UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO: 18-25165-CIV-MIDDLEBROOKS

JOSE ANTONIO JIMENEZ,

Petitioner,

vs.

JULIE L. JONES, Secretary, Florida Department of Corrections,

Respondent.
_____/

ORDER ON EMERGENCY PETITION UNDER 28 USC §2254

THIS CAUSE came before the Court upon Petitioner's Emergency Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody and Incorporated Memorandum of Law ("Emergency Petition") (DE 1) and Emergency Application for a Stay of Execution ("Application") (DE 7). The State filed a response on December 11, 2018 (DE 9), and an Appendix on December 12, 2018 (DE 16). Petitioner filed a Reply on December 12, 2018 (DE 15). The Governor of the State of Florida has scheduled Petitioner's execution for Thursday, December 13, 2018 at 6:00 p.m.

The Court has given expedited consideration to the Emergency Petition in light of the impending execution and the limitations on district courts' jurisdiction contained in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(b). I have carefully considered the submissions of the Parties, the record and applicable law. For the reasons set forth below, the Application is denied and the Emergency Petition is dismissed.

I. BACKGROUND

Jose Antonio Jimenez is on Florida's death row at the Union Correctional Institution in Raiford, Florida following his conviction for the first degree murder of Phyllis Minas in 1992.[1] Having exhausted the state court post-conviction process, the Petitioner filed a petition for writ of habeas corpus by a person in state custody on January 20, 2004. (DE 1) (04-CV-20132-DMM). The Court denied relief on all claims. (DE 73) (04-CV-20132-DMM). Petitioner sought appellate review at the United States Court of Appeals for the Eleventh Circuit, but the Court denied his request for a Certificate of Appealability. (DE 92) (04-CV-20132-DMM). Petitioner then sought certiorari review from the United States Supreme Court. The writ for certiorari was denied on June 22, 2009. Five years later, the Petitioner filed a Rule 60(b) motion. (DE 97) (04-CV-20132-DMM). The Court denied the motion on June 12, 2014. (DE 99) (04-CV-20132-DMM). The Petitioner filed another post-judgment motion, filed pursuant to Federal Rule of Civil Procedure 59(e). (DE 101) (04-CV-20132-DMM). It was denied. (DE 103) (04-CV-20132-DMM). Petitioner again sought appellate review at the United States Court of Appeals for the Eleventh Circuit. (DE 104) (04-CV-20132-DMM). It too was denied. (DE 116) (04-CV-20132-DMM). Petitioner again sought certiorari review from the United States Supreme Court. The writ for certiorari was denied on February 28, 2017. (DE 119) (04-CV-20132-DMM). In the ensuing years, Petitioner was subject to an active death warrant, a stay of execution issued by the Florida Supreme Court, and has continued to seek post-conviction relief in the state court system. On November 15, 2018, the Governor of the State of Florida again signed the Petitioner's death warrant and scheduled his execution for December 13, 2018 at 6:00pm. The Emergency Petition and Application followed.

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[1] The factual history of the crime is detailed in *Jimenez v. State*, 703 So.2d 437 (Fla. 1997).

Petitioner raises three claims for federal habeas relief. First, he argues that the Eighth and Fourteenth Amendments to the United States Constitution require that his sentence be vacated and he be re-sentenced in accordance with Florida's current requirements for capital sentences. Second, he argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Finally, Petitioner argues that the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by Florida's refusal to extend to the Petitioner the benefit of the approval of "Amendment 11," which would grant retroactive application to amendments to Fla. Stat. § 921.141.[2] (DE 1 at 1–97).

II. DISCUSSION

Section 2244(b)(3)(A) requires a district court to dismiss for lack of jurisdiction a second or successive petition for a writ of habeas corpus unless the petitioner has obtained an order from the Circuit Court of Appeals authorizing the district court to consider it. *See Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007). Petitioner submits that the clear statutory command of § 2244(b)(3)(A) does not apply to his habeas petition because the Supreme Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), creates an exception for issues that are not ripe at the time an earlier habeas petition is filed. Petitioner argues that the three claims he now raises could not have been brought on January 20, 2004, the date his initial federal habeas petition was filed. As a result, Petitioner asserts, this habeas petition is not a "second or successive petition" for purposes of 28 U.S.C. § 2244. (DE 1 at 2).

