Nos. 23-7590 and 23A1064
CAPITAL CASE

In the
Supreme Court of the United States

JAMIE MILLS,
Petitioner,
v.
JOHN HAMM, Commissioner, Alabama Department of Corrections,
Respondent.

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

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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EXECUTION SCHEDULED MAY 30, 2024

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

Jamie Mills was sentenced to death in 2007 for the brutal execution of an elderly couple with a machete, tire tool, and hammer. His common-law wife, JoAnn, testified against him. Both she and the district attorney averred to the trial court that there was no pretrial plea deal whereby she would receive leniency for her role in the murder in exchange for her testimony. For years, Mills argued that JoAnn had perjured herself, but he introduced no evidence to support his claim. Then, after the State of Alabama moved to set his execution in 2024, Mills's longtime counsel procured an affidavit from JoAnn's trial attorney stating that JoAnn had received a pretrial plea deal. On that ground, Mills sought relief in his long-closed federal habeas case under Federal Rule of Civil Procedure 60. The district court denied the motion. The questions presented are:

1. Whether Mills was entitled to a certificate of appealability where the court of appeals found that no reasonable jurist would conclude that the district court abused its discretion in denying the Rule 60 motion and the concurring judge agreed that the denial was proper under existing precedent.

2. Whether Mills was entitled to Rule 60(b)(2), (b)(3), (b)(6), or (d)(3) relief in his federal habeas proceedings based solely on a factually suspect affidavit from an individual known to him for nearly seventeen years, yet produced more than three years after his habeas petition was denied, and unsupported by anything but an error-riddled attorney fee declaration.

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INTRODUCTION

Jamie Mills is scheduled to be executed **tomorrow, May 30, 2024**. He was convicted of murdering an elderly couple, Floyd and Vera Hill, and sentenced to death in 2007. The jury that decided Mills's fate heard copious inculpatory evidence, including that the murder weapons were found in his trunk alongside a pair of pants with his name on them, covered in the blood of one of the victims. His wife and codefendant, JoAnn Mills, also testified against him. She came clean on the stand, explaining that Mills savagely beat the Hills as she stood by. JoAnn, along with the district attorney, stated multiple times that day on the record that she did not have a plea deal for her testimony. The family of the victims had been adamant that neither defendant be offered a bargain, as Mills and JoAnn were accused of brutally beating the Hills, robbing them, and leaving them for dead. But following Mills's conviction, the district attorney approached the family about offering JoAnn a plea bargain, and they relented because of her sincerity and remorse.

According to JoAnn, she testified in pursuit of "forgiveness from God." According to Mills, JoAnn testified as part of an undisclosed pretrial plea bargain and repeatedly perjured herself by testifying otherwise. Since 2007, across his state and federal filings, Mills has alleged that JoAnn and the State have lied about this pretrial plea bargain and hidden the evidence. It appears that Mills latched on to this theory based on JoAnn receiving a deal *after* she testified. Courts have been rejecting this claim as long as Mills has been bringing it because, as the district court put it, "Mills never offered any evidence in support of this claim." App'x D at 1.

Mills, in fact, had ***no evidence*** of any conspiracy until a few weeks after the State moved for his execution in January 2024. Now he has only some exceedingly suspect evidence. Mills claims to have approached JoAnn's trial counsel, J. Tony Glenn, for the first time in February 2024 and obtained from him an affidavit claiming that there was, in fact, a pretrial deal seventeen years ago. The affidavit proves far too little, far too late. For one, Glenn has *no documentary evidence* of the alleged pretrial deal: no notes, no terms, no signed writing. Nothing. The affidavit comes with a fee declaration that is no more reliable than Glenn's memory; it is littered with obvious errors about crucial dates, like when the trial took place. For another, the affidavit carries with it the incredible implication that Glenn sat in court, watched his client and the district attorney lie, and said nothing until now. Mills's perverse theory is that the more unbelievable the testimony, the more "extraordinary" the case and thus the more entitled he is to relief. For a third, the district attorney and a former investigator on the case produced rebuttal affidavits, emphatically denying that any such deal existed—the position the State has maintained all along.

For these reasons, every court to consider Mills's "newly discovered evidence" has rejected his claims. No court has credited the affidavit. The state circuit court denied and dismissed Mills's successive postconviction petition on April 16, DE47-1, the Northern District of Alabama (Mills's habeas court) denied his Rule 60 motion on May 17, App'x D, and the Eleventh Circuit denied a certificate of appealability in a published opinion on May 28, App'x A. As Chief Judge Pryor explained for the

Eleventh Circuit, no reasonable jurist would dispute that Mills's Rule 60(b)(2) and (b)(3) claims were untimely, having been filed three and a half years after the district court denied his habeas petition. *Id.* at 6–7. The court of appeals further found that the district court did not abuse its discretion in denying Mills's Rule 60(d) claim of fraud, as the claim's sole basis was the questionable affidavit and erroneous fee declaration, which fell far short of the clear and convincing evidence Mills needed. *Id.* at 8. Finally, the court of appeals correctly found that the district court did not abuse its discretion in denying Mills's meritless Rule 60(b)(6) claim, which sought relief on the same grounds raised in his other claims, although Rule 60(b)(6) is not an avenue to obtain relief in situations covered by other grounds for Rule 60(b) motions. *Id.* at 9–10.

Mills would have the Court believe that evidence of a *Brady* violation has just now come to light after seventeen years and that his lone affidavit is reason both to grant certiorari and stop his scheduled execution. But this case is not worthy of cert or a stay. The affidavit is vague, suspiciously timed, and discredited by its appearance alongside a fee declaration with indisputably false entries. The State has provided affidavits countering the evidence. And, even taken at face value, the contemplated impeachment of JoAnn would not have changed the result of Mills's trial, which included robust evidence against him. Mills's meritless, fact-bound, and belated claim is not cert-worthy, and so the Court should deny certiorari and permit Mills's execution to proceed on May 30.

Any other result would reward Mills's gamesmanship. "Delay" has been the overarching theme of Mills's execution litigation. He purportedly waited nearly seventeen years to approach JoAnn's counsel, about a month after the State moved for an execution date. Mills has "offered no reason why he could not have spoken with Glenn or obtained his fee declaration" sooner. App'x A at 4 (cleaned up). And then Mills waited *another* month to initiate proceedings in the district court and took his time in bringing his appeal last week. In the Eleventh Circuit's other May 28 opinion concerning Mills, the court agreed with the district court that Mills had unduly delayed in commencing his § 1983 litigation, adding, "It is no surprise, as the Commissioner notes, that execution days are '*often* long,' on account of 'last-minute appeals'—like Mills's, which was lodged less than a week before his execution, on the cusp of a three-day-holiday weekend." *Mills v. Hamm*, 24-11689, 2024 WL 2721521, at *4 (11th Cir. May 28, 2024). Thus, Mills has not presented an even arguably cert-worthy question. To the extent a stay might be needed to assess his petition's merits, equity demands that it be denied.

