CAPITAL CASE

No. 23-6737

In the

Supreme Court of the United States

ANTHONY FLOYD WAINWRIGHT, *Petitioner*,

v.

RICKY D. DIXON, Secretary, Florida Department of Corrections, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Eleventh Circuit affirming the denial of the Rule 60(b)(6) motion to reopen the dismissal of the first habeas petition as untimely.

II. Whether this Court should grant review to decide whether a district court may determine that habeas counsel's conduct of missing the deadline was the result of negligence based on the existing record without conducting an evidentiary hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

OPINION BELOW

The Eleventh Circuit's opinion is unpublished but available at *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 4582786 (11th Cir. July 18, 2023) (No. 20-13639).

JURISDICTION

On July 18, 2023, the Eleventh Circuit affirmed the district court's denial of the Rule 60(b)(6) motion to reopen. *Wainwright*, 2023 WL 4582786, at *1,*7. On August 8, 2023, Wainwright, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a motion for rehearing en banc in the Eleventh Circuit. *See* No. 20-13639 Entry #70. On October 13, 2023, the Eleventh Circuit denied rehearing. Entry #72. On February 10, 2024, following an extension, Wainwright, represented by CHU-N, 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). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment. The Fifth Amendment to the United States Constitution, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. V.

The habeas statute of limitations, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This petition involves two questions regarding a Rule 60(b)(6) motion to reopen the initial federal habeas proceedings in a Florida capital case to relitigate the issue of equitable tolling of the habeas statute of limitations, 28 U.S.C. § 2244(d)(1). The Eleventh Circuit had affirmed the denial of equitable tolling in the original litigation over a decade earlier. *Wainwright v. Sec'y, Dep't of Corr.*, 537 F.3d 1282 (11th Cir. 2007).

Facts of the crime

Anthony Wainwright and co-perpetrator Richard Hamilton escaped from prison in Newport, North Carolina. They stole a green Cadillac and then burglarized a home, taking guns from the home, including a Winchester rifle and Remington .22 rifle. They then drove to Florida. On April 27, 1994, in Lake City, they decided to steal another car because the stolen Cadillac was overheating. They drove into a Winn-Dixie parking lot and saw Carmen Gayheart, a young mother of two, loading groceries into her blue Ford Bronco. Hamilton forced her into her own car at gunpoint, while Wainwright followed in the stolen Cadillac. They ditched the Cadillac, transferring the stolen weapons and ammunition to the Bronco. They headed north on I-75 but drove off the highway into a wooded area. They raped, strangled, and executed her by shooting her twice in the back of the head with the stolen .22 rifle. They were arrested the next day in Mississippi following a shootout with troopers. *See generally Wainwright v. State*, 704 So.2d 511, 512 (Fla. 1997).

Procedural history in state court

Wainwright was convicted of first degree murder, armed robbery, armed kidnapping, and armed sexual battery. *Wainwright v. State*, 896 So.2d 695, 697 (Fla.

2004). He was sentenced to death for the murder and to three life sentences for the other convictions.

The Supreme Court of Florida affirmed the convictions and sentences in the direct appeal. *Wainwright v. State*, 704 So.2d 511 (Fla. 1997). The United States Supreme Court denied the petition for writ of certiorari. *Wainwright v. Florida*, 523 U.S. 1127 (1998). The Florida Supreme Court later affirmed the denial of state postconviction relief and denied the state habeas petition. *Wainwright v. State*, 896 So.2d 695 (Fla. 2004).

Wainwright then filed numerous successive postconviction motions in state court over the years. The pro se appeal of his most recent state successive postconviction motion, the seventh successive postconviction motion, was dismissed by the Florida Supreme Court on September 16, 2022. *Wainwright v. State*, SC2022-1187 (Fla. Sept. 2022).

Original federal habeas litigation

On March 29, 2005, Wainwright, represented by Joseph Hobson, filed a § 2254 petition in the Middle District of Florida. *Wainwright v McDonough*, 3:05-CV-276-J-25, 2006 WL 8449862, at *1 (M.D. Fla. Mar. 10, 2006). The Secretary moved to dismiss the petition as untimely under the AEDPA. The first petition was six days late. *Wainwright v. Sec'y, Dep't of Corr.*, 537 F.3d 1282, 1284 (11th Cir. 2007). The federal district court had dismissed the petition as untimely, rejecting a claim of equitable tolling. *Wainwright*, 2006 WL 8449862, at *3-*4.

Wainwright appealed to the Eleventh Circuit. A panel of the Eleventh Circuit concluded that equitable tolling did not apply and affirmed the district court's dismissal of the first habeas petition as untimely. *Wainwright*, 537 F.3d at 1287.

Procedural history of the current Rule 60(b)(6) motion to reopen

Over a decade later, on June 22, 2018, the district court granted the Capital Habeas Unit of the Northen District of Florida's (CHU-N) motion to be appointed as Wainwright's federal habeas counsel. (Doc. #47). Nearly one year after the appointment, on June 21, 2019, CHU-N filed the current Rule 60(b)(6) motion to reopen this closed habeas case. (Doc. #52). The motion to reopen argued the district court should reconsider its prior ruling regarding equitable tolling: 1) because original federal habeas counsel Joseph Hobson had a conflict of interest because his missing AEDPA's deadline necessarily implicated his own professional conduct, as established by *Christeson v. Roper*, 574 U.S. 373 (2015); and 2) because Hobson perpetrated fraud on the court by arguing for equitable tolling based on the Florida Supreme Court mailing a copy of the order denying rehearing to the wrong address. (Doc. #60 at 9 & n.7). Alternatively, Wainwright raised a gateway claim of actual innocence based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013). The claim of innocence was premised on a June 19, 2019, affidavit from DNA analyst Candy Zuleger criticizing the findings and testimony of the State's two DNA experts at trial.[1] The motion to reopen also raised numerous new grounds for habeas relief that were not raised in the original habeas petition filed in 2005.

