No. 24-7084

In the
Supreme Court of the United States

JEFFREY GLENN HUTCHINSON, *Petitioner*,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *Respondent*.

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

BRIEF IN OPPOSITION

EXECUTION SCHEDULED FOR MAY 1, 2025, at 6:00 P.M

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Capital Case

QUESTION PRESENTED

I. Whether this Court should grant review of an unpublished decision of the Eleventh Circuit denying a certificate of appealability (COA) on the issue of whether a claim of "new" evidence that the habeas petitioner suffered from mild neurocognitive disorder and Gulf War Illness may be brought under Federal Rule of Civil Procedure 60(b)(6) rather than being required to be brought under Federal Rule of Civil Procedure 60(b)(2), deserves further encouragement?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

OPINION BELOW

The Eleventh Circuit's opinion is unpublished but available at *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, No. 25-11271 (11th Cir. April 23, 2025).

JURISDICTION

On April 23, 2025, the Eleventh Circuit issued an unpublished opinion denying a certificate of appealability regarding a Rule 60(b) motion to reopen. The Eleventh Circuit also denied the motion for a stay of the execution.

On April 28, 2025, Hutchinson, represented by the Capital Habeas Unit of the Office of the Public Defender of the Northern District of Florida (CHU-N), filed a petition for a writ of certiorari in this Court. The petition is timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appeals statute, 28 U.S.C. § 2253, provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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

28 U.S.C. § 2253 (emphasis added).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The litigation in this capital case spans nearly 25 years.

Facts of the crime

On September 11, 1998, Hutchinson murdered his live-in girlfriend, Renee Flaherty, and her three young children: Logan, Amanda, and Geoffrey. *See Hutchinson v. State*, 882 So. 2d 943, 948-49 (Fla. 2004). Logan was four years old, Amanda was seven years old, and Geoffrey was nine years old. Hutchinson shot the four victims with his pistol-grip Mossberg shotgun, which was found inside the home on the kitchen counter. *Id.* at 948.

Hutchinson had been living with Renee and her three children immediately prior to the murders. She and Hutchinson had a fight. Hutchinson, who had been drinking, loaded his clothes and guns into his truck and drove to a local bar. He told the bartender that Renee was "pissed off" at him, while drinking more beer. *Hutchinson*, 882 So. 2d at 948. Hutchinson's blood alcohol content level was between .21 to .26 on the night of the murders. *Hutchinson*, 882 So. 2d at 959.

Renee called a friend after Hutchinson left and she told her friend that Hutchinson had left for good. *Hutchinson*, 882 So. 2d at 948. But Hutchinson returned to the house after leaving the bar and broke down the front door, which had been locked with a dead bolt. *Id.* at 949. In a drunken rage at Renee, he shot her and her three children. Renee was on the bed in the master bedroom with her two youngest children. Hutchinson shot her once in the head. Hutchinson also shot Amanda once in the head. The deputies found the seven-year-old girl's body on the floor near the

bed. Hutchinson shot Logan once in the head as well. The deputies found the four-year-old boy's body at the foot of the bed. Hutchinson shot Geoffrey twice–once in the head and once in the chest. The deputies found the nine-year-old boy's body in the living room between the couch and the coffee table. *Id.* at 948.

A 911 call from 410 John King Road, the victims' home, was received at 8:41 p.m. (T. XXII 728,750). The 911 caller stated, "I just shot my family." (T. XXII 701). Deputies arrived at the home within ten minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone nearby. *Hutchinson*, 882 So. 2d at 948. The caller identified one of the victims as his girlfriend, not his wife. (T. XXII 706).

One of the child victim's tissue, caused from the blowback of shooting the child with a shotgun, was on Hutchinson's pants. *Hutchinson v. State*, 17 So. 3d 696, 698 (Fla. 2009). The State's DNA expert at trial, Candy Zuleger, testified that Geoffrey's tissue was on Hutchinson's leg. (T. XXIV 1174; XXVII 1616-1617).

Hutchinson also had gunshot residue on his hands, according to the residue test performed at 10:20 p.m. on September 11, 1998, the night of the murders. (T. XXV 1250).

