinson waived his penalty phase jury. The state postconviction court summarily denied the successive postconviction motion.

The Florida Supreme Court affirmed the postconviction court's summary denial of the *Hurst* claim. The Florida Supreme Court noted that "Hutchinson waived his right to a penalty phase jury and presented mitigation to the trial judge" and then held that "*Hurst* relief is not available for defendants who have waived a penalty phase jury." *Hutchinson v. State*, 243 So.3d 880, 881, 883 (Fla. 2018), *cert. denied*, *Hutchinson v. Florida*, 139 S.Ct. 261 (2018).

On May 26, 2020, Hutchinson's federal habeas counsel, CHU-N, finally filed an amended Rule 60(b)(6) motion in federal district court based on *Martinez v. Ryan*, as well as asserting an actual innocence claim based on the FBI's investigative file of the Paxton, Florida bank robbery. *Hutchinson v. Inch*, 2021 WL 6335753, 3:13-cv-28-MW (N.D. Fla. Jan. 15, 2021) (Doc. #78). The CHU had obtained portions of the FBI file through the Freedom of Information Act (FOIA). 5 U.S.C. § 552. The actual innocence claim relied on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), to lift the time bar. On June 12, 2020, the State filed an answer to the counseled, amended Rule 60(b)(6) motion to reopen. (Doc. #79). On January 15, 2021, the federal district denied the motion to reopen with prejudice and denied a certificate of appealability (COA) regarding the claim. (Doc. #82). The district court rejected the actual innocence claim

based on the FBI file concluding that the evidence established that Hutchinson made the 911 call and that Hutchinson was the one who "shot his girlfriend and her children with his own shotgun." (Doc. #82 at 18).

The Eleventh Circuit denied a certificate of appealability (COA) on the Rule 60(b) motion to reopen. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 6340256 (11th Cir. Mar. 24, 2021), *cert. denied*, *Hutchinson v. Dixon*, 142 S.Ct. 787 (2022). And the United States Supreme Court then denied review. *Hutchinson v. Dixon*, 142 S.Ct. 787 (2022) (No. 21-5778).

Procedural history of current successive state postconviction litigation

On June 12, 2020, Hutchinson, represented by state postconviction counsel, registry counsel Clyde M. Taylor, filed a second successive 3.851 motion raising a claim of newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (2021 Succ. PCA at 58-85). The *Brady* claim was based on the failure to disclose the FBI investigative file of a bank robbery of the Regions Bank in Paxton, Florida, that occurred on August 7, 1998. Hutchinson's federal habeas counsel obtained the FBI file via a FOIA request.

Six days later after the successive postconviction motion was filed, on June 18, 2020, the State filed an answer. (2021 Succ. PCA at 86-117). The State's answer to the successive motion thought the sole issue being raised was a *Brady* claim because the *Giglio* claim was not raised as a separate claim. On July 13, 2020, one day before the case management conference, state postconviction counsel, registry counsel Taylor, filed an amended successive motion. (2021 Succ. PCA at 129-182). The amended motion seemed to being raising three claims: 1) a *Brady* claim based on the state prosecutor's failure to disclose the FBI file; 2) a *Giglio* claim related to the Adamses' testimony; and 3) a claim of newly discovered evidence of innocence. The *Giglio* claim,

however, was not raised as a separate claim, despite having a different factual foundation.

On July 16, 2020, the trial court struck the amended successive postconviction motion as insufficiently pled. (2021 Succ. PCA at 184-187). The trial court's order identified three deficiencies in the successive postconviction motion including that the *Giglio* claim was facially insufficient. (2021 Succ. PCA at 185 citing *Jimenez v. State*, 265 So.3d 462, 479 (Fla. 2018)). The trial court then allowed registry counsel to file an amended motion to correct the pleading deficiencies, as mandated by Florida Supreme Court precedent of *Bryant v. State*, 901 So.2d 810, 818-19 (Fla. 2005), and *Spera v. State*, 971 So.2d 754 (Fla. 2007). (2021 Succ. PCA at 185-186).

On September 14, 2020, registry counsel Taylor filed an amended successive postconviction motion attempting to address those deficiencies. (2021 Succ. PCA at 191-261). But the *Giglio* claim was again not separately pled. (2021 Succ. PCA at 202-03). The relevant fact section of the amended motion discussed the trial testimony of both Adams and the Paxton bank robbery. (2021 Succ. PCA at 194-97). The Adamses, Mr. and Mrs. Adams, both testified at trial that the voice on the 911 tape was Hutchinson's voice. The amended motion asserted that the prosecutor mislead the court and jury that the Adamses were not getting a benefit for identifying the voice on the 911 tape as Hutchinson's and stated: "the State committed a classic *Giglio* violation where prejudice is presumed." (2021 Succ. PCA at 203). There was, however, no citation to the trial transcript after that assertion.