On July 18, 2019, the Secretary filed a response to the Rule 60(b) motion to reopen. (Doc. #54 at 1-2, 9-11). The Secretary argued that the motion, in reality, was an unauthorized successive habeas petition over which the district court lacked jurisdiction because it raised numerous new grounds. The Secretary's response also

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[1] Wainwright, however, has not raised a claim of newly discovered evidence of innocence based on the 2019 affidavit from DNA analyst Zuleger in state court, which was the main basis of the claim of innocence in the Rule 60(b)(6) filed in federal court.

contained an extensive discussion of the untimeliness of the Rule 60(b)(6) motion to reopen. (Doc. #54 at 1-2, 9-11).

The district court denied the Rule 60(b)(6) motion to reopen concluding that the motion to reopen was actually an unauthorized successive habeas petition over which it lacked jurisdiction. The district court also denied a certificate of appealability (COA).

On March 29, 2021, the Eleventh Circuit granted COA on three issues:

(1) Whether Appellant is entitled to equitable tolling;

(2) Whether a claim of actual innocence, which does not impugn a prior district court ruling that a habeas petition was untimely, may constitute a cognizable extraordinary circumstance warranting relief under Rule 60(b) from the prior ruling; and

3) If the answer to (2) is yes, whether Appellant made out a claim of actual innocence.

The Secretary moved to vacate the COA, but the Eleventh Circuit denied the motion to vacate.

The Eleventh Circuit affirmed the district court's denial of the Rule 60(b)(6) motion to reopen and the denial of an evidentiary hearing on the issue of equitable tolling. *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 4582786 (11th Cir. July 18, 2023) (unpublished). The Eleventh Circuit did not address the timeliness of the Rule 60(b)(6) motion which was raised by the Secretary in both the district court and in the Eleventh Circuit.

On February 10, 2024, Wainwright, represented by CHU-N, filed a petition for a writ of certiorari in this Court raising two questions.

REASONS FOR DENYING THE WRIT

QUESTION I

Whether this Court Should Grant Review of a Decision of the Eleventh Circuit Affirming the Denial of the Rule 60(b)(6) Motion to Reopen the Dismissal of the First Habeas Petition as Untimely.

Petitioner Wainwright seeks review of the Eleventh Circuit's decision affirming the district court's denial of a motion to reopen, under Federal Rule of Civil Procedure 60(b)(6), of a habeas case that had been closed over a decade earlier. Pet. at 17. Wainwright sought to reopen his first habeas petition, which had been dismissed as untimely, arguing that his habeas counsel, who missed the deadline, had a conflict of interest under *Christeson v. Roper*, 574 U.S. 373 (2015), in litigating his own conduct of missing the deadline during the prior proceedings. The Rule 60(b)(6) motion, however, was itself untimely. This Court recently lauded the circuit courts for enforcing the rule requiring motions to reopen be filed within a reasonable time. *Kemp v. United States*, 596 U.S. 528, 538 (2022) (observing the importance of the time limitation in Rule 60(c)(1) in forestalling "abusive litigation" in habeas cases). The Rule 60(b)(6) motion in this case was filed years after *Christeson* was decided and was intentionally dilatory. Contrary to the assertion in the petition that this is a "pristine" vehicle, the threshold issue of the untimeliness of the Rule 60(b)(6) motion renders this case a poor vehicle. Pet. at 29. Additionally, there is no conflict between this Court's view that negligence is not a sufficient basis for a finding of extraordinary circumstances for purposes of equitable tolling of the habeas statute of limitations and the Eleventh Circuit's unpublished decision in this case. This Court in *Maples v. Thomas*, 565 U.S. 266 (2012), explained that even "egregious" attorney error is not sufficient to warrant equitable tolling. Instead, abandonment or similar conduct sufficient to break the agency relationship, is required to establish extraordinary circumstances necessary for equitable tolling. But Wainwright's federal habeas

counsel did not abandon him. Rather, as the district court found, prior habeas counsel simply misunderstood the operation of the habeas statute of limitations. Furthermore, there also is no conflict between the lower federal appellate courts and the Eleventh Circuit's unpublished decision in this case. The vast majority of the circuit cases cited in the petition in an attempt to establish a circuit split were decided before this Court's decision in *Maples* and therefore, do not establish an active circuit split. And an unpublished opinion from one circuit does not create a conflict with the other circuits. Review of the first question should be denied.

The Eleventh Circuit's decision in this case

The Eleventh Circuit affirmed the district court's summary denial of the Rule 60(b)(6) motion to reopen the long-closed initial habeas proceedings. *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 4582786 (11th Cir. July 18, 2023) (unpublished). The Eleventh Circuit noted that, on June 21, 2019, Wainwright had filed a Rule 60(b) motion to reopen in the district court seeking to relitigate the timeliness of his original habeas petition. *Id.* at *1. Wainwright argued that the issue of equitable tolling should be revisited. He asserted that his prior federal habeas counsel, who missed the deadline, had a conflict of interest under *Christeson v. Roper*, 574 U.S. 373 (2015). He claimed his prior habeas counsel Hobson had misrepresented his experience and qualifications in federal habeas litigation and that his attorney had lied to him both about working on the petition and about conducting research.