Hutchinson's shotgun, a Mossberg 12-gauge pistol-grip shotgun, was positively identified as the murder weapon. The murder weapon was located on the kitchen counter in the house. (T. XXII 621; XXVI 1547, 1552, 1557; XXVII 1710); *Hutchinson*, 882 So. 2d at 948. All eight expended shells–the five involved in the murders and the three located in the closet of the house–were from this shotgun. (T. XXVI 1557).

Procedural history

On January 18, 2001, the jury convicted Hutchinson of four counts of first-degree murder with a firearm, as indicted. *Hutchinson*, 882 So. 2d at 948. Hutchinson waived his right to a penalty phase jury, but presented mitigation to the trial judge at a bench penalty phase. *Id.*

The sentencing court found two aggravating factors for the murders of Logan and Amanda: (1) previously convicted of another capital felony for the murders of the other children; and (2) the victim was less than 12 years of age. *Hutchinson*, 882 So. 2d at 959; *see also State v. Hutchinson*, 2001 WL 36412569 (Fla. Cir. Ct. Feb. 6, 2001) (trial court's sentencing order). The trial court found three aggravating factors for the murder of Geoffrey Flaherty: (1) previously convicted of another capital felony for the murders of the other children; (2) the victim was less than 12 years of age; and (3) the murder was heinous, atrocious, and cruel (HAC). The sentencing court found one statutory mitigator: no significant history of prior criminal activity and gave it significant weight. *Hutchinson*, 882 So. 2d at 959. The sentencing court also found 20 non-statutory mitigators. *Id.* at 959-60 (listing the 20 non-statutory mitigators and the weight given to each).

On February 6, 2001, the trial court imposed three death sentences for the murders of each of the three children. *Hutchinson*, 882 So. 2d at 949. The trial court also sentenced Hutchinson to life imprisonment for the murder of the children's mother.

The Florida Supreme Court affirmed the convictions and sentences, including the three death sentences for the murders of the three children. *Hutchinson*, 882 So. 2d at 961. The Florida Supreme Court affirmed the denial of the initial postconviction

motion. *Hutchinson v. State*, 17 So. 3d 696, 704 (Fla. 2009). The Florida Supreme Court then affirmed the summary denial of his first successive postconviction motion. *Hutchinson v. State*, 243 So.3d 880 (Fla. 2018). The Florida Supreme Court also affirmed the summary denial of his second successive postconviction motion. *Hutchinson v. State*, 343 So. 3d 50, 54 (Fla. 2022).

On January 15, 2025, Hutchinson, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed a third successive Rule 3.851 motion raising two claims: (1) a claim of newly discovered evidence of a mild neurocognitive disorder due to traumatic brain injury (TBI) resulting from his military service during the Gulf War; and (2) a claim of newly discovered evidence of Gulf War Illness. On January 21, 2025, the State filed an answer to the third successive postconviction motion. The State asserted the third successive postconviction motion should be summarily denied.

On March 31, 2025, the Governor signed a warrant scheduling the execution for May 1, 2025. The next day, April 1, 2025, a new judge, Judge Lacy Powell Clark, was assigned to preside over both the pending third successive postconviction motion and the warrant litigation.

On April 4, 2025, the postconviction court summarily denied the third successive postconviction motion finding both claims to be untimely. The lower court did not address the improperly pled Eighth Amendment claim. And, on April 8, 2025, the postconviction court denied the motion for rehearing, again determining the successive claims of newly discovered evidence to be untimely. The lower court also denied the motion to stay the execution.

Hutchinson filed an appeal in the Florida Supreme Court from the denial of his third successive postconviction motion raising three issues: (1) the postconviction court improperly summarily denied the successive postconviction claim of newly discovered evidence of a mild neurocognitive disorder due to traumatic brain injury (TBI); (2) the postconviction court improperly summarily denied the successive postconviction claim of newly discovered evidence of Gulf War Illness; and (3) the Eighth Amendment required consideration of new mitigation discovered years after the sentences were final. He also filed a motion to stay the execution. On April 11, 2025, the State filed an answer brief. The State also filed a response to the motion to stay. Hutchinson filed a reply brief.