On October 2, 2020, the State filed its answer to the amended postconviction motion. (2021 Succ. PCA at 262-289). In a footnote, the State noted first that the *Giglio* claim was not "separately pled," and was not properly identified as claim 2, as required by rule 3.851(e)(1). (2021 Succ. PCA at 285, n.10). The State also asserted that the *Giglio* claim remained insufficiently pled, despite the trial court's allowing

counsel to amend the claim, because counsel never identified "exactly what testimony was indisputably false." The State complained that it could not really address a claim that was so inadequately pled, except to say the prosecutor did not knowingly present false testimony by arguing to the trial court, outside the presence of the jury, that Adams could not be impeached regarding the bank robbery without a formal conviction under Florida law.

On October 19, 2020, the state postconviction court held a second case management conference. (2021 Succ. PCA at 295-304). At the second hearing, registry counsel relied on the pleadings for the arguments. (2021 Succ. PCA at 298-299). The State responded that the successive postconviction motion remained untimely, regardless of the November 2017 date, because counsel was not diligent in making the FOIA requests. (2021 Succ. PCA at 299-300). The State's view was that any FOIA request for the FBI investigative file of the Paxton bank robbery should have been made in 2003 or 2007, not a decade later in 2017. (2021 Succ. PCA at 299).[3] Registry counsel acknowledged that the prosecutor had disclosed the federal grand jury testimony of Adams and his wife regarding the Paxton bank robbery and also disclosed the State of Florida information charging Billy Lee Taylor with the bank robbery. (2021 Succ. PCA at 301).

Registry counsel then discussed the *Giglio* claim at the hearing but he seemed to mistakenly believe that *Giglio* imposed a duty to disclose exculpatory information (as opposed to *Brady*) rather than involving the presentation of false testimony at trial. (2021 Succ. PCA at 301-302). Registry counsel never identified any trial testimony of Mr. Adams or Mrs. Adams that he believed to be false or explained how the prosecutor

---

[3] The transcript of the second hearing refers to 2003 or 2017, but the correct dates are 2003 or 2007. Undersigned counsel certainly may have misspoke at the hearing but it is clear from the State's answer that the date the State asserted any FOIA request should have been made by 2003 or 2007, not 2017.

would have known that the testimony was false.

On December 4, 2020, the state trial court summarily denied the amended successive postconviction motion. (2021 Succ. PCA at 305-714). The trial court found the *Giglio* claim to be facially insufficient because it failed "to identify with any specificity what testimony was false and that the State knew the testimony to be false." (2021 Succ. PCA at 322). The trial court observed that Hutchinson failed "to cite any portion of the FBI records that demonstrate" that either Adams or his wife's testimony at trial was false. (2021 Succ. PCA at 322). The trial court also ruled that, because Hutchinson failed to specifically identify any false testimony, the court could not conduct a materiality analysis. (2021 Succ. PCA at 324). The trial court stated that "suspicions are not enough" to prove a *Giglio* claim. *Id.* Additionally, the trial court found that the allegation that the prosecutor misled defense counsel, the jury, and the trial court "in representing that it had disclosed all impeaching and exculpatory evidence relating to the bank robberies" was not a valid basis for a *Giglio* claim. (2021 Succ. PCA at 322, n.68). The trial court reasoned that to the extent Hutchinson was attempting to claim that Adams was not prosecuted in the bank robbery in exchange for either his or his wife's testimony in this case, he failed to include an affirmative allegation to that effect in the amended claim. (2021 Succ. PCA at 322).

On January 7, 2021, Hutchinson, represented by registry counsel Taylor, appealed the denial of the successive postconviction motion to the Florida Supreme Court. A few weeks later, prior to any briefing, Taylor withdrew as appellate counsel. Hutchinson was then represented on appeal by the Office of Capital Collateral Regional Counsel – North (CCRC-N). On June 16, 2022, following briefing, the Florida Supreme Court affirmed the state trial court's summary denial of the successive postconviction motion. *Hutchinson v. State*, 343 So.3d 50 (Fla. 2022) (SC21-18). On June 30, 2022, Hutchinson filed a motion for rehearing in the Florida Supreme Court.

On August 4, 2022, the Florida Supreme Court denied the rehearing.