The district court denied the Rule 60(b) motion to reopen. *Wainwright*, 2023 WL 4582786, at *1. The Eleventh Circuit noted that the district court agreed that prior counsel had a conflict under *Christeson* but the district court concluded that prior counsel missing the deadline was due to the attorney's misunderstanding of 28 U.S.C. § 2244(d), and his negligent miscalculations. The district court found that Hobson had

not lied to Wainwright about when he assured him that he would work on the petition. *Id.* at *1.

The Eleventh Circuit noted that the district court denied the Rule 59(e) motion to alter or amend concluding that the record showed that the attorney's conduct "did not constitute egregious attorney misconduct." *Wainwright*, 2023 WL 4582786, at *2. The Eleventh Circuit also noted that the district court determined that Wainwright had not shown "the existence of an equitable tolling claim with some merit." *Id.* at *2.

The Eleventh Circuit noted that the standard of review for a motion to reopen was an abuse of discretion. *Wainwright*, 2023 WL 4582786, at *2 (citing *Buck v. Davis*, 580 U.S. 100, 122-23 (2017), *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006), and *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014)). The Eleventh Circuit also noted the same "deferential" standard, the "abuse of discretion" standard, governed the denial of an evidentiary hearing on the issue of equitable tolling. *Id.* at *2 (citing *Cano*, 435 F.3d at 1342-43, and *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1206-07 (11th Cir. 2014)). But, as the Eleventh Circuit noted, a different standard of review applies to the district court's findings of fact in connection with the equitable tolling claim which is that of clear error.

Wainwright argued that this was not a typical case of negligence because his prior habeas counsel Hobson (1) operated under a conflict of interest under *Christeson* because he was the attorney who had missed the habeas filing deadline; (2) engaged in bad faith by (a) lying to him about working on the habeas petition and making it seem as if the petition would be filed on time, and (b) misrepresenting to him that the petition was timely; and (3) perpetrated a fraud on the court by basing his equitable tolling argument on the false claim that he was not provided notice of the rulings of the Florida Supreme Court. *Wainwright*, 2023 WL 4582786, at *2. The district court rejected the claim that the attorney was dishonest, concluding instead that the

attorney "misunderstood" the federal statute of limitations, relying on the record of both the attorney's court filings and letters to Wainwright. *Id.* at *3. But "such misconceptions are not extraordinary" and Hobson is "not the only attorney to have thought that the limitations period did not start running until the Florida Supreme Court docketed a denial of certiorari review." *Id.* at *3. The district court also explained that habeas counsel Hobson communicated his mistaken belief about the operation of the limitations period "did not amount to a lie." *Id.* at *3. The district court reasoned, relying on Eleventh Circuit precedent, that gross negligence or a misunderstanding of the law are not enough, by itself, to warrant equitable tolling. *Id.* at *3 (citing *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216 (11th Cir. 2017)). The district court found that Hobson did not lie to Wainwright when he assured Wainwright that he was working on the habeas petition based on the record fact that Hobson "filed a 73-page habeas petition raising 11 grounds." *Id.* at *3. The Eleventh Circuit affirmed the denial of the Rule 60(b) motion. *Wainwright*, 2023 WL 4582786, at *1,*7.

Threshold matter of timeliness

This Court typically does not grant review of a question that raises a threshold issue or an antecedent question. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993) (dismissing a writ of certiorari as improvidently granted because there was a threshold issue); *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (explaining that the petition for writ of certiorari was properly denied by the Court, despite the question being presented being a significant one that is worthy of review, because the case might require the Court to first resolve antecedent questions of state law and trademark-protection principles).

There is a threshold issue of the timeliness of the Rule 60(b)(6) motion itself.

Rule 60(b)(6) motions must be filed within a "reasonable time." Fed. R. Civ. P. 60(c)(1). The "reasonable time" clock for Rule 60(c)(1) begins ticking when the movant is, or should be, aware of the factual or legal basis for the motion. *Ghaleb v. Am. Steamship Co.*, 770 Fed. Appx. 249 (6th Cir. 2019) (citing *Moses v. Joyner*, 815 F.3d 163, 166-67 (4th Cir. 2016), and *Bouret-Echevarría v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 43-44 (1st Cir. 2015)). When a Rule 60(b)(6) motion is premised on a change in law, courts measure timeliness from the date of the new decision, not from the date of the judgment. *Bynoe v. Baca*, 966 F.3d 972, 980 (9th Cir. 2020) (citing *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017), and *Miller v. Mays*, 879 F.3d 691, 699 (6th Cir. 2018)).

This Court recently declined to specifically define the "reasonable time" standard for Rule 60(b) motions in habeas cases but noted with approval that circuit courts have defined the reasonable time requirement of Rule 60(c)(1) "to forestall abusive litigation" in habeas cases. *Kemp v. United States*, 596 U.S. 528, 538 (2022).

But, this Court, in analogous context, has concluded that waiting more than 3½ months after a new case was decided by this Court to file a motion to stay an appellate mandate based on that new decision, without any explanation for the delay, was dilatory. *Ryan v. Schad*, 570 U.S. 521, 523, n.2 & 526, n.3 (2013); *see also Miller v. Mays*, 879 F.3d 691, 700 (6th Cir. 2018) (finding a Rule 60(b) motion based on a new decision to be untimely, relying on this Court's decision in *Schad*). Likewise, any Rule 60(b)(6) motion based on a new decision must be filed within a few months of the new decision to be filed within a "reason time" for purposes of Rule 60(c)(1).

In this case, the clock began ticking for purposes of Rule 60(c)(1) once *Christeson* was decided in January of 2015 and CHU-N became operational later in 2015. The Rule 60(b)(6) motion to reopen had to be filed in 2015 to be timely but was not filed until 2019. The Rule 60(b)(6) motion was filed over three years late.