On April 21, 2025, the Florida Supreme Court affirmed the summary denial of the third successive postconviction motion. *Hutchinson v. State*, No. SC2025-0497, 2025 WL 1155717 (Fla. April 21, 2025). The Florida Supreme Court also denied the motion to stay the execution. *Id.* at *3.

On April 7, 2025, as part of the warrant litigation, Hutchinson, represented by CCRC-N, filed a fourth successive postconviction motion raising four claims: (1) a claim asserting that the compressed warrant schedule, the reassignment of a new judge to preside over the warrant litigation, the pending litigation, and the lack of advanced and equal notice of the warrant, combined violated due process; (2) a claim that the execution of an inmate with a mild neurocognitive disorder is arbitrary in violation of *Furman v. Georgia*, 408 U.S. 238 (1972); (3) a claim that the combination of the length of the time he has spent on death row, in addition to the "solitary confinement" he

endured while suffering from various mental conditions violates the Eighth Amendment; and (4) a claim that the refusal of the Department of Corrections (DOC) to allow him an additional witness and access to a telephone during the execution violated the access to courts provision of the state constitution. He also filed a motion to stay the execution.

On April 8, 2025, the State filed an answer to the fourth successive postconviction motion urging that the claims be summarily denied. The State also filed a response to the motion to stay. On April 11, 2025, the postconviction court summarily denied the fourth successive postconviction motion and denied a stay of execution.

On appeal from the summary denial of the fourth successive postconviction motion Hutchinson raised six issues: (1) the lower court abused its discretion in denying his public records requests; (2) the lower court abused its discretion in denying his motion to stay; (3) the compressed warrant and the lack of equal notice of the warrant as well as other circumstances violated due process; (4) the Governor's unfettered power to sign warrant and executing a defendant with a mild neurocognitive disorder were both arbitrary in violation of *Furman v. Georgia*, 408 U.S. 238 (1972); (5) his years spent on death row violated the Eighth Amendment; and (6) DOC denying his requests for an additional witness and access to telephone violated the state constitution's access to courts provision.

On April 14, 2025, Hutchinson, represented by CCRC-N, filed a state habeas petition in the Florida Supreme Court raising three issues: (1) the Eighth Amendment

prohibits the execution of capital defendants with Neurocognitive Disorders as a result of his military service; (2) ineffective assistance of state postconviction counsel; and (3) a constitutional challenge to the heinous, atrocious, and cruel (HAC) aggravating factor found for the murder of nine-year-old Geoffrey. On April 16, 2025, the Secretary filed a response to the state habeas petition. On April 21, 2025, CCRC-N filed a reply.

The Florida Supreme Court affirmed the lower court's summary denial of the fourth successive postconviction motion and denied the motion for a stay of the execution. *Hutchinson v. State*, No. SC2025-0517, 2025 WL 1198037, at *1 (Fla. Apr. 25, 2025). The Florida Supreme Court also denied the state habeas petition. *Hutchinson*, 2025 WL 1198037, at *6-*7.

Initial federal habeas litigation

On July 24, 2009, Hutchinson filed a pro se Section 2254 petition raising a checklist of issues from his direct appeal and initial state postconviction appeal. *Hutchinson v. McNeil*, 5:09-cv-00261-RS (N.D. Fla.) (Doc. 1). The district court appointed D. Todd Doss as federal habeas counsel. (Doc. 9). On November 23, 2009, counsel filed an amended petition raising five grounds. (Doc. 19). On December 13, 2009, Respondent filed a motion to dismiss the federal habeas petition as untimely. (Doc. 28). The petition was "three years, nine months, and twenty-four days" late. *Hutchinson v. Florida*, 677 F.3d 1097, 1098 (11th Cir. 2012). On September 28, 2010, the district court granted the motion to dismiss and dismissed the first habeas petition as untimely. (Doc. 39); *Hutchinson v. Florida*, 2010 WL 3833921 (N.D. Fla.

Sept. 28, 2010). The district court concluded that the attorneys' error in miscalculating the deadline was a case of "simple negligence" and denied equitable tolling. *Hutchinson*, 2010 WL 3833921 at *2 (citing *Holland v. Florida*, 560 U.S. 631, 651-52 (2010) (stating that "a garden variety claim of excusable neglect," such as "a simple miscalculation" that leads a lawyer to miss a filing deadline, "does not warrant equitable tolling.").