STATEMENT OF THE CASE

A full recitation of the facts of Mills's horrific crimes is unnecessary at this point.[1] In brief, one afternoon in June 2004, thirty-year-old Mills and his wife, JoAnn, went to the home of Floyd and Vera Hill in Guin, Alabama, with the intent to rob the couple. Floyd, eighty-seven, cared for seventy-two-year-old Vera, a diabetic in poor health. After Floyd took Mills out to his shed to see some items for an upcoming yard

1. For a detailed account, Respondent would direct the Court to the sentencing order, DE37-1:122–37.

sale, Mills savagely beat him, and then Vera, with a machete, tire tool, and ball-peen hammer as JoAnn stood by. Floyd died of his wounds before help arrived, while Vera languished for nearly twelve weeks before succumbing to her injuries. Mills and JoAnn stole various items from the Hills' home, including a wallet, purse, and Vera's prescription medication. They were apprehended the following morning while trying to leave their home with a duffel bag containing the murder weapons, bloody evidence, and a cement block in the trunk of their car.

A. Mills's trial and JoAnn's guilty plea

Mills went to trial for capital murder on August 20, 2007. JoAnn was the State's final witness prior to the defense's guilt-phase presentation, and she testified on August 22.[2] At the beginning of her testimony, JoAnn stated that she had no agreement with the prosecution and that her attorney, Tony Glenn, was present with her in court that day. DE37-8:R. 685–86. Under cross-examination, JoAnn insisted there was no deal for her testimony:

> Q. And you're telling us today that your lawyer and you—you're a codefendant in this case, right?
>
> A. Yes.
>
> Q. Your lawyer and you have decided that it's a good idea for you to get up here and basically admit to capital murder where if you're convicted, the only two sentences are life without parole or death by lethal injection, and that you haven't made a deal with the DA?
>
> A. No, sir.

2. *See* DE37-8:R. 634 (beginning of proceedings on August 22); DE37-9:R. 830 (end of proceedings on August 22). This was the only day of trial on which JoAnn testified; she was not recalled on August 23 or called at the sentencing hearing on September 14. *See* DE37-6:R. 65–66 (listing witnesses).

Q. You're just up here admitting to capital murder without any hope of help from the district attorney's office?

A. No, sir.

Q. You do expect help from the district attorney's office?

A. No, sir.

Q. Has anybody told you that if you get up here and tell this story that the district attorney will have pity on you and let you plead to something besides murder?

A. No, sir.

Q. So you expect as a result of your testimony today to get either life without parole or death by lethal injection?

A. Yes.

[…]

Q. But you hope by doing this today to get off of life without parole or death by lethal injection, don't you, because you said a minute ago possibly. That's what you expect, don't you?

A. No.

Q. And your lawyer has suggested that you do this today, right?

A. He left it up to me.

Q. Okay. He let you decide whether or not to admit to being an accomplice to capital murder, where if convicted you only get life without parole or death by lethal injection? Your lawyer suggested that?

A. Yes.

Q. And you say that you don't expect some benefit from your testimony today?

A. Some forgiveness from God.

Id. at R. 720–23.

At the conclusion of the day's testimony, once the jury had been dismissed, the defense raised the issue of JoAnn's testimony again. District Attorney Jack Bostick affirmed on the record that there had been "[n]ot a promise, not a maybe, not a nudge, not a wink" to JoAnn to induce her testimony, including any "suggest[ion] that a promise might be made after she testifies truthfully." *Id.* at R. 829–30.[3] Glenn was present in court for JoAnn's testimony,[4] *id.* at 685–86, 753, and he said nothing to the trial court to indicate that she or District Attorney Bostick had lied.

Mills was convicted of three counts of capital murder on August 23, 2007. DE37-1:C. 78–80. At the conclusion of the penalty phase the following day, the jury recommended death 11–1. *Id.* at C. 112. The court then held a sentencing hearing on September 14 and accepted the jury's recommendation. DE37-10:R. 1022–33; *see* DE37-1:C. 122–37 (sentencing order).

Ten days later, on September 24, JoAnn was permitted to plead guilty to a single count of murder and was sentenced to life with the possibility of parole. App'x F, Ex. 2. The following day, Glenn filed his attorney fee declaration, signing to declare that his claim for payment was accurate. App'x F, Ex. 1 at 3.

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[3] In this Court, Mills adds a new accusation that the State's investigator's "encourage[ment]" of JoAnn's testimony contradicts Bostick's in-court statement. Pet. 5, 28–29. But, of course, there are many ways to encourage a witness short of offering of a plea deal. Likewise, JoAnn's testimony that she had no "hope of help" is not contradicted by the fact that she simply met with prosecutors; to the contrary, if the district attorney conveyed the family's position that JoAnn should not get a deal, meeting with the prosecution would have solidified her hopelessness. *Contra* Pet.17–18.

4. Glenn also attested in his fee declaration that he attended the trial—though he claimed he attended for four hours on September 11 and two hours on September 12, which cannot be accurate. *See* App'x F, Ex. A at 5.

B. Mills's motion for new trial and direct appeal

The following week, Mills's trial counsel filed a motion for new trial alleging seven errors but offering anything approximating detail as to only the sixth:

> 6. The co-defendant Jo Ann Mills whose self serving testimony constituted the sole direct evidence against the defendant perjured herself by declaring that her testimony was given neither in an attempt to procure leniency for herself, nor pursuant to an expressed or implied pea [sic] bargain agreement or arrangement, nor as a result of an expresses [sic] or implied offer of leniency. Charged with three counts of capital murder she in fact pleaded guilty to murder and was sentenced to life in prison thirty days after the verdict in this case.

DE37-1 at C. 120. The trial court denied the motion on October 10. *Id.* Mills raised the issue again on direct appeal, asserting that he had "learned of [JoAnn's] plea bargain" before raising the issue in his motion for new trial. DE37-11:18–20. Failure to disclose the deal, he argued, violated the Sixth, Eighth, and Fourteenth Amendments. DE37-11:18–20. But the Alabama Court of Criminal Appeals (ACCA) affirmed denial of his motion for new trial because that motion "did not include any evidence," instead resting on "counsel's bare assertions that JoAnn committed perjury." *Id.* at 109. Trial counsel filed a petition for certiorari in the Alabama Supreme Court in February 2009, again claiming that the State failed to disclose a plea agreement with JoAnn and elicited perjured testimony. DE37-12:40–41. The court denied certiorari as to that claim. DE37-13:159. When counsel failed to then timely file a brief or waiver, counsel from the Equal Justice Initiative (EJI) moved to

appear in December 2009.[5] The motion was granted on December 22, 2009,[6] and EJI has represented Mills ever since.