Respondent raised the untimeliness of the Rule 60(b)(6) motion at some length

in both the district court and the Eleventh Circuit. *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 3:05-cv-00276-TJC (M.D. Fla.) (Doc. #54 at 1-2, 9-10); *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 20-13639 (11th Cir.) (Doc. #47 at 27-32). Respondent relied on this Court's decision in *Schad*, as well as caselaw from the Third, Fourth, Fifth, and Sixth Circuits, to argue that, when a Rule 60(b)(6) motion to reopen is based on a new decision, the motion to reopen must be filed within a few months of that new decision to be considered timely. (Doc. #47 at 29, n.2).[2]

The reply brief Wainwright filed in the Eleventh Circuit insisted that he was entitled to a year from the date of appointment to file the Rule 60(b)(6) motion. (Doc. #54 at 8). But that view would encourage dilatory tactics in violation of this Court's view of the importance of forestalling "abusive" motions to reopen in habeas cases by enforcing the timeliness requirement of Rule 60(c)(1). *Kemp*, 596 U.S. at 538. CHU-N waiting years after becoming fully operational to seek appointment as substitute habeas counsel, despite the Eleventh Circuit listing this case in the opinion creating that office. *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1215 (11th Cir. 2014) (advocating establishing a capital habeas unit (CHU) in Florida); *id.* at 1224 (Martin, J., concurring) (agreeing and listing numerous Florida capital case where the deadline was missed, including Wainwright's case in the appendix). Thus, the motion to reopen was intentionally dilatory.

The petition filed in this Court did not address the timeliness of Rule 60(b)(6)

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[2] *Cox v. Horn*, 757 F.3d 113, 116 (3d Cir. 2014) (observing that a Rule 60(b)(6) motion based on a new decision which was filed roughly 90 days after the new decision, was "close enough" to be deemed filed within a reasonable time); *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016) (concluding that a Rule 60(b)(6) motion filed more than two years after the new decision was untimely); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (concluding a Rule 60(b)(6) motion filed nearly eight months after the new decision was untimely); *Miller v. Mays*, 879 F.3d 691, 699 (6th Cir. 2018) (concluding a Rule 60(b)(6) motion based on a new decision, that was filed 18 months after the new decision, was untimely).

in any manner, other than to note that neither of the lower courts ruled on the timeliness of the motion to reopen. But both courts denied relief. This Court, however, would have to address the timeliness issue to grant Rule 60(b)(6) relief. And, because the Rule 60(b)(6) motion is quite clearly untimely, this Court would never reach the issue presented in the petition of whether the standard for attorney misconduct required to invoke equitable tolling includes such matters as promises to the client or misrepresentations of the attorney's prior experience in capital habeas litigation. This Court should decline review of both of the questions presented in the petition due to the significance of the threshold issue of the timeliness of the Rule 60(b)(6) motion itself.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence on Rule 60(b) motions in habeas cases and the Eleventh Circuit's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). There certainly is no conflict with this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In *Gonzalez*, this Court held the district court did not abuse its discretion in denying a Rule 60(b) motion to reopen a habeas case. Gonzalez's first habeas petition had been dismissed as untimely under circuit precedent. A few months later, this Court decided *Artuz v. Bennett*, 531 U.S. 4 (2000), under which there was no question that Gonzalez's petition would be considered timely. But that change in the law, according to this Court, was still not an extraordinary circumstance warranting granting a Rule 60(b)(6) motion and reopening a habeas case that had been closed eight months earlier. This Court commented that the *Artuz* decision, which arrived at "a different interpretation of the statute" from the circuit court, was "hardly extraordinary" and stated that not every new decision warrants reopening habeas

cases "long since final." *Gonzalez*, 545 U.S. at 536. The *Gonzalez* Court considered the *Artuz* decision to be less than "extraordinary" which is the standard for granting both equitable tolling and 60(b)(6) relief. *Id.* at 537. This Court expressed concern that granting Rule 60(b)(6) motions to reopen habeas cases based on a change in the law "could be used to circumvent" the Congressional mandate regarding changes in the law. *Gonzalez*, 545 U.S. at 531-32. The *Gonzalez* Court stated that granting a Rule 60(b)(6) motion in a habeas case should only "rarely" occur. *Id.* at 535.

This Court's concern about circumventing Congressional intent regarding changes in the law applies with greater force to this case where the dismissal of the first petition as untimely was affirmed by the Eleventh Circuit over a decade before the motion to reopen was filed. *Wainwright v. Sec'y, Dep't of Corr.*,537 F.3d 1282 (11th Cir. 2007). This is not that "rare" habeas case that warrants being reopened. The type of conflict of interest in *Chisteson* is not sufficient to warrant Rule 60(b) relief. Allegations of attorney conflict or attorney misconduct that would suffice in initial habeas proceedings to warrant substitution of counsel, do not suffice to reopen a case closed long ago. Permitting Rule 60(b)(6) motions to be used to reopen older habeas petitions would "circumvent" Congressional intent by allowing new procedural decisions, such as *Christeson*, to be applied retroactively. It would also undermine Congressional intent in enacting the statute of limitations, which was to further finality of convictions and sentences, especially in capital cases. *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (stating the "AEDPA's 1-year limitations period 'quite plainly serves the well-recognized interest in the finality of state court judgments'" quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)).