In 2012, the Eleventh Circuit affirmed the dismissal of his federal habeas petition as untimely, due to Hutchinson's lack of diligence. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012). The Eleventh Circuit focused on Hutchinson's lack of diligence, pointing out that he knew that his attorney had not filed the state postconviction motion that would have tolled the federal habeas deadline but he did not file a pro se federal habeas petition "for nearly four years." *Id.* at 1102. And Hutchinson did not provide any reason for that delay. Therefore, he had "not carried his burden of showing that he pursued his rights diligently," as required by *Holland*.. *Id.* at 1103. He "waited three-and-three-quarter years before he filed a pro se federal habeas petition" which was "not reasonable diligence." The Court compared Hutchinson's "lengthy delay in filing his pro se federal habeas petition" to the diligence that Holland showed noting that Holland had prepared a pro se petition "the very day" that he discovered the deadline had been missed by his attorneys "and promptly filed it with the District Court." *Id.* at 1103. This Court denied review. *Hutchinson v. Florida*, 568 U.S. 947 (2012) (No. 12-5582).

First Rule 60(b) motion to reopen

On March 21, 2013, Hutchinson filed a successive habeas petition. *Hutchinson v. Crews*, 3:13-cv-00128 (N.D. Fla. 2013) (Doc. 3). Five days later, Respondent filed a motion to dismiss for lack of jurisdiction. (Doc. 2). On February 11, 2015, the newly formed Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N), entered a notice of appearance. (Doc. 27).

Over five years later, on May 26, 2020, CHU-N filed a memorandum in support of the pending Rule 60(b) motion to reopen relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *McQuiggin v. Perkins*, 569 U.S. 383 (2013). (Doc. 78). On June 12, 2020, Respondent filed a response to the motion to reopen arguing the Rule 60(b)(6) motion was untimely. (Doc. 79). CHU-N filed a reply. (Doc. 81). On January 15, 2021, the district court denied the Rule 60(b)(6) motion and denied a certificate of appealability (COA). (Doc. 82). *Hutchinson v. Inch*, No. 3:13-cv-00128, 2021 WL 6335753, at *10 (N.D. Fla. Jan. 15, 2021), *certificate of appealability denied*, No. 21-10508-P, 2021 WL 6340256 (11th Cir. Mar. 24, 2021).

In 2021, a single judge of the Eleventh Circuit denied a COA regarding the denial of a Rule 60(b) motion to reopen for the reasons in the district court's order. (Doc. 88). CHU-N filed a motion for reconsideration of the denial of a COA before the entire panel. The Eleventh Circuit denied a COA rejecting an actual innocence claim based on *McQuiggin*, recounting the extensive evidence of Hutchinson's guilt. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 6340256 (11th Cir. Mar. 24, 2021) (quoting *Hutchinson v. State*, 17 So. 3d 696, 698 (Fla. 2009)). This Court denied

review. *Hutchinson v. Dixon*, 142 S. Ct. 787 (2022) (No. 21-5778).

Second Rule 60(b) motion to reopen

On April 11, 2025, after the Governor signed a warrant, CHU-N filed a second Rule 60(b) motion to reopen. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, 3:13-cv-00128 (N.D. Fla.) (Doc. 91). CHU-N also filed a motion to stay the execution. (Doc. 92). The motion to reopen was labeled as a Rule 60(b)(6) motion and argued that Hutchinson's newly discovered diagnosis of mild neurocognitive disorder and Gulf War Illness were reasons to reopen the case to relitigate the timeliness of his 2009 habeas petition. CHU-N argued that Hutchinson's "new" diagnoses excused his lack of diligence and warranted equitable tolling. On April 14, 2025, Respondent filed a response to the motion to reopen asserting it was actually a Rule 60(b)(2) motion and a response to the motion for a stay. On April 16, 2025, CHU-N filed a reply. The district court denied the motion to reopen. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, No. 3:13-cv-00128, slip op. at 15-18 (N.D. Fla. Apr. 17, 2025).

The Eleventh Circuit denied a COA and the motion to stay. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, No. 25-11271 (11th Cir. April 23, 2025).

Hutchinson, represented by CHU-N, filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision denying the state habeas petition, raising a single question regarding the denial of a COA.