C. Mills's first Rule 32 proceedings

In Mills's first state postconviction (Rule 32) petition, filed through EJI counsel in November 2011, he raised two claims concerning the alleged pretrial plea bargain. First, he contended that trial counsel were ineffective in litigating the motion for new trial because they failed to present evidence. DE37-15:86. Second, he claimed that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). *See* DE37-15:93–95.

In July 2013, the circuit court summarily dismissed Mills's petition in part. The court held that his claims of ineffective assistance were insufficiently pleaded under Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. As for the *Brady* claim, the court held that it was procedurally barred under Rule 32.2(a), as it was "raised and rejected at trial and on direct appeal." DE37-16:105–06.

ACCA affirmed in a memorandum opinion in December 2015. DE37-21:122–213. As to the claim of ineffective assistance, ACCA held that Mills failed to plead facts that could have been discovered and presented at the hearing on that motion, and so the claim was insufficiently pleaded. *Id.* at 202–03. As to the *Brady* claim, ACCA held that it was procedurally barred by Rule 32.2(a), explaining:

> With regard to the *Brady*/*Napue* claim, Mills did not plead facts indicating that JoAnn's plea deal was not known to him before he filed his motion for a new trial. Indeed, his trial counsel raised the issue of the plea deal in the motion for a new trial. Furthermore, Mills did not

5. Motion for Permission to Appear, *Ex parte Mills*, No. 1080350 (Ala. Dec. 16, 2009).
6. Order, *Ex parte Mills*, No. 1080350 (Ala. Dec. 22, 2009).

> allege any specific facts as to when the State made the plea deal with JoAnn. Accordingly, as pleaded, this claim was procedurally barred.

Id. at 213.

The Alabama Supreme Court denied certiorari as to both claims, DE37-22:168, and Mills did not pursue certiorari in this Court.

D. Mills's federal habeas proceedings

Through EJI counsel, Mills filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama in May 2017. Therein, he alleged, as he had in his Rule 32 pleadings, that trial counsel were ineffective in arguing his motion for new trial and that the State violated *Brady*, *Giglio*, and *Napue* by failing to tell the defense about JoAnn's supposed pretrial plea deal.

The district court was unconvinced. As to the motion for new trial, the court explained that Mills "still fails to allege what specific evidence…his trial counsel could have presented during the motion for new trial" in support of Mills's theory that JoAnn lied about not testifying as part of a deal. DE26:154–55. Mills even argued that "*if it was true that JoAnn perjured herself and the State failed to disclose this*, Mills would have a claim under *Brady*." *Id.* Likewise, as to the *Brady* claim, the court stated that it was procedurally defaulted, which Mills could not overcome through ineffective assistance of counsel because he "ha[d] never pleaded any specific facts" and had "offer[ed] no evidence, other than speculation," to support his claim that JoAnn perjured herself. *Id.* at 200–03.

Both the district court and the Eleventh Circuit declined to issue a certificate of appealability, *id.* at 206; *Mills v. Comm'r, Ala. Dep't of Corr.*, 21-11534, 2021 WL

5107477 (11th Cir. Aug. 12, 2021), and this Court denied certiorari on April 18, 2022, *Mills v. Hamm*, 142 S. Ct. 1680 (2022) (mem.).

E. Mills's execution litigation and second Rule 32 proceedings

For nearly two years, Mills made no attempt to bring his claims before any court or to further investigate his claims of perjury and *Brady* violations. On January 29, 2024, the State moved for Mills's execution to be set. DE44-3. His counsel requested an enlargement of time to answer that motion and were granted until March 7 to do so.

On March 4, Mills filed his second state Rule 32 petition.[7] For the first time, he offered more than innuendo in support of his claim that JoAnn and District Attorney Bostick perjured themselves: an affidavit from JoAnn's attorney, Glenn, dated February 26, 2024.[8] App'x F, Ex. A at 2. Therein, Glenn stated that he did not speak with any attorney from EJI "regarding Jamie Mills' case or Jo Ann's testimony in her husband's case" until February 23, 2024. *Id.* On March 7, Mills answered the State's execution motion in the Alabama Supreme Court, arguing that the court should postpone setting his execution until after the circuit court had considered his new claims.[9]

7. Petition for Relief from Judgment, *Mills v. State*, 49-CC-2004-402.61 (Marion Cnty. Cir. Ct. Mar 4, 2024), Doc. 1.
8. The affidavit is dated both February 26 and March 26, 2024.
9. Response to the State of Alabama's Motion to Authorize Execution, *Ex parte Mills*, No. 1080350 (Ala. Mar. 7, 2024).

The State responded to Mills's successive Rule 32 petition[10] and his response in the Alabama Supreme Court[11] on March 11. Attached to both filings were affidavits from District Attorney Bostick, DE44-1, and Investigator Ted Smith, DE44-2, denying the allegations in Glenn's affidavit. District Attorney Bostick explained that he met with the victims' family prior to Mills's trial, and they were "adamant" that the State seek the death penalty. DE44-1:¶3. Glenn "believed it would be in his client's best interest to testify against Jamie Mills," and so he brought JoAnn to the District Attorney's Office to speak with Investigator Smith, who knew her well. *Id.* ¶¶ 4–5. Investigator Smith did not offer JoAnn a plea deal, as he was not authorized to do so; first, "[n]egotiation was strictly the purview of the prosecutors," and second, the victims' family insisted that JoAnn should not receive a deal. *Id.* ¶¶ 6–7. After JoAnn testified, however, District Attorney Bostick sat down with the victims' family and asked if something could be done for her. Because the family felt that JoAnn "was sincere and remorseful in her testimony," they agreed that she could plead to murder in exchange for a life sentence. *Id.* ¶ 8. As for Investigator Smith, he stated that while he was "well acquainted" with JoAnn and "encouraged" her to testify against Mills, he never offered her a plea bargain, nor could he have done so. DE44-2.

While the matter was pending, the Alabama Supreme Court granted the State's execution motion on March 20,[12] and Mills's execution was then set for May 30. App'x F, Ex. 3. On April 16, the circuit court denied and dismissed Mills's

10. State of Alabama's Answer and Motion to Dismiss, *Mills v. State*, Doc. 5.
11. State of Alabama's Response to Mills's Opposition to State's Motion to Set an Execution Date, *Ex parte Mills*, No. 1080350 (Ala. Mar. 11, 2024).
12. Order, *Ex parte Mills*, No. 1080350 (Ala. Mar. 20, 2024).

successive Rule 32 petition, noting its untimeliness and Mills's lack of diligence in waiting almost seventeen years to talk to Glenn. DE47-1. Mills did not appeal that decision.