Wainwright's petition to this Court largely ignores the Rule 60(b)(6) aspect of this case. Instead, the petition reads as though it was a petition from an original proceeding rather than a motion to reopen. It contains no argument regarding whether

a claim based on *Christeson* is properly raised in a Rule 60(b)(6) motion under this Court's decision in *Gonzalez*. The petition cites *Gonzalez* only once and then only in support of the proposition that equitable tolling is a flexible and fact-intensive concept. Pet. at 28. This Court should not grant review of a case when the petition ignores such a crucial aspect of the case that will have to be addressed by this Court.

Nor does the Eleventh Circuit's decision in this case conflict with this Court's equitable tolling jurisprudence. Wainwright relies on *Holland v. Florida*, 560 U.S. 631 (2010), to argue that his attorney's conduct was either gross negligence or bad faith and asserts that either is sufficient to warrant a finding of extraordinary circumstances for purposes of equitably tolling of the habeas statute of limitations. He argues, based on *Holland*, that negligence, if beyond "garden variety" negligence, can be sufficient to warrant equitable tolling. Pet. at 21, n.7 (citing *Holland*, 560 U.S. at 652). *Holland*, however, is not this Court's last word on the subject of attorney misconduct warranting equitable tolling. Rather, this Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012), is this Court's last word.

In *Maples*, this Court held that an attorney abandoning a habeas petitioner "without a word of warning" amounted to extraordinary circumstances for purposes of equitable tolling. *Maples*, 565 U.S. at 283, 289. Under agency principles, this Court explained, abandonment severs the agency relationship between the attorney and the client. *Id.* at 281, 283. This Court reasoned that Maples' two attorneys leaving the firm that was representing him pro bono to accept new employment that prohibited any outside employment, without filing a motion to withdraw in the state court, ended the agency relationship between those attorneys and Maples. *Id.* at 284 (citing Restatement (Second) of Agency § 112 (1957)). Justice Alito had earlier rejected gross negligence as the standard for equitable tolling as making little sense and being "impractical in the extreme," in his concurring opinion in *Holland*. *Holland*, 560 U.S.

at 657-58 (Alito, J., concurring). This Court in *Maples* adopted much of Justice Alito's views because, in this Court's word's, he had "homed in on the essential difference between a claim of attorney error, however ***egregious***, and a claim that an attorney had essentially abandoned his client." *Maples*, 565 U.S. at 282 (emphasis added). Gross negligence, *i.e.*, egregious attorney error, is not sufficient to establish extraordinary circumstances for purposes of equitable tolling, according to the *Maples* Court. Instead, abandonment by the attorney, or its functional equivalent, is required by *Maples*. Neither promises by the attorney to conduct research nor an attorney's assurances that he was working on the petition or misrepresentations regarding an attorney's prior experience break the agency relationship. Such allegations are *not* the equivalent of abandonment.

Wainwright's federal habeas counsel did not abandon him. In stark contrast to the facts of *Maples*, his federal habeas counsel filed a lengthy § 2254 petition, albeit six days late. As the Eleventh Circuit noted, Hobson "filed a 73-page habeas petition raising 11 grounds. *Wainwright*, 2023 WL 4582786, at *3. Prior habeas counsel Hobson did not abandon Wainwright. Rather, he missed the deadline by six days.

There is no conflict between this Court's decision in *Maples* and the Eleventh Circuit's unpublished decision in this case.

Furthermore, this Court has previously denied review of petitions seeking to reopen long closed federal habeas petitions via Rule 60(b)(6) to relitigate the timeliness of the original petition. *See e.g.*, *Zack v. Sec'y, Fla. Dep't of Corr.*, 721 Fed. Appx. 918 (11th Cir. 2018), *cert. denied, Zack v. Jones*, 139 S.Ct. 322 (2018) (No. 17-9549); *Howell v. Sec'y, Fla. Dep't. of Corr.*, 730 F.3d 1257 (11th Cir. 2013), *cert. denied, Howell v. Crews*, 571 U.S. 1235 (2014) (No. 13-8530). This Court has also denied review of the issue of timeliness of the Rule 60(b)(6) motion. *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018) (18-5597). And this Court should do likewise

in this case.

No conflict with the lower federal appellate courts

There is also no conflict between the decision of any federal appellate court and the Eleventh Circuit's unpublished 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 lower 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.

Wainwright cites several circuit cases to establish a conflict among the circuit courts regarding whether an attorney negligence is sufficient for purposes of equitable tolling. Pet. at 26-27 (citing *Dillon v. Conway*, 42 F.3d 358 (2d Cir. 2011); *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011); *Luna v. Kernan*, 784 F.3d 640 (9th Cir. 2015); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007); and *Downs v. McNeil*, 520 F.3d 1311, 1321 (11th Cir. 2008)). But the vast majority of the cases cited in the petition were decided before this Court's decision in *Maples* was issued in 2012. To establish an existing and active conflict among the circuits, a petitioner must rely on circuit cases that were decided after this Court's most relevant decision because it cannot be known whether those circuits would follow their existing circuit precedent in the wake of this Court's later decision. Pre-*Maples* cases do not establish an active split among the federal appellate courts regarding gross negligence as a basis for equitable tolling. Because the majority of circuits have not addressed the question in the wake of *Maples*, the

conflict, if any, is quite shallow.