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[2] The Petitioner acknowledges that this claim is currently unexhausted because it is still pending before the Florida Supreme Court. (DE 1 at 98). To properly exhaust state remedies, the Petitioner must fairly present every issue raised in his federal petition to the state's highest court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (internal citations omitted).

A. 28 U.S.C. §2244

Under the gatekeeping provisions of 28 U.S.C. § 2244(b)(2), there are two limited circumstances under which a federal habeas petitioner may present claims in a second or successive petition brought pursuant to 28 U.S.C. § 2254:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). These circumstances are not present here. As such, Petitioner must instead turn to the additional exception announced by the U.S. Supreme Court in *Panetti*.

In *Panetti,* the Petitioner filed a habeas motion relying on *Ford v. Wainwright*, 477 U.S. 399 (1986), claiming that he was incompetent to be executed because of his mental condition at the time of the scheduled execution. The U.S. Supreme Court held that his claim of incompetency was not successive and therefore not jurisdictionally barred. The Court held that, because this type of claim may not be ripe when an initial habeas petition is filed, it need not be brought at that time. *Panetti,* 127 S.Ct. at 2855 ("The statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."). Here, the Petitioner does not raise a *Ford* incompetency issue, but he argues that the

Panetti decision applies to his claims nonetheless. The *Panetti* Court left open whether its holding applies to non-*Ford* claims.

The Eleventh Circuit has narrowly interpreted *Panetti*, which significantly undercuts the expansive reading which Petitioner urges this Court to adopt. In *Tompkins v. Sec'y, Dep't. of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009), the Eleventh Circuit stated:

> The *Panetti* case involved only a *Ford* claim, and the Court was careful to limit its holding to *Ford* claims. *See id.* at 2853 (referring to 'the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe'). The reason the Court was careful to limit its holding is that a *Ford* claim is different from most other types of habeas claims. It is different because "*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." *Id.* at 2852.

The panel in *Tompkins* rejected the idea that claims involving discovery violations arising under *Brady* are not "ripe" until the evidence is discovered; rather, the Court explained that a claim is "ripe" in the *Panetti* sense when "the facts to be measured or proven—the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away." *Id.* at 1260. *Tompkins* concluded that the "violation of constitutional rights asserted in these kinds of claims [i.e. *Brady* and *Giglio*] occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition." *Id.* As such, the Court concluded that the petitioner's *Brady* and *Giglio* claims are covered by 2244(b)(2)(B), the newly discovered facts provision of the statute, which dictates that second or successive petitions should be dismissed unless the underlying facts "could not have been discovered through the exercise of due diligence" or "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty." *Id.*; 28 U.S.C. § 2244(b)(2)(B). Moreover, the court reasoned that even if the newly discovered facts did meet the criteria for a

§ 2244(b)(2)(B) exception, the Petitioner would need to first "obtain from [the Court of Appeals] an order authorizing the district court to consider the second or successive petition." *Id.*

The same issue was recently analyzed by another panel of the Eleventh Circuit within the context of a 28 U.S.C. § 2255 motion. In *Scott v. United States*, the Eleventh Circuit panel followed *Tompkins* and again held that *Panetti* does not extend or include newly discovered *Brady* claims, even if those claims could not have been brought at the time of the initial federal habeas petition. 890 F.3d 1239 (11th Cir. 2018). The panel expressly disagreed with the *Tompkins* decision but accepted that it was bound by the Court's prior determination. *Scott*, 890 F.3d at 1257 ("[e]ven when a later panel is 'convinced [the earlier panel] is wrong,' the later panel must faithfully follow the first panel."). So too, is this Court.[3] *See Evans v. Sec'y, Dep't. of Corr.*, 699 F.3d 1249 (11th Cir. 2012) ("[W]e must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions.").