F. The present litigation

On April 5, 2024, nearly three and a half years after the district court denied habeas relief, Mills filed a Rule 60 motion, App'x F, based upon the facts he alleged in his second Rule 32 petition concerning Glenn's affidavit. Mills claimed that he was entitled to relief pursuant to Rules 60(b)(2), (b)(3) and (d), and (b)(6). Nearly six weeks later on the evening May 16, at the prodding of the Middle District of Alabama in his untimely 42 U.S.C. § 1983 litigation,[13] Mills moved the district court for a stay of execution. App'x G.

Early the following afternoon, on May 17, the district court denied both Mills's Rule 60 motion and his motion for stay of execution in a thorough order. App'x D. First, the court held that Mills's Rule 60(b)(2) claim was untimely, that Mills did not exercise reasonable diligence in obtaining Glenn's affidavit, and that the affidavit was merely impeachment evidence. *Id.* at 13–16. Second, the court held that Mills's Rule 60(b)(3) and (d) claim was untimely and that he failed to offer clear and convincing evidence of fraud. *Id.* at 16–21. Third, the court held that Mills's Rule

13. Evidentiary Hearing Transcript at 7, *Mills v. Hamm*, 2:24-cv-00253 (M.D. Ala. May 14, 2024), ECF No. 25. Counsel told the court that they had not yet moved for a stay in the Northern District, as "[W]e don't believe that we are going to need to." *Id.* at 8. The Middle District denied injunctive relief on May 21, noting especially Mills's unreasonable delay. Memorandum Opinion and Order, *Mills v. Hamm*, 2:24-cv-00253 (M.D. Ala. May 21, 2024), ECF No. 26.

60(b)(6) claim was untimely and that he failed to show the "extraordinary circumstances" needed to be entitled to relief. *Id.* at 21–22.

Despite arguing that there was "a critical need" for the district court to grant a COA because of his impending execution, DE49:1, Mills waited almost four days—until nearly noon on May 21—to move for one. The district court denied the motion two and a half hours later, App'x E, and Mills moved the Eleventh Circuit for a COA and stay of execution on May 23.

The Eleventh Circuit affirmed denial of the COA and denied the stay motion as moot. *See* App'x A. Writing for the panel, Chief Judge Pryor concluded that no reasonable jurist could conclude that the district court abused its discretion. *Id.* at 6.

First, the panel affirmed denial of a COA with respect to Rule 60(b)(2) for newly discovered evidence. *Id.* Rule 60(c)(1)'s "plain text" required the motion be made within a year, but as Mills's was filed after more than three years, a COA was unwarranted. *Id.*

Second, the panel affirmed denial of a COA for relief under Rule 60(b)(3) and (d). *Id.* at 7. As with Rule 60(b)(2), the one-year limit also applies to motions under (b)(3). *Id.* If the movant can establish fraud on the court under (d)(3), then there is no time limit, but proving fraud is difficult. *Id* (quoting 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2870 (3d ed. Apr. 2023)) ("WRIGHT & MILLER"). Fraud on the court, the panel explained, is an "unconscionable plan or scheme" against "the judicial machinery" that "defiles the court itself." *Id.* at 7–8 (cleaned up). But the standard is "demanding." *Id.* at 7

(quoting *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)). The movant needs to show fraud on the court by "clear and convincing evidence," *id.* (citing *Booker v. Dugger*, 825 F.2d 281, 283 & n.4 (11th Cir. 1987)), and must establish that the fraud on the court is "highly probable," *id.* (quoting *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013)).

"No reasonable jurist could conclude that the district court abused its discretion in ruling that Mills failed to establish that it is highly probable that the State hatched an unconscionable scheme." *Id.* at 8. Here, the court of appeals noted, Mills did "not dispute" that Glenn's fee declaration, offered in support of this so-called scheme, contained error. *Id.* Those errors are "blatant" and "about the very events at the heart" of this case, so "declining to credit" it was not an abuse of discretion. *Id.* Similarly, no reasonable judge could determine that the district court abused its discretion "in assessing the *plausibility* of Glenn's affidavit," which the district court was skeptical of because, "if the affidavit '[were] to be believed,' Glenn witnessed both Bostick and JoAnn repeatedly perjure themselves on August 22, 2007, yet said nothing and then, as the Commissioner says, 'held his tongue for nearly seventeen years.'" *Id.* The evidence of the fraud was simply too feeble for any reasonable jurist to determine that the district court abused its discretion in determining that Mills's evidence was not enough to meet the "'demanding' standard of Rule 60(d)(3)." *Id.*

Third, the panel held that no reasonable jurist could determine that the district court abused its discretion in denying relief under Rule 60(b)(6). *Id.* at 9. Citing the text of the rule, "a leading treatise," and precedent from this Court, the

Eleventh Circuit explained that relief under this rule must be for a reason "other" than those listed in (b)(1)–(5). *Id.* In other words, Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment…provided that the motion is…not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)). Mills's request for relief under (b)(6) is "identical" to his requests under (b)(2) and (b)(3), and relief "would have been available" under those Rules. *Id.* Allowing him to proceed under (b)(6) would have made the one-year time limit on motions on those grounds "superfluous" and made grounds listed in (b)(1)–(5) "pointless." *Id.* at 9–10. Thus, no reasonable jurist could conclude that the district court abused its discretion in denying relief under (b)(6). *Id.* at 10.

Judge Abudu "concur[red] in the denial of Mills' motion for a certification of appealability" but "wr[o]te separately to express concern" about a "rigid" application of Rule 60(b)(6) when a condemned inmate "is asserting actual innocence." *Id.* at 11. She agreed that "[t]he case law supports a rejection of Mills' request for relief under Rule 60(b)(6) as duplicative." *Id.* at 13. While Mills attempts to paint Judge Abudu's *concurrence* as a dissenting opinion—ostensibly showing the debatability of his claim, Pet. 3, 14, 21–22, 27–28—she plainly agreed that the "case law does not extend" so far as to require a COA here.

Mills's present petition for certiorari and motion for stay of execution followed on the afternoon of May 29.