REASONS FOR DENYING THE PETITION

ISSUE I

Whether this Court should grant review of an unpublished decision of the Eleventh Circuit denying a certificate of appealability (COA) on the issue of whether a claim of "new" evidence that the habeas petitioner suffered from mild neurocognitive disorder and Gulf War Illness may be brought under Federal Rule of Civil Procedure 60(b)(6) rather than being required to be brought under Federal Rule of Civil Procedure 60(b)(2), deserves further encouragement?

Petitioner Hutchinson seeks review of the Eleventh Circuit's unpublished opinion denying a certificate of appealability on the issue of whether new evidence of his mental condition to excuse his lack of diligence regarding equitable tolling of his 2009 untimely habeas petition may be raised in a Rule 60(b)(6) motion or must be raised in Rule 60(b)(2) motion and filed within a year. There is no conflict between this Court's jurisprudence regarding Rule 60(b)(2) motions to reopen and the Eleventh Circuit's decision requiring such a claim be brought under Rule 60(b)(2). Indeed, the Eleventh Circuit decision relied nearly exclusively on this Court's caselaw regarding Rule 60(b)(2) motions to reopen to reach that conclusion. There is also no conflict with the COA statute's requirement that the underlying habeas claim be "substantial" to be granted a COA. There is also no conflict with the other federal circuit courts regarding the propriety of such claim being raised only under Rule 60(b)(2), in the wake of *Kemp v. United States*, 596 U.S. 528 (2022), and certainly no conflict regarding the COA statute requirement of a substantial underlying habeas claim. Because the issue involves a matter where there is no conflict with this Court or with the other federal circuit courts, this Court should deny review of the question.

The Eleventh Circuit's unpublished decision denying COA

The Eleventh Circuit, in an unpublished opinion, denied a COA. *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, 25-11271 (11th Cir. April 23, 2025). The Eleventh Circuit denied the COA for four reasons. First, the Court explained that the motion to reopen was properly classified a Rule 60(b)(2) motion, not a Rule 60(b)(6) motion, because it relied on "newly discovered evidence. *Id.* slip. op. at 5 (citing *Kemp v. United States*, 596 U.S. 528, 533 (2022), and *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)). The Eleventh Circuit reasoned that Rule 60(b)(2) governed even though the motion to reopen sought relief from a judgment that was "not as a result of a trial or penalty phase," but because of a "later post-conviction matter." *Id.* at 5-6 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 534-35 (2005) (stating that "Rule 60(b) has an unquestionably valid role to play in habeas cases"), and citing *James v. Sec'y, Dep't of Corr.*, 130 F.4th 1291, 1295 (11th Cir. 2025), *cert. denied*, *James v. Dixon*, 2025 WL 864457 (U.S. Mar. 20, 2025) (No. 24-6777)). Second, the Eleventh Circuit concluded that even if the motion was viewed as a Rule 60(b)(6) motion, it was untimely because it was not filed within a reasonable time as required by Rule 60(c)(1). Slip. op. at 6-7. The Court explained that the neurocognitive impacts of exposure to repetitive low level blasts had been known for five years. Third, the Eleventh Circuit determined that there were no extraordinary circumstances to justify reopening the judgment dismissing his habeas petition as untimely because he did not establish any connection with the new diagnoses and his ability to file a timely pro se petition. *Id.* at 7-9. Fourth, the Eleventh Circuit concluded that Hutchinson had not established that his

underlying federal habeas petition contained a debatable and substantial claim. *Id.* at 3-4, 10 (noting a circuit court may issue a COA "only if" the petitioner makes a "substantial showing of the denial of a constitutional right," citing 28 U.S.C. § 2253(c)(2)).

Rule 60(b)(2) motions to reopen

The Eleventh Circuit properly determined that the motion to reopen raising a claim of two new mental diagnoses was a Rule 60(b)(2) motion, not a Rule 60(b)(6) motion. A Rule 60(b)(6) motion may only be filed if Rule 60(b)(1) through Rule 60(b)(5) do not apply. *Kemp v. United States*, 596 U.S. 528, 533 (2022); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)). "Rule 60(b)(6) permits relief in extraordinary circumstances not captured by the other Rule 60(b) categories." *Merilien v. Warden*, 2023 WL 5846294, at *1 (11th Cir. Sept. 11, 2023), *cert. denied, Merilien v. McFarlane*, 144 S. Ct. 1036 (2024).