Only one of the cases cited in the petition was decided after *Maples*, which is the Ninth Circuit case of *Luna v. Kernan*, 784 F.3d 640 (9th Cir. 2015). The Ninth Circuit in *Luna* held that "egregious attorney misconduct of all stripes may serve as a basis for equitable tolling." *Luna*, 784 F.3d at 649. So, the only conflict raised by the petition is between the Ninth Circuit and the Eleventh Circuit. *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1236 (11th Cir. 2017) (holding that "negligence, even gross negligence, alone is enough to meet the extraordinary circumstance requirement for equitable tolling in a habeas case."), *cert. denied*, 583 U.S. 1122 (2018) (No. 17-6146). But the Eleventh Circuit has stated that the Ninth Circuit has "misinterpreted" their position. *Cadet*, 853 F.3d at 1236 (citing *Luna*, 784 F.3d at 647-48 and stating that "We certainly do not hold, or in any way mean to imply, that abandonment is the only circumstance that can meet the extraordinary circumstance element for equitable tolling"). The Eleventh Circuit considers bad faith of an attorney in promoting their own interests to be the functional equivalent of abandonment and has granted equitable tolling on that basis. *Thomas v. Att'y Gen. of Fla.*, 992 F.3d 1162 (11th Cir. 2021). The actual dimensions of any conflict between the Ninth and Eleventh Circuits is unclear. So, the petitioner has not established that there is even a shallow split, much less a deep split regarding the issue of whether negligence, beyond the garden variety, can be a basis for equitable tolling of the habeas statute of limitations, and he certainly has not established any split at all on the issue in the context of a Rule 60(b)(6) motion to reopen.[3]

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[3] There is a law review note that asserts there is conflict among the circuits regarding Rule 60(b)(6) motions based on attorney misconduct, but the cases cited to support that proposition, by and large, are not habeas cases. Stephen White, *The Universal Remedy for Attorney Abandonment: Why Holland v. Florida and Maples v. Thomas Give All Courts the Power to Vacate Civil Judgments Against Abandoned Clients by Way of Rule 60(b)(6)*, 42 PEPP. L. REV. 155, 166-173 (2014) (detailing the various circuits' positions). It is far from clear that these circuits would necessarily follow their general civil precedent in § 2254 and § 2255 cases. There are special

Furthermore, the opinion in this case was unpublished. Unpublished opinions are not binding precedent in the Eleventh Circuit. *Rogers v. Sec'y, Dep't of Corr.*, 855 F.3d 1274, 1278, n.1 (11th Cir. 2017) (stating that unpublished opinions are not controlling authority citing 11th Cir. R. 36-2, and *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007)); 11th Cir. R. 36-2 (providing "[u]npublished opinions are not considered binding precedent"). Because the unpublished *Wainwright* opinion is not the law of the Eleventh Circuit, it cannot establish conflict with the decision of any other circuit court. There is no conflict.

Due to the threshold issue of the timeliness of the Rule 60(b)(6) motion itself, as well as there being no conflict between this Court's jurisprudence on Rule 60(b)(6) motions or equitable tolling and the Eleventh Circuit's decision in this case or a conflict between the Eleventh Circuit's unpublished opinion in this case and any other circuit, review of the first question should be denied.

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considerations in habeas cases regarding the AEDPA's goal of finality that are not present in other types of civil cases, as this Court noted in both *Gonzalez* and *Duncan*. The note also does not discuss the obvious timeliness problems under Rule 60(c)(1) of filing Rule 60(b)(6) motions to reopen based on *Holland* or *Maples*, both of which were decided over a decade ago. The note does not cite Rule 60(c)(1), much less account for this Court's recent observations about the importance of enforcing Rule 60(c)(1) in habeas cases. *Kemp*, 596 U.S. at 538.

QUESTION II

Whether this Court Should Grant Review to Decide Whether a District Court may Determine that Habeas Counsel's Conduct of Missing the Deadline was the Result of Negligence Based on the Existing Record without Conducting an Evidentiary Hearing.

Petitioner Wainwright seeks review of an Eleventh Circuit's decision affirming the district court's denial of an evidentiary hearing on the claim of equitable tolling. Pet. at 17. The district court denied the equitable tolling claim without conducting an evidentiary hearing relying on the existing record. Wainwright asserts that the district court improperly relied on the statements of the conflicted counsel to deny the claim of equitable tolling and that the district court committed clear error by doing so because the existing record is insufficient to support the district court's findings. Pet. at 18. But, again, the Rule 60(b)(6) motion itself was untimely. Furthermore, as the Eleventh Circuit concluded, there was no causal connection between many of the allegations of attorney misconduct and the late filing of the first petition. Either of those two independent grounds, untimeliness, or the lack of any connection, which are both matters of law, was a sufficient basis alone for denying an evidentiary hearing. There is no reason for a district court to conduct an evidentiary hearing to develop facts when the claim of equitable tolling is due to be denied as a matter of law twice over. And, as the Eleventh Circuit properly found, the existing record establishes that there was also no abandonment by original habeas counsel Hobson who filed a lengthy habeas petition a few days late. The district court did not abuse its discretion in refusing to conduct an evidentiary hearing on equitable tolling or commit clear error in its factual findings. Review of the second question should also be denied.

The Eleventh Circuit's decision in this case

The Eleventh Circuit also affirmed the district court's denial of an evidentiary hearing on the subject of equitable tolling. *Wainwright v. Sec'y, Fla. Dep't of Corr.*,

2023 WL 4582786 (11th Cir. July 18, 2023) (unpublished). The Eleventh Circuit noted that the district court had concluded that "there was no basis for an evidentiary hearing." *Wainwright*, 2023 WL 4582786, at *3.

The Eleventh Circuit noted the same "deferential" standard of review also governed the denial of an evidentiary hearing which was the "abuse of discretion" standard. *Wainwright*, 2023 WL 4582786, at *2 (citing *Cano*, 435 F.3d at 1342-43, and *Lugo*, 750 F.3d at 1206-07). The Eleventh Circuit emphasized the abuse of discretion standard gives a district court a "range of choice" regarding holding an evidentiary hearing. *Wainwright*, 2023 WL 4582786, at *4. But a different standard of review applies to the district court's findings of fact regarding the equitable tolling claim, which is the clear error standard. *Id.* at *2.