REASONS CERTIORARI AND A STAY OF EXECUTION SHOULD BE DENIED

A stay pending "disposition of a petition for a writ of certiorari" is unwarranted unless the applicant can show (1) "a reasonable probability" that four justices will grant certiorari; (2) "a fair prospect" that the Court will reverse; and (3) that denial of a stay is likely to result in "irreparable harm." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). If the case is "close," the Court will consider the "balance of the equities." *Id.*

Mills's petition is not worthy of certiorari. His claim is fact bound, does not implicate a circuit split, and is wholly meritless. The lower courts correctly denied Rule 60 relief because his claims were untimely and meritless, supported only by Glenn's questionable affidavit and his erroneous attorney fee declaration. In particular, as the Eleventh Circuit wrote, "No reasonable jurist could conclude that the district court abused its discretion in ruling that Mills failed to establish that it is highly probable that the State hatched an unconscionable scheme." App'x A at 8. As Mills has failed to show grounds for certiorari, both his petition and his application for stay of execution should be denied.

Moreover, the equities demand denial of a stay. As the district court noted, the State "has an interest in seeing that Mills' execution is carried out, and for Mills to wait until after the State has set his execution to attempt to reopen his habeas litigation based upon information he could have produced years ago is prejudicial to the State's interests." App'x D at 22. He still "offers no reason why he could not have spoken with Glenn or obtained Glenn's September 2007 fee declaration before

February 2024, nor does he plead that Glenn refused to speak with him at an earlier date." *Id.* at 15. All Mills offers this Court is the question-begging assertion that his unexplained and inexplicable delay should be laid at the State's feet for allegedly "conceal[ing] critical evidence." Stay App. 8; Pet. 16. But the State's consistent position has been that there is no "evidence" to "conceal" because there never was a plea deal. And there is no allegation that the State knew of Glenn's assertion or that the State somehow "concealed" Glenn from Mills. Thus, Mills's dilatory tactics are reason enough to deny his stay application.

I. There is no likelihood that four Justice of this Court will vote to grant certiorari.

There is no "reasonable probability" that this Court will grant certiorari on Mills's questions presented. The answers to his questions are obvious, fact bound, or immaterial in this case. Mills has not demonstrated any conflict with a decision of this Court or any other, and he has hardly disguised his request for error correction.

First, this Court is not likely to grant certiorari on the question whether a COA must be issued whenever a multimember court is not unanimous in its denial. That is an unserious question. Reasonableness is an "objective standard" that does not "turn[] on the view of a particular judge." *Griffin v. Sec'y of Fla. Dep't of Corr.*, 787 F.3d 1086, 1094–96 (11th Cir. 2015). Additionally, it would turn the judiciary upside-down if a lower court's view on whether a question is debatable could somehow bind the Supreme Court's resolution of the same standard. And this case is an exceedingly poor vehicle for resolving the first question presented because Judge Abudu, in fact, *concurred* in the denial of Mills's application for a COA.

Second, whether reasonable jurists could debate whether Mills is entitled to relief under Rule 60 based on alleged concealment of evidence is about as fact bound as it gets. This question presented, moreover, is premised on Mills's claim that the State concealed evidence, but no court has been willing to credit that claim. There is no reason for this Court to question the lower courts' judgments about the record in this case, especially in the rushed posture produced by Mills's dilatory conduct.

Third, whether reasonable jurists could debate if defendants "bear the burden of ferreting out prosecutorial misconduct" is not presented by this case. Like the second question presented, this claim is premised on credible evidence of a deal between the district attorney and JoAnn Mills, but the lower courts have not found the late-breaking evidence to be plausible. Similarly, examining the lower courts' credibility determinations is a fact-bound endeavor. And, as the court of appeals demonstrated, Mills's claims fail whether or not he had a burden of diligently pursuing evidence, so answering this question presented likely will do nothing for him.

II. Jurists of reason would not disagree with the district court's resolution of Mills's Rule 60(b)(3) and (d) claim of fraud.

The district court correctly denied a COA for Mills's Rule 60(b)(3) and Rule 60(d) motion. As the Eleventh Circuit held, because the Rule 60(b)(3) motion was "untimely" and the Rule 60(d) motion fails "on the merits," [n]o reasonable jurist" could determine that the district court abused its discretion. App'x A at 7.

Rule 60(b)(3) provides that a party may be entitled to relief based upon "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct

by an opposing party." A motion under Rule 60(b)(3) must be filed within one year of the judgment. FED. R. CIV. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). But under Rule 60(d)(3), when a party has committed a "fraud on the court" (which is "distinct[]" from "mere" fraud) there is "no time limit." WRIGHT & MILLER § 2870; *see* FED. R. CIV. P. 60(d)(3).

Mills contended that he was entitled to relief because District Attorney Bostick allegedly lied under oath about the existence of a pretrial plea deal with JoAnn, and the State did not correct his allegedly false statements in the prior habeas proceedings. App'x F at 26–29. He is not entitled to a COA based on these grounds for two reasons. ***First***, the claim under Rule 60(b)(3) was untimely because the district court entered judgment in 2020, but Mills did not file his motion until 2024. *See* FED. R. CIV. P. 60(c)(1) (Rule 60(b)(3) motion must be made "no more than a year after the entry of the judgment"); App'x A at 7.

Second, although the one-year time limit does not apply when there has been a fraud upon the court, FED. R. CIV. P. 60(d)(3); App'x A at 7, "[n]o reasonable jurist could conclude that the district court abused its discretion" in determining that Mills failed to establish such a fraud, App'x A at 8. The court below explained that fraud on the court "'embrace[s] only that species of fraud' that officers of the court 'perpetrate[]' against 'the judicial machinery' and that 'defile[s] the court itself.'" *Id.* at 7–8 (alterations in original) (quoting *Travelers Indem. Co. v. Gore*, 761 F.2d 1549,

1551 (11th Cir. 1985)). Fraud on the court "involves 'an unconscionable plan or scheme,'" *id.* at 8 (quoting *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255, 1262 (11th Cir. 2000)), and it is "very unusual," resulting in "far more than an injury to a single litigant," WRIGHT & MILLER § 2870 (citation and punctuation omitted). The fraud must be proven by clear and convincing evidence. *See Booker*, 825 F.2d at 283; *accord, e.g., United States v. Yeje-Cabrera*, 430 F.3d 1, 29 (1st Cir. 2005); *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 95 (2d Cir. 2002); *United States v. MacDonald*, 161 F.3d 4 (4th Cir. 1998). The Eleventh Circuit rightly concluded that the district court did not abuse its discretion in finding that Mills fell short of that "demanding" standard. App'x A at 7.