Rule 60(b)(2) provides: "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2) applied to Hutchinson's claim because it was a claim based on new evidence of two diagnoses and therefore, a Rule 60(b)(2) motion was the exclusive vehicle to raise the claim.

The district court had found that Rule 60(b)(2) did not apply because in federal habeas review there is no "trial" in such proceedings. *Hutchinson v. Crews*, 3:13-cv-00128 (N.D. Fla.) (Doc. 98 at 9-10) (citing *Waddell v. Hendry Cnty. Sheriff's Office*, 329

F.3d 1300, 1309 (11th Cir. 2003)). The district court believed that Rule 60(b)(2) only applied when the newly discovered evidence "would have materially affected the outcome of a trial or penalty phase, not some later post-conviction matter" such as equitable tolling of the habeas statute of limitations.

But the Eleventh Circuit correctly concluded that Rule 60(b)(2) governed. This Court has expressed concern about Rule 60(b) motions undermining finality of habeas litigation when applied in the habeas context. *Banister v. Davis*, 590 U.S. 504, 518 (2020) (noting Rule 60(b)'s potential for "undermining AEDPA's scheme to prevent delay and protect finality;" and observing that, unlike Rule 59(e) motions "with their fixed 28-day window, Rule 60(b) motions can arise long after the denial of a prisoner's initial petition–depending on the reason given for relief, within either a year or a more open-ended reasonable time."). This Court noted Rule 60(b) motions, which are "often distant in time and scope" and attack "an already completed judgment," can "threaten serial habeas litigation." *Banister*, 590 U.S. at 520-21. This Court warned that "without rules suppressing abuse, a prisoner could bring such a motion endlessly." *Id.* at 521.

The district court limiting Rule 60(b)(2) motions to trials, in effect, writes Rule 60(b)(2) motions out of habeas litigation because there are no trials in § 2254 proceedings. The more critical part of Rule 60(b)(2) is about relief "from a final judgment, order, or proceeding" based on new evidence which applies to habeas litigation. It is the more minor diligence part of that rule where the word "trial" appears. Allowing any motion relating to new evidence to be raised as a Rule 60(b)(6)

motion instead of requiring it to be filed as Rule 60(b)(2) motion permits such claims to be raised without the one-year time limit that applies to Rule 60(b)(2) motions. That reading of Rule 60(b)(2) increases the threat of serial habeas litigation this Court warned about in *Banister*. It is Rule 60(b)(6), both because it is a catch-all and because it does not have a one-year time limitation, that presents the greatest threat to the finality of habeas litigation.[1] The Eleventh Circuit correctly classified the motion to reopen as a Rule 60(b)(2) motion.

The Rule 60(b)(2) motion, however, was untimely. Any Rule 60(b)(2) motion was required to be filed within one year. The timing provision of Rule 60 requires that any motion under "(1), (2), and (3)" be filed "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. Rule 60(c)(1). The judgment dismissing the original amended habeas petition as untimely was entered on September 28, 2010. *Hutchinson v. McNeil*, 5:09-cv-00261 (N.D. Fla.) (Doc. 40). So, any Rule 60(b)(2) motion to reopen had to be filed by September 28, 2011, to be timely under Rule 60(c)(1). But the Rule 60(b)(2) motion was not filed until April 11, 2025. *Hutchinson v. Cannon*, 3:13-cv-00128 (N.D. Fla.) (Doc. 91). The Rule 60(b)(2) motion was filed 13 years, 6 months, and 14 days late. The Rule 60(b)(2) motion to reopen was untimely.