On appeal, Wainwright argued that the district court should have held an evidentiary hearing on equitable tolling. *Wainwright*, 2023 WL 4582786, at *4. The Eleventh Circuit found that the district court's factual findings concerning attorney dishonesty and misconduct were not clearly erroneous. *Id.* at *4 (citing *Cooper v. Harris*, 581 U.S. 285, 293 (2017)). The Court agreed with the district court's finding that prior habeas counsel Hobson missed the deadline "because he misunderstood how AEDPA's statute of limitations functioned" and that "Hobson did not lie to Wainwright when he said he was working on the habeas petition."

The Eleventh Circuit rejected the allegations about Hobson's apparent deceit about his experience and qualifications in federal habeas litigation on the legal basis that there was "no causal link" between the deceit and the untimely filing of the first habeas petition. *Wainwright*, 2023 WL 4582786, at *4. The Eleventh Circuit explained that without such a link, any deceit on Hobson's part did "not provide a basis" for equitable tolling. *Id.* at *4. The Eleventh Circuit concluded that the existing record refuted most of the allegations regarding Hobson's conduct and explained that in "such

a situation, a district court is not required to hold an evidentiary hearing." *Id.* at *4 (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). The Eleventh Circuit saw "no abuse of discretion on the part of the district court" in denying an evidentiary hearing. *Wainwright*, 2023 WL 4582786, at *4.

Threshold matter of the timeliness

Again, there is a threshold issue of the timeliness of the Rule 60(b)(6) motion itself. Evidentiary hearings on untimely motions to reopen should not be granted. While the decision to grant an evidentiary hearing is generally left to the sound discretion of the district court under *Townsend v. Sain*, 372 U.S. 293, 318 (1963), an evidentiary hearing should not be held when the claim is due to be denied as a matter of law. *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (affirming the district court's denial of an evidentiary hearing explaining that the district court was well "within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record that would entitle him to habeas relief' due to the waiver of mitigation). For example, there is no reason for a district court to hold an evidentiary hearing on a claim that is barred by *Teague v. Lane*, 489 U.S. 288 (1989), because, regardless of what is shown at the evidentiary hearing, the claim would still remain *Teague*-barred. Likewise, there is no point in a district court holding an evidentiary hearing on equitable tolling, sifting through the facts, including the background and records of the attorney, and making credibility determinations when the claim should be denied as a matter of law because it was raised in an untimely Rule 60(b)(6) motion.

Alternatively, there was no causal connection between the allegations of attorney misconduct and the late filing of the first petition, as required by Eleventh Circuit precedent to grant equitable tolling. There is no reason for a district court to

conduct an evidentiary hearing when the claim of equitable tolling fails as a matter of law twice over. District courts are not required to waste their resources in such a manner. On either basis, the district court did not abuse its discretion by refusing to conduct an evidentiary hearing under *Landrigan*.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence regarding evidentiary hearing and factual findings and the Eleventh Circuit's unpublished decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

There is no case from this Court holding, or even hinting, that an evidentiary hearing must be conducted to explore any claim of equitable tolling of the habeas statute of limitations. In *Schriro v. Landrigan*, 550 U.S. 465, 469 (2007), this Court held that the district court did not abuse its discretion in refusing to grant an evidentiary hearing in a § 2254 case regarding a claim of ineffectiveness of trial counsel for failing to present mitigation. Landrigan, however, had waived the presentation of mitigation. He sought an evidentiary hearing in federal district court to present additional mitigation in support of his claim of ineffectiveness, but the district court denied the request for an evidentiary hearing. This Court stated that the decision to grant an evidentiary hearing "rests in the discretion of the district court." *Id.* at 468. While *Landrigan* was an AEPDA case, this Court noted that before the AEPDA, the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. *Landrigan*, 550 U.S. at 473 (citing *Brown v. Allen*, 344 U.S. 443, 463-64 (1953), and *Townsend v. Sain*, 372 U.S. 293, 313 (1963)). The Court explained that in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the factual

allegations, which, if true, would entitle the applicant to relief. *Id.* at 474. But if the record refutes the factual allegations or otherwise precludes habeas relief, "a district court is not required to hold an evidentiary hearing." *Id.* at 474. This Court concluded that the district court "was well within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record that would entitle him to habeas relief." *Id.* at 475.

As the Eleventh Circuit concluded, Wainwright had not shown "the existence of an equitable tolling claim with some merit." *Wainwright*, 2023 WL 4582786, at *2. Wainwright cannot develop a factual record that would entitle him to equitable tolling and therefore, he was not entitled to an evidentiary hearing. The district court did not abuse its discretion in refusing to conduct an evidentiary hearing.

Furthermore, the Eleventh Circuit's conclusion that there was no causal connection between most of the allegations and late filing of the habeas petition is more of a legal conclusion than a factual finding. *Wainwright*, 2023 WL 4582786, at *4. In the briefs in the Eleventh Circuit, current habeas counsel openly acknowledged that some of the allegations had no connection to the first habeas petition being untimely. RB at 11-16; AB at 18. The "causal connection" dispute is a legal battle, not a factual battle. Based on the legal conclusion that there was no causal connection, the Eleventh Circuit was entitled to conclude that no evidentiary hearing was required prior to denying equitable tolling claim. The district court did not abuse its discretion by refusing to conduct an evidentiary hearing.