The only evidence Mills offered in support of this supposed fraud was Glenn's suspiciously timed affidavit and error-riddled fee declaration. App'x D at 17–19. The fee declaration contained "blatant errors about the very events at the heart" of this case. App'x A at 8. It is "undisputed" that Joann testified in late August on the penultimate day of Mills's trial, but Glenn's fee declaration records him as having attended Mills's trial with her for two days in mid-***September***. *Id.* Mills attempted to resurrect its credibility by dismissing the mistakes as "scrivener's errors" or "transposition of numbers," *see* App'x B at 38, but the district court was unwilling to find that the District Attorney "perjured himself" and that the "State lied" based on a document with "errors." App'x D at 19. "[D]eclining to credit" a facially suspect declaration offered in support of such bold claims is not an abuse of discretion. App'x A at 8.

Nor could any reasonable jurist conclude that the district court abused its discretion by discounting the "*plausibility* of Glenn's affidavit." *Id.* "[I]f Glenn's affidavit is to be believed, then Glenn sat in court on August 22, 2007, and watched both JoAnn and District Attorney Bostick repeatedly perjure themselves, yet said nothing to the [trial court]." App'x D at 21; *see* App'x A at 8. Thus, either Glenn's affidavit is incorrect or else Glenn, an officer of the court, witnessed JoAnn and the District Attorney commit perjury but held his tongue for nearly seventeen years. The district court credited the more plausible version of events.

Moreover, while Glenn's fee declaration made reference to meetings with the District Attorney and JoAnn concerning a "proposed plea offer" on July 17 and 23, 2007, nowhere did the declaration state that ***the District Attorney*** was the one proposing the offer or that any bargain was struck. App'x D at 20. On the contrary, District Attorney Bostick was adamant in his affidavit that he did not offer JoAnn a deal for her testimony because the victims' family was so opposed; only after she testified did they agree to let her plead to murder and receive a life sentence. *Id.* (citing DE44-1:2). Thus, the district court concluded, "Glenn's time entries indicating that he had discussions with JoAnn of a plea deal after August 23, 2007—such as the entries dated August 27 and 29, and September 3 and 5, support District Attorney Bostick's recollection of events." *Id.* at 20–21.

Instead of proving an "unconscionable plan or scheme" by clear and convincing evidence, Mills would have this Court believe that the State kept an elaborate scheme of deception under wraps for almost two decades, even though one coconspirator was

so willing to talk that he told the first attorney for Mills who asked—and all based on Glenn's word and his indisputably flawed fee declaration. As the panel below held, "[n]o reasonable jurist" could conclude that the district court abused its discretion in finding that Mills's story is not "clear and convincing."

Thus, this claim is meritless, not cert-worthy, and is no grounds for a stay of execution.

III. Jurists of reason would not disagree with the district court's resolution of Mills's Rule 60(b)(2) claim of newly discovered evidence

Although Mills appears not to seek certiorari on his Rule 60(b)(2) claim, his Rule 60(b)(6) claim is properly viewed either under Rule 60(b)(2) or (b)(3). Because his claim fails under each of the latter two Rules, he cannot succeed on his Rule 60(b)(6) claim. The court of appeals and district court correctly denied relief and a COA as to Mills's Rule 60(b)(2) claim. It was untimely, Mills failed to exercise reasonable diligence, and the new evidence was merely impeachment evidence and would not have changed the outcome of Mills's trial.

Under Rule 60(b)(2), a "court may relieve a party…from a final judgment" based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." Mills alleged that relief was warranted because he exercised due diligence in discovering his new evidence—that is, Glenn's February 2024 affidavit—because the new evidence was material and neither cumulative nor merely impeachment evidence, and because there was a reasonable probability of a different result had evidence that JoAnn had a pretrial agreement with the prosecution been presented at trial. App'x F at 20–26.

First, the motion was untimely. A Rule 60(b)(2) motion must be made "no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c)(1). Because the district court denied habeas relief on November 30, 2020, Mills's Rule 60(b)(2) motion, filed in 2024, was untimely. App'x A at 6; App'x D at 14. Mills's only response to this point below was that the one-year limitation period does not apply because he has alleged "fraud on the court." *See* App'x A at 6. As discussed above, that claim is without merit. "No reasonable jurist" could disagree with the district court's determination that Mills's motion under Rule 60(b)(2) was untimely. *Id.*

Second, Mills failed to satisfy the requirements of Rule 60(b)(2). Citing the Eleventh Circuit's instruction that "[a] motion for a new trial under Rule 60(b)(2) is an extraordinary motion and the requirements of the rule must be strictly met," *Scutieri v. Paige*, 808 F.2d 785, 793 (11th Cir. 1987), the district court listed the factors that a movant must show to be entitled to Rule 60(b)(2) relief:

> "(1) the evidence must be newly discovered since the trial; (2) due diligence on the part of the movant to discover the new evidence must be shown; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial would probably produce a new result."

App'x D at 14 (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000)).

The court found that Mills failed to make the appropriate showing. First, the court pointed to Mills's lack of diligence "in discovering his new evidence." App'x D at 14. Mills raised this claim for over a decade with "no evidence, other than pure

speculation." DE26:202. After his initial federal habeas proceedings concluded, Mills "made no attempt…to further investigate his claims of perjury" for "nearly two years." App'x D at 8. Then, nearly a month after the state moved for his execution, Mills's attorneys finally spoke with Glenn. *Id.* at 8–9. But Mills had known that Glenn represented JoAnn since at least his August 2007 trial, where she testified that Glenn was her attorney, that he was in the courtroom, and that she had had discussions with him about testifying. Mills could have even accessed Glenn's "filed" fee declaration—the only thing even resembling support for Glenn's affidavit—anytime "between 2007 and 2020, let alone 2024." App'x D at 15. With nothing to suggest that Glenn would not have spoken with him sooner, *id.* at 15, Mills fails to show that he "could not have…discovered" Glenn's testimony "with reasonable diligence." FED. R. CIV. P. 60(b)(2).

Mills claimed on appeal that the district court applied the wrong legal standard in assessing his diligence. Citing *Banks v. Dretke*, 540 U.S. 668 (2004), he argued that because criminal defendants need not "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed," he "exercised due diligence in discovering this evidence." App'x B at 43, 45; *see* Pet. 21. But Mills's suggestion that he had to "scavenge" to obtain evidence from Glenn is absurd; apparently, all he had to do was ask. *Banks*, moreover, was about whether a habeas petitioner had demonstrated "cause" for his failure to develop a claim in state court. *See* 540 U.S. at 691. That standard is focused on "events or circumstances external to the defense," *id.* at 696 (quotation omitted), whereas Rule 60(b)(2),

applicable after a federal court's final judgment, requires the movant to demonstrate *his* "due diligence" in pursuing the evidence, *Toole*, 235 F.3d at 1316. Mills did not pursue evidence from Glenn with "due diligence" by doing nothing for almost two decades. His "continued and persistent" filings, *see* Pet. 22, 24–25 (citing "*fifteen distinct requests* for information about a plea offer"), do not excuse his failure to speak to Glenn and procure the allegedly extraordinary evidence within a reasonable time.