Additionally, the Rule 60(b)(2) motion to reopen was invalid because neither

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[1] This Court's concerns about Rule 60(b) motions effects on the finality of habeas litigation are exemplified by the first Rule 60(b)(6) motion filed in the case. The first Rule 60(b) motion remained pending in the district court for six years, from 2015 until 2021, during which CHU-N was permitted to investigate the case as well as conduct discovery and was even granted a stay of the Rule 60(b) litigation based on *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust a new claim in state court.

diagnosis was "newly discovered evidence." Both the diagnosis of mild neurological disorder and Gulf War Illness were known at the time of the 2001 penalty phase. Dr. McClaren testified at the penalty phase that Hutchinson suffered from some degree of brain dysfunction based on the results of the digit symbol subtest. (T. XXXI 2497). While the cause of the brain dysfunction may be new, the actual diagnosis was available. And there is absolutely nothing new about the Gulf War Illness diagnosis. Dr. Baumzweiger's report prepared prior to the penalty phase repeatedly referred to the neurological aspects of Gulf War Illness. The defense expert's report discussed the neurological effects on Hutchinson from his exposure to chemical agents during the Gulf War. Additionally, it was clear from the pre-trial hearing on the defense's counsel motion to appoint a third mental health expert with an expertise in neurology, that trial counsel Cobb was also aware of the neurological aspects of Gulf War Illness well before the penalty phase. Neither diagnosis is newly discovered evidence.

There was no legitimate basis for the Rule 60(b)(2) motion. The Rule 60(b)(2) motion was both untimely and baseless.

COA statute requirements

The COA statute, 28 U.S.C. § 2253(2), provides: "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." But, as the Eleventh Circuit correctly noted, Hutchinson never identified "a single debatable claim" in his 2009 amended counseled federal habeas petition. *Hutchinson v. McNeil,* 5:09-cv-00261 (N.D. Fla.), slip op. at 10. As the Eleventh Circuit observed, Hutchinson did not identify, in either the district court or in the Eleventh Circuit, any underlying habeas claim that was both "debatable" and "substantial," as required by the COA statute. *Id.*

Contrary to opposing counsel's argument, just pointing to three claims that were raised in the original amended petition, in a cryptic manner, does not suffice to establish that any of those underlying claims are both substantial and debatable, it merely establishes that those claims were raised.[2] Hutchinson failed to meet the statutory requirement for a COA.

Evidentiary hearings on equitable tolling

Hutchinson seeks review of the Eleventh Circuit's statement that there were no extraordinary circumstances to justify reopening the judgment dismissing his habeas petition as untimely because he did not establish any connection with the new diagnoses and his ability to file a timely pro se petition. *Hutchinson*, 25-11271, slip op. at 7-9.

Hutchinson does not account for this Court's decisions in *Banister* and *Kemp*. And Hutchinson cites no published circuit court case holding a capital defendant is allowed to reopen his closed habeas case under Rule 60(b) and be granted an evidentiary hearing to

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[2] The five grounds raised in the original amended petition were: 1) ineffectiveness of trial counsel at the guilt phase regarding the 911 tape and the nylon stocking; 2) the prosecutor's various comments in closing argument violated his due process right to a fair trial; 3) the officer's testimony that he talked with Hutchinson after his arrest, when the trial court granted a motion to suppress part of the conversation, was a violation of his right to remain silent; 4) denial of a fair trial occurred when, during a lunch break at a local restaurant, a woman told three jurors that they should "hang" Hutchinson; and 5) the less-than-12-years-old aggravating circumstance did not genuinely narrow the class of murders. *Hutchinson v. McNeil*, 5:09-cv-00261 (N.D. Fla.) (Doc 19). The ineffectiveness claims regarding the voice of the 911 caller and the nylon stockings certainly were not substantial or debatable. *Hutchinson v. State*, 17 So. 3d 696, 701-02 (Fla. 2009) (concluding that trial counsel made a reasonable strategic decision not to challenge the voice on the 911 tape and noting prior counsel's testimony regarding the 911 call); id. at 702 (concluding there was neither deficient performance nor prejudice regarding counsel not presenting the tan nylon stocking because Hutchinson claimed that the intruders wore black ski masks).

present evidence to excuse his lack of diligence that he should have argued excused his lack of diligence in the original equitable tolling litigation. Both of the diagnoses Hutchinson presents as "new" evidence were known at the time of the original equitable tolling litigation.

Hutchinson's reliance on district court cases conducting evidentiary hearings on equitable tolling claims in the original equitable tolling litigation is misplaced. Those cases are not cases where the closed habeas case was reopened and then the capital defendant was granted an evidentiary hearing to present evidence that was available at the time of the original equitable tolling litigation.