On November 2, 2022, Hutchinson, represented by CCRC-N, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A CLAIM BASED ON *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972), AS INSUFFICIENTLY PLED, UNDER STATE LAW, BECAUSE THE ALLEGEDLY FALSE TESTIMONY WAS NOT IDENTIFIED IN THE SUCCESSIVE POSTCONVICTION MOTION FILED IN THE STATE TRIAL COURT.

Petitioner Hutchinson seeks review of the Florida Supreme Court's decision holding that a successive postconviction claim based on *Giglio v. United States*, 405 U.S. 150 (1972), was insufficiently pled because it never identified the testimony alleged to be false testimony, despite the state trial court allowing counsel two months to file an amended motion to cure the pleading deficiencies. The pleading requirements for a postconviction motion filed in a state court is a matter of state law, not a matter of federal due process. Because the petition presents an issue that does not raise a federal constitutional question, this Court lacks jurisdiction to grant the petition. Moreover, there is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision finding the successive postconviction claim was not properly pled. Hutchinson cites no case from this Court holding, or even hinting, that reasonable pleading requirements for postconviction claims filed in state court violate due process. There certainly is no conflict with this Court's decision in *Skinner v. Switzer*, 562 U.S. 521, 525 (2011), which left only "slim room" for procedural due process challenges to state postconviction proceedings. Nor is there any conflict

with this Court's due process access-to-courts jurisprudence. There is also no conflict between the federal circuit courts or state courts of last resort and the Florida Supreme Court's decision. Both federal and state appellate courts have similar pleading requirements for *Giglio* claims. Hutchinson cites no federal or state appellate court case holding that a state's reasonable pleading requirements violate the federal due process. There is no conflict. Alternatively, the issue is purely academic because the *Giglio* claim is both untimely and meritless, regardless of any pleading deficiencies. Review should be denied.

The Florida Supreme Court's decision in this case

Hutchinson appealed the state trial court's summary denial of the successive postconviction motion raising a claim based on *Giglio v. United States*, 405 U.S. 150 (1972), to the Florida Supreme Court. Hutchinson raised the *Giglio* claim as a subissue, not as a separate issue, despite it having a different factual basis from the *Brady* claim. IB at 40. Opposing counsel devoted only four pages to the *Giglio* claim despite being allowed to file a 75 page initial brief. And the initial brief did not attempt to explain the pleading deficiencies in any manner, despite those deficiencies being the entire basis for the state trial court's denial of the *Giglio* claim.

The State, in its answer brief, filed in the Florida Supreme Court, summarized the state trial court's ruling denying the *Giglio* claim, highlighting the claim was insufficiently pled to the point the trial court stated that it could not even analyze the claim. AB at 51-52. The State asserted that the *Gigilo* claim remained insufficiently pled in the amended motion, despite the trial court having given counsel 60 days to amend the claim to cure the deficiencies. AB at 50, 52-54. The State noted that the trial court had found the *Giglio* claim to be facially insufficient because it failed "to identify with any specificity what testimony was false and that the State knew the

testimony to be false." AB at 51 (citing 2021 Succ. PCA at 322). The State also argued, in the merits section of its answer brief, that opposing counsel, even in the initial brief never identified "exactly what testimony was indisputably false." AB at 56-57. Rather, the initial brief seemed to point for the first time to the prosecutor's argument to the trial court regarding the admissibility of the Paxton bank robbery to impeach Adams as the basis of the *Giglio* claim, but, as the State noted, "the jury was not present at that time." AB at 56 (citing IB at 42 citing T. Vol. XXII at 650; XXII 644).

In his reply brief, opposing counsel admitted that Adams' testimony was "technically accurate" but then insisted that the accurate testimony, coupled with the prosecutor's closing argument to the jury, somehow conveyed a "false impression" to the jury. RB at 25. The reply brief, despite the State's answer brief focusing on the *Giglio* claim being insufficiently pled both below and on appeal, still did not address the issue of the numerous pleading flaws. RB at 25.

The Florida Supreme Court affirmed the summary denial of the *Giglio* claim. *Hutchinson v. State*, 343 So.3d 50, 54 (Fla. 2022). The Florida Supreme Court reasoned:

> To obtain relief under *Giglio*, Hutchinson needs to demonstrate, among other things, that a State witness gave false or misleading testimony at trial. *Valentine v. State*, 47 Fla. L. Weekly S105, S107 n.5, 339 So.3d 311, 314 n.5 (Fla. Apr. 7, 2022) (citing *Jimenez v. State*, 265 So.3d 462, 479 (Fla. 2018)). However, in his motion below, Hutchinson failed to identify with specificity any false or misleading testimony by a State witness at trial. Accordingly, we agree with the circuit court that the *Giglio* claim is legally insufficient.