In any event, *Banks* is inapplicable here because there has been no *Brady* violation. It is immaterial that Mills allegedly made so many "requests for information," Pet. 22, when the State had nothing to offer him. Again, the State did not prevent Mills from speaking to Glenn at any time. Mills would have this Court rule that whenever a habeas petitioner brings forward any purported *Brady* evidence, he no longer needs to exercise diligence. That can't be right.

Third, as to the third and fifth *Toole* factors, Mills's new evidence is at most "impeachment evidence and would not have changed the result of Mills' trial." App'x D at 16. Even if Glenn's affidavit were accurate—which the district court called into doubt, *see id.* at 21—the fact that JoAnn perjured herself about the existence of a plea agreement "would not constitute evidence that she lied as to the rest of her testimony," particularly as her testimony "was but one part of the overwhelming evidence against Mills," *id.* at 16. To that end, the trial court's sentencing order noted:

- Jennifer Yaden, the victims' next-door neighbor, noticed a white late-model four-door sedan driving by their house several times on the day of the murder, then saw that car parked in their driveway.
- Guin Police Chief Bryan McCraw and Officer Larry Webb knew that Mills drove a white car of that description.

- The Millses (and their car) were not home in the early morning hours of June 25, 2004, shortly after the victims were attacked.
- Police encountered the Millses in their car—a white two-door Nissan Infinity M30—at 9:45 a.m. on June 25, trying to leave their residence. Mills claimed that he and JoAnn had spent the night in Hamilton at his father's house.
- JoAnn consented for the investigators to search the trunk of the car, where they found Vera Hill's tackle box of medicine and a blood-splattered duffel bag. The bag included "an assortment of items," including the murder weapons and multiple pieces of clothing stained with the victims' blood. One piece of bloody clothing was a pair of work pants with Mills's name on the inside tab.

DE37-1:C. 125–27. The case not, as Mills would have it, "built on the testimony of a single witness." Pet. 6.

While Mills's Rule 60 motion attempted to pin the crime on Benjie Howe, a local drug user who Mills claimed could have planted the evidence in his car, App'x F at 22–25, Mills admitted at trial that he did not believe Howe drove his car on the day of the murders, nor did he believe that Howe was in his car at all that day, DE37-9:R. 818–19. Howe testified that on the day of the murders, he spent much of his time at the home of another man, having a radio installed in his truck, and that he only went to Mills's home that afternoon "[b]ecause Jamie was calling two or three times that he had something that I wanted," which turned out to be Vera Hill's Lortab. DE37-10:R. 871–74. Howe then went out that evening and spent the night with his date, *id.* at R. 875, making Mills's claim that Howe planted the evidence implausible.

Glenn's affidavit is also weak at best. The State denies that any plea deal existed. JoAnn and the district attorney told the court just that at Mills's trial. The district attorney and his investigator maintain that position and submitted sworn affidavits on that point. App'x D at 15. Mills, the district court noted, has "no

documentary evidence" of a plea deal, but only Glenn's affidavit, which makes "vague references" to a fee declaration littered with "errors." *Id.* He offers no "note" from Glenn's files on the "terms" of any deal, nothing "signed by JoAnn," and nothing signed by the State. *Id.* In sum, the new affidavit was merely impeaching at best and would not have probably produced a new result.

The court of appeals correctly concluded that the district court did not abuse its discretion by denying a COA on this issue. This claim is not cert-worthy, nor is Mills entitled to a stay of execution.

IV. Jurists of reason would not disagree with the district court's resolution of Mills's Rule 60(b)(6) catch-all claim.

Reasonable jurists would not disagree with the district court's rejection of Mills's Rule 60(b)(6) motion, either. Rule 60(b)(6) is a catch-all provision, stating that a party may seek relief from a final judgment for "any other reason that justifies" it. As this Court has explained, Rule 60(b)(6) is available for reasons "other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). It only provides courts "authority to relieve a party from a final judgment" if the motion "is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg*, 486 U.S. at 863. A movant traveling under this exception must also show "extraordinary circumstances," which will "rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. And the Rule 60(b)(6) motion must be brought "within a reasonable time." *See* FED. R. CIV. P. 60(c)(1). Mills fails across the board.

First, the Eleventh Circuit correctly concluded that Rule 60(b)(6) is unavailable to Mills because his motion is "premised on…grounds for relief enumerated" in Rule 60(b)(2) and (b)(3). App'x A at 9 (quoting *Liljeberg*, 486 U.S. at 863). The "grounds" Mills asserts as the basis for relief under Rule 60(b)(6), the court of appeals noted, are "identical" to those he asserts in his other Rule 60(b) claims. *Id.* Rule 60 lays out specific standards for motions based on such evidence, and Mills cannot make the required showing under either. There is "much authority" backing up the notion that (b)(6) and the remaining categories are "mutually exclusive"; thus, because relief could have been warranted under either (b)(2) or (b)(3), relief under (b)(6) "cannot be had." *Id.* (quoting WRIGHT & MILLER § 2864). Any other reading would render Rule 60(c)(1)'s one-year limitation period "superfluous" because a (b)(6) motion, subject to a reasonable time limitation, could always be available, and (b)(1)–(5) would be "pointless." *Id.* Rule 60(b)(6) is "not [the] easy escape from the time limit" of (b)(2) and (b)(3) that Mills needs. WRIGHT & MILLER § 2864.

Second, Mills's Rule 60(b)(6) motion was untimely. "What constitutes a 'reasonable time' depends upon the circumstances of each case, including 'whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner.'" *Gill v. Wells*, 610 F. App'x 809, 812 (11th Cir. 2015) (quoting *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 (11th Cir. 2008)). The district court noted that while there is no firm time limit for Rule 60(b)(6) claims, "the delay before filing must be reasonable." App'x D at 21. Here, Mills unreasonably delayed in bringing his claim when he waited until February

2024—after the State had moved for his execution—to talk to Glenn. *Id.* at 21–22. The court also noted that the State has an interest in seeing Mills's execution carried out as scheduled, "and for Mills to wait until after the State has set his execution to attempt to reopen his habeas litigation based upon information he could have produced years ago is prejudicial to the State's interests." *Id.* at 22.