No conflict with this Court's jurisprudence

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

The Eleventh Circuit's denial of COA regarding a Rule 60(b)(2) motion does not conflict with this Court's decision in *Kemp*. In *Kemp*, this Court held an error of law was a "mistake" for purposes of Rule 60(b)(1) and subject to the one-year time limit. *Kemp,* 596 U.S. at 533-34. Kemp filed a Section 2255 habeas petition which was dismissed as untimely. *Id.* at 531. Approximately two years later, he filed a Rule 60(b)(6) motion to reopen but the motion arguably was actually a Rule 60(b)(1) motion because the motion argued the district court made a mistake of law in dismissing his habeas petition as untimely. *Id* at 532. The Eleventh Circuit concluded that the motion to reopen was properly classified as a Rule 60(b)(1) motion, not a Rule 60(b)(6)

motion, and then determined that the Rule 60(b)(1) motion itself was untimely. This Court agreed, refusing to interpret Rule 60(b)(1) narrowly. *Id* at 539. This Court noted that Rule 60(b)(6) was a "catchall" which allows relief for "any other reason that justifies relief." *Id.* at 533. But the catchall Rule 60(b)(6) is "only" available "when Rules 60(b)(1) through (b)(5)" do not apply. *Id.* (citing *Liljeberg*, 486 U.S. at 863, n. 11).

Here, the Eleventh Circuit, following the logic of *Kemp*, properly refused to allow Hutchinson to invoke the catchall Rule 60(b)(6) when Rule 60(b)(2) applied. The Eleventh Circuit in this case refused to interpret Rule 60(b) narrowly, just as it had done in *Kemp*. The Eleventh Circuit interpreted Rule 60(b)(2) broadly rather than narrowly. There is no caselaw from this Court even hinting that a COA should be granted to litigate an untimely and baseless Rule 60(b)(2) motion to reopen a federal habeas case that was closed over a decade ago and this Court's decision in *Banister* certainly cautions otherwise.

Nor is it debatable that a COA should not be granted when no underlying potentially meritorious claim in the counseled habeas petition was ever identified, as required by the COA statute. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (stating that a "COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."). There were five grounds raised in the amended habeas petition but Hutchinson failed to identify any one of those

grounds as both substantial and debatable. The Eleventh Circuit's decision denying a COA does not conflict with this Court's COA jurisprudence.[3]

No conflict with the other federal circuit courts

There is also no conflict between the federal circuit courts and the Eleventh Circuit's decision denying a COA. 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 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).

Hutchinson cites no decision from any federal circuit court holding that Rule 60(b)(2) does not apply in Section 2254 habeas litigation due to the presence of the word "trial" in that rule, in the wake of *Banister* and *Kemp*. Nor does he cite any federal circuit case allowing a defendant to reopen a closed habeas case over a decade later based on evidence that was known at the time of the original penalty phase and

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[3] Hutchinson's request that this Court grant review of the role of agency principles in equitable tolling certainly conflicts with this Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012). In *Maples*, this Court held that where an attorney abandoned his client without notice "principles of agency law and fundamental fairness" amounted to extraordinary circumstance to excuse a procedural default. *Id.* at 289. But this case does not directly present that issue. The first and threshold issue is whether a COA should have been granted regarding a Rule 60(b) motion to reopen a closed habeas case involving mental conditions that were known at trial and at the time of the first round of litigation regarding equitable tolling.

at the time of the original equitable tolling litigation.

Further, an unpublished decision from the Eleventh Circuit regarding a COA cannot create an actual conflict with another circuit because it is not binding precedent, even in the Eleventh Circuit. *Patterson v. Georgia Pac., LLC*, 38 F.4th 1336, 1346 (11th Cir. 2022) ("Our unpublished opinions are not precedential, so they do not bind us or district courts to any degree" citing 11th Cir. R. 36-2)).

Because the denial of COA regarding an untimely, baseless Rule 60(b)(2) motion to reopen with no underlying debatable and substantial habeas claim identified, as required by the COA statute, does not conflict with this Court's COA jurisprudence or with any decision of any other federal circuit court, review of this question should be denied.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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