Id. at 54. The Florida Supreme Court, in a footnote, refused to address the issue of equitable tolling regarding the timeliness of the *Giglio* claim due to its finding that the

Giglio claim had not been sufficiently pled below. *Id.* at 54, n.5.

Florida's reasonable pleading requirements

Florida has reasonable pleading requirements regarding state postconviction motions filed in its state courts. Florida requires *Giglio* claims identify the false testimony presented at trial and contain an allegation explaining how the prosecutor knew or should have known, the testimony was false. *Dailey v. State*, 283 So.3d 782, 791 (Fla. 2019) (denying a *Giglio* claim because the capital defendant did not identify "any false testimony presented during his trial, much less alleged that the State knew of its falsity"), *cert. denied, Dailey v. Florida*, ___ S.Ct. ___, 2022 WL 4657191 (Oct. 3, 2022) (No. 21-1411).

Florida provides state postconviction counsel to all capital defendants to assist with the presentation of postconviction claims. § 27.7001, Fla. Stat. (2022) (stating it "is the intent of the Legislature" . . . "to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner"); *State v. Kilgore*, 976 So.2d 1066, 1068-70 (Fla. 2007) ("Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants" and discussing the various provisions of chapter 27 of Florida Statutes). And the attorneys who represented capital defendants in state postconviction litigation are required to be death-qualified attorneys with prior experience in capital state postconviction litigation or in capital federal habeas litigation. Fla. R. Crim. P. 3.112(k); *In re Amend. Fla. Rules of Judicial Admin.; Fla. Rules of Crim. P.; and Fla. Rules of App. P. – Capital Postconviction Rules*, 148 So.3d 1171 (Fla. 2014) (adopting heightened minimum qualifications for lead capital state postconviction counsel). Florida capital defendants are not navigating these basic

pleading requirements pro se; rather, all Florida capital defendants have qualified capital attorneys to represent them in state court and to properly plead their postconviction claims. Indeed, Florida capital defendants are not permitted to represent themselves in state postconviction proceedings and must be represented by postconviction counsel, even if they have waived postconviction proceedings. Fla. R. Crim. P. 3.851(b)(6) (providing that a "defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court"); *In re Amend. Fla. Rule of Crim. P. 3.851*, ___ So.3d ___, 47 Fla. L. Weekly S119 (Fla. May 5, 2022) (requiring the appointment of state postconviction counsel for all capital defendants who had previously waived state postconviction proceedings). So, it is a death-qualified attorney, and often a team of postconviction attorneys, who is tasked with complying with these simple pleading requirements.

Florida also mandates that all defendants be permitted an opportunity to amend any postconviction motion that is stricken by the trial court due to pleading deficiencies. *Bryant v. State*, 901 So.2d 810, 818-19 (Fla. 2005) (holding, in a capital case, based on Florida civil practice, it is error to strike initial postconviction motion for pleading deficiencies without granting leave to amend within a reasonable time); *Spera v. State*, 971 So.2d 754 (Fla. 2007) (expanding *Bryant* to non-capital cases). As the Florida Supreme Court explained, a postconviction court should not deny a postconviction claim as being insufficient based simply on easily curable deficiencies without allowing a petitioner an opportunity to correct those deficiencies. *Davis v. State*, 26 So.3d 519, 527 (Fla. 2009). When a postconviction motion fails to comply with the State's pleading requirements, "the proper procedure is for the court to strike the motion with leave to amend within a reasonable period." *Id.* at 527. The Florida Supreme Court suggested that trial courts allow between 10 and 30 days to cure any pleading deficiencies. *Bryant*, 901 So.2d 819. And permitting an opportunity to amend

is mandated for both legal and facial deficiencies. *Nelson v. State,* 977 So.2d 710, 711 (Fla. 1st DCA 2008). All Florida defendants are permitted at least one opportunity to amend a postconviction claim to cure any pleading deficiencies.

Here, the state trial court permitted postconviction counsel 60 days to cure the deficiencies, which is double the amount of time suggested by the Florida Supreme Court. (2021 Succ. PCA at 185-186). But the amended claim yet again not did identify the exact testimony alleged to be false or explain how the prosecutor would have known that testimony was false. The amended *Giglio* claim remained insufficiently pled with the same original flaws. As the State noted in its answer to the amended claim, the amended *Giglio* claim was still so vague that the State could only guess the basis for the claim. State postconviction counsel was provided notice of the deficiencies as well as a generous amount of time to correctly plead the *Giglio* claim but failed to even attempt to do so.