Once more, Mills contends that his motion is timely, citing *Banks*, Pet. 21–27, but *Banks* remains inapplicable for the reasons discussed *supra* at 25–26. *Banks* is a case of prosecutorial suppression. *See id.* There is simply no suppression in Mills's case; his "new evidence" is an affidavit he obtained from JoAnn's trial counsel, the accuracy of which the State vehemently denies. Mills has not produced a single document suppressed by the State, nor has he produced any contemporaneous documentation from Glenn besides Glenn's erroneous fee declaration. Much as Mills wants to make this a *Banks* case, he has utterly failed to show that the State suppressed ***anything***.

Third, the district court held that Mills failed to show an entitlement to relief. "A 'movant seeking relief under Rule 60(b)(6) [has] to show "extraordinary circumstances' justifying the reopening of a final judgment,'" but as the Supreme Court has stated, "'[s]uch circumstances will rarely occur in the habeas context." App'x D at 22 (quoting *Gonzalez*, U.S. at 535). Glenn's late-coming affidavit and problematic fee declaration did not constitute an exception to this rule. As the court of appeals did not err in denying a COA on this ground, Mills has not presented a cert-worthy claim and is not entitled to a stay of execution.

V. Mills's Rule 60 motion resembles a second and successive habeas petition, which would be barred.

This Court is unlikely to grant certiorari because this case is a poor vehicle to address any issues ruled on relating to Rule 60. That is because this case would present difficult questions regarding AEDPA and Rule 60 that were not addressed below. Although AEDPA does not "expressly circumscribe the operation of Rule 60(b)," the Rules of Civil Procedure, including "Rule 60(b)," apply only to the extent those rules are "not inconsistent" with "applicable federal statutory provisions." *Gonzalez*, 545 U.S. at 529.

Rule 60 motions in habeas cases can conflict with AEDPA's restrictions on "second or successive habeas petitions." *Id.* at 529–30. For instance, using "a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated" would evade AEDPA's "more convincing factual showing" and "precertifi[cation]" requirement—that is, "assuming" that the new evidence "causes that motion to escape § 2244(b)(1)'s prohibition of claims 'presented in a prior application.'" *Id.* at 531–32. Although a "defect in the integrity of the federal habeas proceedings," like fraud, may be raised in a Rule 60 motion, *id.* at 532 & n.5, that fraud should be impermissible to raise by such motion "if the fraud on the habeas court includes (or necessarily implies) related fraud on the state court," *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006); *see also Gonzalez*, 545 U.S. at 532 n.5. If this Court were to grant certiorari, it would have to consider whether Mills's Rule 60 motions are subject to AEDPA. If AEDPA applies, then Mills's Rule 60 motions are either barred as claims presented in a prior application, 28 U.S.C. § 2244 (b)(1), or will fall far short

of AEDPA's demanding standard for second or successive petitions based on new evidence, *id.* § 2244 (b)(2).

VI. The equities favor denial of the motion to stay.

A. Mills has not shown that he will suffer irreparable harm absent a stay of execution. The State inflicts no harm, let alone irreparable harm, when it carries out a lawful and just sentence. To the contrary, punishing the guilty is the fulfillment of the public's "moral judgment." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Mills is guilty. After seventeen years, he offers a questionable affidavit that at best could be used to impeach one witness, but the prosecution had a trove of physical evidence, too. The legal standard at this late stage requires a substantial likelihood of harm—*i.e.*, a substantial likelihood that Mills is innocent and would be wrongfully executed. Even if Mills were likely to succeed on the merits of certain claims (such as the misconduct or fraud grounds for his motion), he would not necessarily have shown innocence and thus a likelihood of irreparable harm.

B. Even if Mills had proven that he has a debatable claim such that he is entitled to a COA, he has not attempted to show that this Court will ultimately grant certiorari and reverse. Using this Court's equitable powers to allow Mills to appeal a likely unsuccessful claim (even if debatable) would be pointless. Because Mills will lose on the merits in the end, he suffers no irreparable harm from the denial of his COA, yet the State and the public suffer every day the judgment is delayed.

C. Mills's Rule 60 motion and stay motion are also untimely. Mills was convicted of capital murder in August 2007. The district court denied habeas relief in

November 2020, DE26, and this Court denied certiorari in April 2022, *Mills v. Hamm*, 142 S. Ct. 1680 (2022) (mem.). He should have known since that point that the State could move to execute him at any time. Yet suddenly, a month after the State moved, he decided to talk to Glenn—a person known to him since at least August 2007—and move for state postconviction relief on March 4, 2024.[14] Not until April 5 did Mills launch his untimely federal assault via Rule 60 motion, and only on May 16—two days after being prodded by a *different* court—did Mills move the Northern District for a stay. It is absurd to say "*[t]he State* has delayed a substantive review," Pet. 26; Stay App. 8, when Mills could have spoken to Glenn years ago.

As this Court explained in *Hill v. McDonough*, "[a] court considering a stay must also apply a strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay." 547 U.S. 573, 574–75 (2006). "Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) (internal quotation omitted). Should a court permit execution litigation to proceed, then it "'can and should' protect settled state judgments from 'undue interference' by invoking [its] 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Id.* at 150–51 (quoting *Hill*, 547 U.S. at 584–85). As the Eleventh Circuit has noted, this Court "has unanimously

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instructed the lower federal courts on multiple occasions that we must apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay.'" *Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1297 (11th Cir. 2016) (quoting *Hill*, 547 U.S. at 584)).

Mills's claims absolutely could have been brought earlier. That he waited until February 2024 to talk with Glenn is unreasonable, that he waited until April 5 to bring his claims before the district court makes them untimely, but that he then delayed until May 16 to move for a stay is inexcusable. The district court denied the stay the following afternoon, May 17, then denied a COA on the afternoon of May 21. Mills waited more than twenty-four hours after that to file notice of appeal on May 22, and when he filed in the Eleventh Circuit on May 23, he failed to serve the Appellee for more than five hours. His litigation timeline is indicative of manipulation and should weigh strongly against the grant of a stay.

CONCLUSION

The district court denied Mills's Rule 60 motion on multiple grounds and then denied a COA and a stay of execution. A three-judge panel of the Eleventh Circuit likewise denied a COA and stay, and though the concurring judge was not entirely satisfied with the state of the law, she agreed that Mills's motion for COA was due to be denied. App'x A at 11. Mills asks this Court to ignore the untimeliness of his claims and his filings in favor of finding the existence of a seventeen-year fraud perpetrated by the State, based solely on an affidavit he procured after the State moved for his

execution, which itself is based on an erroneous attorney fee declaration. As Mills has shown no substantial likelihood of success on his claims, the Court should deny his cert petition and stay application. And because of Mills's dilatory tactics, his stay application should be denied on equitable grounds as well.

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