The Eleventh Circuit noted that the standard of review that applies to the district court's findings of fact in connection with the equitable tolling claim was "that of clear error" and affirmed those findings. *Wainwright*, 2023 WL 4582786, at *4. This Court has observed of the clearly erroneous standard of review that an appellate court is not entitled to reverse the finding of a district court "simply because it is convinced

that it would have decided the case differently" and has explained that where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). The clearly erroneous standard of review has been colorfully described as: the finding must "more than just maybe or probably wrong;" rather, it must strike the appellate court "as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988); *see also United States v. Choulat*, 75 F.4th 489, 493 (5th Cir. 2023), *pet. for cert. filed* Oct. 30, 2023, *Choulat v. United States*, No. 23-5908; *United States v. Miller*, 35 F.4th 807, 817 (D.C. Cir. 2022); *U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Virginia, LLC*, 899 F.3d 236, 258 (4th Cir. 2018); *In re Nevel Properties Corp.*, 765 F.3d 846, 850 (8th Cir. 2014). None of the district court's findings regarding equitable tolling are "wrong with the force of a five-week-old, unrefrigerated dead fish."

Wainwright argues that all of the district court's factual findings are clearly erroneous because the findings are all based on statements made by an attorney with a conflict of interest whose credibility should not have been accepted by the district court without an evidentiary hearing. Wainwright's arguments contain the implicit assertion that the entire record regarding the timeliness of the first petition consists solely of statements made by prior conflicted habeas counsel Hobson. But the record does not consist solely of statements made by Hobson. The record objectively establishes that a "lengthy" habeas petition was, in fact, filed in the district court by Hobson, albeit six days late. Pet. at 24; *Wainwright*, 2023 WL 4582786, at *3 (noting that Hobson "filed a 73-page habeas petition raising 11 grounds"). That fact does not depend on Hobson's credibility. Rather, that fact is established by the district court's own computerized filing system. And the district court was entitled, based on that one indisputable fact, to conclude, based on the length of the petition as well as

the numbers of claims raised, in addition to the petition being only a few days late, that Hobson had been working on the petition, just as he had told Wainwright. And that one indisputable fact also establishes that there was no abandonment by habeas counsel. An attorney who files a lengthy pleading on behalf of a client, by definition, has not abandoned that client. So, that one indisputable fact definitively establishes that there are no extraordinary circumstances, both factually and legally.

Wainwright attempts to distinguish this Court's decision in *Cooper v. Harris*, 581 U.S. 285, 293 (2017), which the Eleventh Circuit relied upon in its unpublished opinion. Pet. at 19. The Eleventh Circuit, quoting *Cooper*, stated that a "finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Wainwright*, 2023 WL 4582786, at *4 (quoting *Cooper*, 581 U.S. at 293). Wainwright seems to be arguing that this legal maxim cannot be invoked unless an evidentiary hearing was conducted but there is no such limitation. *Stewart v. Peters*, 958 F.2d 1379, 1382 (7th Cir. 1992) (explaining that despite the district court not conducting an evidentiary hearing, the clearly erroneous standard still applies to any factual determination made based on a purely paper record citing *Anderson*, 470 U.S. at 574; *RCI Northeast Services Div. v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987) (stating that it is "settled" that findings of fact do not forfeit "clearly erroneous" deference merely because they are made from a paper record citing *Anderson*, 470 U.S. at 573-76).

But this Court typically does not grant review of questions raising a district court's factual findings. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous fact findings"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating we "do not grant a certiorari to review evidence and discuss specific facts).

There is no conflict with this Court's jurisprudence regarding evidentiary

hearings or factual findings made without an evidentiary hearing and the Eleventh Circuit's unpublished decision in this case affirming the denial of an evidentiary hearing.

No conflict with the lower federal appellate courts

There is also no conflict between any decision of any federal appellate court and the Eleventh Circuit's unpublished decision in this case. In the absence of such conflict, certiorari is rarely warranted. *Braxton*, 500 U.S. at 347; *Rockford Life Ins.*, 482 U.S. at 184 n.3; Sup. Ct. R. 10(b).

Petitioner cites no case from any circuit court requiring evidentiary hearings be routinely conducted in § 2254 cases on claims of equitable tolling, much less on claims of equitable tolling that are raised in Rule 60(b)(6) motions. Nor does the petition cite any circuit case holding that a district court must conduct an evidentiary hearing despite there being no causal connection between the allegations of attorney misconduct and the late filing of the habeas petition.

Moreover, the opinion in this case was unpublished. Unpublished opinions are not binding precedent in the Eleventh Circuit. *Rogers v. Sec'y, Dep't of Corr.*, 855 F.3d 1274, 1278, n.1 (11th Cir. 2017) (stating that unpublished opinions are not controlling authority in the Eleventh Circuit citing 11th Cir. R. 36-2, and *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007)); 11th Cir. R. 36-2 (providing "[u]npublished opinions are not considered binding precedent"). Because the unpublished *Wainwright* opinion is not the law of the Eleventh Circuit, it cannot establish conflict with the decision of any other circuit court. There is no conflict.

Due to the threshold issue of the timeliness of the Rule 60(b)(6) motion itself, as well as there being no conflict between this Court's jurisprudence on evidentiary hearings and factual findings and the Eleventh Circuit's decision in this case or a

conflict between the Eleventh Circuit's unpublished opinion in this case and any other circuit, review of the second question should also be denied.

In sum, the petition presents two questions that involves a threshold issue regarding timeliness of the Rule 60(b)(6) motion itself but neither of which involves any conflict with this Court's jurisprudence nor any conflict with any decision of the federal circuit courts.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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