Florida's pleading requirements are perfectly reasonable and are standard requirements for a *Giglio* claim. Most other appellate courts, both federal and state, have much the same sort of pleading requirements for *Giglio* claims. *See e.g., United States v. D'Amico,* 2022 WL 3023694, *1 (11th Cir. Aug. 1, 2022) (concluding the *Giglio* claim failed because the defendant did not identify any specific statements that were allegedly false), *pet. for cert. filed, D'Amico v. United States,* No. 22-5931 (U.S. Oct. 28, 2022). Indeed, some state supreme courts complain when the defendant cites to particular pages of the testimony but does not identify the exact statements on those pages that he claims was the false testimony. *Greene v. Comm'r of Corr.*, 190 A.3d 851, 861, n.10 (Conn. 2018). Florida's pleading requirements for *Giglio* claims are perfectly reasonable and quite typical of those of other courts.

Issue of pleading requirements is solely a matter of state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). Opposing counsel's view allows the due process clause to serve as an "open sesame" that would automatically turn every issue related to state postconviction proceedings, including a state's reasonable pleading requirements, into a federal constitutional claim. This Court has long disagreed with such an expansive view of the Fourteenth Amendment's due process clause. This Court has explained that "we cannot treat a mere error of state law" as being "a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Merely wrapping a state law claim in due process cloth does not turn that state law claim into a federal question. *Allen v. Sec'y, Dep't of Corr.*, 767 Fed. Appx. 786, 792 (11th Cir. 2019) (noting that questions of state law rarely raise issues of federal constitutional significance, even if couched in terms of due process citing *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988)); *Webb v. Wyo. Dep't of Corr.*, 849 Fed. Appx. 729, 737 (10th Cir. 2021) (observing that a habeas petitioner "cannot transform a state law claim into a federal one merely by attaching a due process label" to the claim, quoting *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017)), *cert. denied*, *Webb v. Pacheco*, 142 S.Ct. 184 (2021) (No. 20-8323).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that it lacks jurisdiction over a case if a state court's decision rests upon two grounds: a state law ground and a federal ground, provided the state law ground is independent and adequate itself. *Id.* at 1038, n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). Provided the state law is not "interwoven" with federal law, this Court's

jurisdiction "fails." *Id.* (citing *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917)); *see also Foster v. Chatman*, 578 U.S. 488, 497 (2016) (noting that this Court lacks jurisdiction to review a state court judgment if that judgment rests on state law citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

But the issue being raised in the petition is *not* interwoven with federal law. Rather, the issue is purely an issue of state law. The Florida Supreme Court did not cite or discuss federal law at any point in its determination that the *Giglio* claim was not properly pled below.

Whether a successive postconviction motion filed in state court is properly pled is solely a matter of state law. As this Court explained in *Skinner v. Switzer*, 562 U.S. 521, 525 (2011), there is only "slim room" left for procedural due process challenges to state postconviction practices and procedures after the decision in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009). And the dissent in *Skinner* would not even have allowed for that "slim room." The dissent's view was that such due process claims should not be cognizable at all. *Skinner*, 562 U.S. at 538 (Thomas, J., dissenting). The *Osborne* Court observed that States have "more flexibility in deciding what procedures are needed in the context of postconviction relief" because the right to due process in postconviction proceedings is "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne*, 557 U.S. at 69. Federal courts may "upset a State's postconviction relief procedures only if they are fundamentally inadequate." *Id.*

Florida's reasonable pleading requirements are not "fundamentally inadequate." The "slim room" left by *Osborne* to raise due process challenges to state postconviction practices and proceedings does not include challenges to a state's reasonable pleading requirements. There is no federal constitutional right to file poorly pled postconviction

claims in state court.

This Court generally does not treat state law regarding procedural requirements for state postconviction motions as federal constitutional issues. For example, even when determining if a federal habeas petition filed in federal court is timely under a federal statute of limitations, this Court totally defers to the state court's determination of untimeliness under state law, for the purposes of tolling under the AEDPA. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (explaining that if a state court determines a state postconviction motion is untimely under state law, that is "the end of the matter for purposes of § 2244(d)(2)"). The Florida Supreme Court found the *Giglio* claim was not sufficiently pled, which, likewise, is "the end of the matter."

There is no federal question presented in the petition and therefore, this Court lacks jurisdiction.

No conflict with this Court's due process jurisprudence

There is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision holding the *Giglio* claim was not properly pled. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court has never held, or even hinted, that States can not place reasonable pleading requirements on postconviction motions filed in its own courts. This Court has never recognized a federal due process access-to-courts right to file poorly pled motions in state postconviction proceedings. *Cf. Lewis v. Casey*, 518 U.S. 343, 354 (1996) (stating that the Constitution does not require the State to enable the prisoner to "litigate effectively once in court"). Indeed, this Court itself once described an access-to-courts claim as being "nearly unintelligible" and "hopelessly incomplete," which did not come "even close to stating a constitutional claim" and then affirmed its dismissal for not stating a cause of action. *Christopher v. Harbury*, 536 U.S. 403, 417-

18 (2002). The Florida Supreme Court merely treated the insufficiently pled *Giglio* claim in this case in the same manner as this Court treated the cause of action in *Harbury*.

Alternatively, even if the federal due process clause extended to oversight of a state's pleading requirements, it would not prevent the state courts from requiring that postconviction claims be pled in a manner that does not require the state court and respondent to guess what the actual basis of a claim is. *Harbury*, 536 U.S. at 418 (observing that both the district court and the defendants were left to "guess" at the "unstated cause of action" and "at the remedy" because the claim was so poorly pled). Neither the state trial court nor the respondent should be put in the position of having to guess what testimony the petitioner believes is false or having to guess how the prosecutor was supposed to know that testimony was false when addressing a *Giglio* claim. But that is the exact position the state trial court, the Attorney General's Office, and the Florida Supreme Court were placed in regarding this *Giglio* claim.

To establish a *Giglio* violation, the petitioner must show: (1) the testimony was actually false; (2) the prosecution knew it was false; and (3) the testimony was material in that there is a reasonable likelihood to have affected the verdict. *Martin v. State*, 311 So.3d 778, 808 (Fla. 2020), *cert. denied*, *Martin v. Florida*, 141 S.Ct. 417 (2020); *see also Davis v. Sellers*, 940 F.3d 1175, 1191 (11th Cir. 2019), *cert denied*, *Davis v. Hatcher*, 141 S.Ct. 116 (2020) (No. 19-8216). And the defendant has the burden of establishing the first two prongs, at least. *Martin*, 311 So.3d at 808.

But the amended *Giglio* claim was, in the trial court's words, "hopelessly incomplete" regarding at least two of the three prongs. Hutchinson did not identify any testimony he believed to be false in the amended claim. There was no citation to any page of the trial transcript of Adams' testimony or quotation of Adams' testimony. Nor was there any comprehensible explanation of why the unidentified testimony was

believed to be false. The amended *Giglio* claim asserted the prosecutor misled the court and jury that the Adamses were not getting a "benefit for identifying the voice on the 911 tape as Hutchinson's voice" and by doing so, "the State committed a classic *Giglio* violation where prejudice is presumed." (2021 Succ. PCA at 202-203). But, as the state trial court found, to the extent Hutchinson attempted to claim that Adams was not prosecuted for bank robbery by the federal government in exchange for either his or his wife's testimony in the state murder case, he failed "to include an affirmative allegation" to that effect in the amended claim. (2021 Succ. PCA at 322). Indeed, there is no explanation to this day of what benefit counsel thinks Adams got but did not disclose. Nor did the amended claim explain how the prosecutor would have known the unidentified testimony was false. While several pages of the amended *Giglio* claim referred to information regarding Adams in the FBI file including the fact that the FBI considered Adams a suspect in the bank robbery, the amended claim did not explain how a Florida prosecutor, trying a murder case, would know the contents of an FBI file. (2021 Succ. PCA at 203-205). Indeed, that vital link to establishing a *Giglio* violation of the prosecutor's knowledge of the falsity of the testimony is not explained even in the petition filed in this Court. And, as the state trial court noted, because Hutchinson failed to specifically identify any false testimony, the trial court could not conduct a materiality analysis. (2021 Succ. PCA at 324). The amended *Giglio* claim was not properly pled, just as the state trial court and the Florida Supreme Court found.

Opposing counsel relies on *Osborne*, which explained that federal courts may upset a State's postconviction relief procedures *only* if they are fundamentally inadequate to vindicate the substantive rights. *Osborne*, 557 U.S. at 69 (emphasis added). But there is nothing inadequate, much less fundamentally inadequate, about requiring a *Giglio* claim to actually identify the testimony that is alleged to be false with a citation to the trial transcript or requiring an explanation of how the prosecutor

would know that the testimony was false. Furthermore, opposing counsel ignores this Court's more recent statement in *Skinner* that *Osborne* itself left only "slim room" for procedural due process challenges to state postconviction practices and does not explain how reasonable pleading requirements would possibly fit into that "slim room." *Skinner*, 562 U.S. at 525. There is no conflict with *Osborne*.

There is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state supreme court and the Florida Supreme Court's decision in this case. 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); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). 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.

Both the federal circuit courts and other state supreme courts also have basic pleading requirements. *Cone v. Bell*, 556 U.S. 449, 482 (2009) (Alito, J., concurring) (noting it is "common practice" for appellate courts to refuse to consider issues that are "mentioned only in passing" in the brief); *Pfau v. Yellen*, 2022 WL 17175594, at *2 (5th Cir. Nov. 23, 2022) (22-50542) (concluding an issue regarding the district court granting a motion for judgment as a matter of law was forfeited because there were no citations to the trial transcripts provided in the brief). Indeed, the federal circuit

courts and state supreme courts have similar pleading requirements for *Giglio* claims. *United States v. D'Amico*, 2022 WL 3023694, *1 (11th Cir. Aug. 1, 2022) (concluding the *Giglio* claim failed because the defendant did not identify any specific statements that were allegedly false), *pet. for cert. filed, D'Amico v. United States,* No. 22-5931 (U.S. Oct. 28, 2022); *Greene v. Comm'r of Corr.*, 190 A.3d 851, 861, n.10 (Conn. 2018) (noting that, while the *Giglio* claim referred to specific pages of the transcript, there was no specific identification of what parts of the testimony on those pages was false).

Hutchinson does not cite to any decision of any federal circuit court or state supreme court holding that pleadings requirements for postconviction claims filed in state court violate the due process clause. *Allen v. Sec'y, Dep't of Corr.*, 767 Fed. Appx. 786, 792 (11th Cir. 2019) (noting that questions of state law rarely raise issues of federal constitutional significance, even if couched in terms of due process citing *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988)); *Webb v. Wyo. Dep't of Corr.*, 849 Fed. Appx. 729, 737 (10th Cir. 2021) (classifying a claim regarding a state speedy trial rule as violating federal due process as being a state law claim and observing that a habeas petitioner "cannot transform a state law claim into a federal one merely by attaching a due process label"), *cert. denied, Webb v. Pacheco*, 142 S.Ct. 184 (2021) (No. 20-8323). Nor does Hutchinson point to any federal or state appellate court allowing a *Giglio* claim to be raised in the same slipshod manner this *Giglio* claim was raised. Hutchinson certainly does not point to any case where a lower court was reversed by an appellate court where the lower court had allowed counsel two months to properly pled the claim but received an amended claim containing the same flaws as the original claim, much less a case reversing in such a situation on federal due process grounds. He cites no appellate case from any court holding there is a federal due process right to sloppy pleading. *Bradshaw v. Unity Marine Corp., Inc.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001) (noting the district court was faced with the "daunting task of

deciphering" the "amateurish pleadings"). All courts have minimal pleading requirements because it is impossible to function without them.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.

Poor vehicle/advisory opinion

This Court does not normally grant review of a case were the legal issue being raised in the petition would not result in any actual relief because, in such cases, the issue becomes merely a theoretical exercise. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (explaining that this Court does not review cases where the judgment would be the same after this Court corrected the lower court's views of federal laws based, in part, on this Court concern's that review in those cases "could amount to nothing more than an advisory opinion" citing *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). In other words, this Court does not typically review cases where the bottom line would remain the same, regardless of any opinion from this Court.

In this case, the *Giglio* claim, in addition to being not properly pled, was also both untimely and meritless. The Florida Supreme Court explicitly stated that it was not addressing the timeliness of the *Giglio* claim because it found the claim to be insufficiently pled. *Hutchinson*, 343 So.3d at 54, n.5. But the Florida Supreme Court is not shy about enforcing time limitations on *Giglio* claims. *Dailey v. State*, 329 So.3d 1280, 1284 (Fla. 2021) (finding a *Giglio* claim to be untimely), *cert. denied, Dailey v. Florida*, ___ S.Ct. ___, 2022 WL 4657191 (Oct. 3, 2022) (No. 21-1411); *Merck v. State*, 260 So.3d 184, 194 (Fla. 2018) (finding a *Giglio* claim to be untimely); *Moore v. State*,

132 So.3d 718, 723 (Fla. 2013) (finding a *Giglio* claim to be untimely).

Florida law requires that a successive *Giglio* claim be diligently pursued and filed within one year of obtaining the factual basis for the new claim to be considered timely. *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008); *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020) (citing *Jimenez*), *cert. denied, Dillbeck v. Florida*, 141 S.Ct. 2733 (2021) (No. 20-7665). The FBI closed its investigation of the Paxton bank robbery in 2007 but Hutchinson did not make a FOIA request for the FBI investigative file of the bank robbery until over a decade later, in 2017. He was not diligent. Additionally, having once obtained the FBI file, petitioner did not file the *Giglio* claim in the state postconviction court until June of 2020. The successive postconviction claim was raised years late. The *Giglio* claim is untimely. If remanded by this Court, the Florida Supreme Court would simply find the *Giglio* claim to be untimely on remand.

Alternatively, the *Giglio* claim is meritless. To the extent Hutchinson is relying on the arguments the prosecutor made to the judge when the jury was not present as the basis for the *Giglio* claim, *Giglio* does not extend to arguments of counsel, much less to arguments made solely to the judge. *Giglio* concerns false *testimony*, not the arguments of counsel. And, while a *Giglio* violation could be premised on false factual statements made by the prosecutor to the judge at a bench trial, a *Giglio* claim cannot be premised on arguments of the prosecutor made to the judge during a proffer because the jury never hears those arguments. The jury must hear the statements for the statements to affect the verdict. The prosecutor's statements regarding Adams' involvement in the bank robbery were made to the judge at a time when the jury was not present and therefore, those statements necessarily do not amount to a *Giglio* violation.

While unclear even at this point in the litigation, opposing counsel's main complaint seems to be the prosecutor referring to Adams as a material witness rather

than as a "suspect" in the bank robbery during the arguments the prosecutor made to the trial court, outside the presence of the jury. But it was the FBI that considered Adams a suspect, not the State of Florida. Florida charged Taylor with bank robbery; Florida never charged Adams with that crime. And ultimately Florida did not even pursue the charges against Taylor; the charges against Taylor were dropped before this trial. (T. Vol. XXIV at 1138). Even in this Court, opposing counsel has still not explained how the prosecutor would personally know whether Adams robbed the bank and therefore, should be characterized as a suspect or how a Florida murder prosecutor would have access to the FBI file on the Paxton bank robbery to know that the FBI considered Adams to be a suspect. The prosecutor's characterization of Adams' role certainly was not indisputably false, as required to establish a *Giglio* violation. *See e.g., Abdus-Samad v. Bell*, 420 F.3d 614, 626 (6th Cir. 2005) (stating, for purpose of a *Giglio* claim, a statement must be "indisputably false rather than merely misleading"). A defendant's disagreement with the prosecutor's word choice regarding Adams' status in the eyes of the Florida authorities is not a legally valid *Giglio* claim.

And a prosecutor's closing argument to the jury, which in this case, opposing counsel acknowledged to the Florida Supreme Court was based on "technically accurate" testimony, does not amount to a valid *Giglio* claim either. (Rep. B. at 25); *United States v. Mangual-Garcia*, 505 F.3d 1, 10 (1st Cir. 2007) (rejecting a claim that prosecutor's closing argument was a violation of *Napue v. Illinois*, 360 U.S. 264 (1959), because the prosecutor's argument was not contrary to any of the evidence). Hutchinson is not entitled to any relief on the *Giglio* claim on the merits. If remanded by this Court, the Florida Supreme Court would simply find the *Giglio* claim to be meritless on remand.

The *Giglio* claim is both untimely and meritless, regardless of its pleading deficiencies. So, the issue of the pleading requirement is merely a theoretical exercise

that would not result in any actual relief.

In sum, the petition presents an issue of state law over which this Court lacks jurisdiction. Moreover, there is no conflict with this Court's due process jurisprudence and the Florida Supreme Court's decision regarding the *Giglio* claim being insufficiently pled. Nor is there any conflict with that of any federal circuit court or state court of last resort. And this case is a poor vehicle to address the issue, because regardless of any pleading flaws, the *Giglio* claim is untimely and devoid of merit.

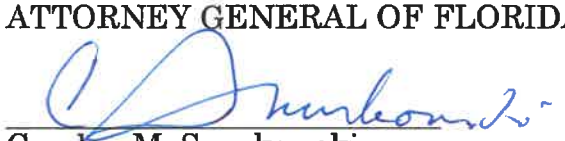
Accordingly, this Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
primary email: capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com