Applying the established law regarding second or successive petitions to the Petitioner's claims, I find that these claims cannot be raised without first obtaining the permission of the Circuit Court of Appeals.

B. Ground One

In Petitioner's first ground for relief, he argues that, in light of the Florida Supreme Court's decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. (DE 1 at 34). Petitioner argues that this claim is properly before the Court because *Hurst v. State* was not decided until

[3] In the *Tompkins* opinion, which the *Scott* panel noted for its "failure to adhere to—or even to attempt to apply—the *Panetti* factors," the limited examination of the underlying legal principle appears misaligned with the gravity of the underlying subject matter. Disagreement within the Eleventh Circuit regarding second-in-time *Brady* claims suggests that a thorough analysis by the Eleventh Circuit *en banc* may be warranted.

2016, long after Petitioner had filed his initial federal habeas petition, and it was therefore unavailable to Petitioner at the time he filed his initial federal habeas petition. However, as *Tompkins* has determined, this is not how the court should determine ripeness. The facts relevant to this claim—namely, that the factual findings that support Petitioner's death sentence were made by a judge rather than a jury—were in existence at the time of his initial federal habeas petition. Accordingly, following the reasoning of the panel in *Tompkins*, this claim was ripe when Petitioner's initial habeas petition was filed. This is true even though, at the time Petitioner filed his initial federal habeas petition, there would not have been precedential law on which to base such a claim.

To the extent this claim was not made at the time of his initial federal habeas petition, it is because there was a subsequent change in the law. This claim must therefore be dismissed. A change in the law is governed by the express language of the statute: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2). Here, the Eleventh Circuit has held that *Hurst* is *not* retroactive on collateral review. *See Lambrix v. Sec., Fla. Dept. of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017). Accordingly, it is excluded from the Court's consideration in a second-in-time petition pursuant to § 2244(b)(2).

C. Ground Two

The Petitioner's second claim is that the State of Florida withheld eighty-one (81) pages of records kept by the North Miami Police Department concerning the Petitioner and the police

investigation of the murder. These documents were discovered on July 30, 2018, following the signing of his initial death warrant on July 18, 2018. (DE 1 at 81). The Petitioner argues that the Court has jurisdiction over this claim because the State withheld this information from the Petitioner and it was not known until well after the initial habeas petition was filed. Because this claim was not ripe until recently, Petitioner argues, it is not considered a second or successive petition pursuant to *Panetti*. *Id.* at 83. However, as previously discussed, it is not the date upon which the information was disclosed which makes the claim ripe but rather the date upon which the violation of the constitutional right occurs. *Tompkins*, 557 F.3d at 1260. As was the case with Claim I, Congress declined to include in the statute an exemption for this type of claim from the prohibition against second or successive petitions. Rather, Congress provided an exemption only for newly discovered evidence that "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* § 2244(b)(2)(B)(ii). This is not the case.

D. Ground Three

The Petitioner's final claim is that the "Florida electorate approved what was listed on the general election ballot as proposed Amendment 11 to the Florida Constitution." Amendment 11 functions to "delete[] provision [previously in Florida's Constitution] that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment; retains current provision allowing prosecution of a crime committed before the repeal of a criminal statute." (DE 1 at 99). Petitioner argues that the Amendment will allow for the retroactive application of the unanimity provision for capital sentencing juries in the revised § 921.141. Here, Petitioner concedes that this claim is unexhausted—as it is still pending before

the Florida Supreme Court—but argues that when the Florida Supreme Court issues a ruling, this Court will have jurisdiction to consider the claim because it "is premised upon the results of the November 6, 2018 general election" and thus "fits within the exceptions to the general bar on 'second or successive' habeas applications under *Panetti v. Quarterman*." *Id.* at 98. There is no precedent to support the Petitioner's assertion that this claim would not be a second or successive claim or that it meets a statutory exception. A plain reading of § 2244(b)(2) shows that there was no exception established for perceived changes in state law and retrospective application to federal habeas petitioners. Moreover, since the effective date of Amendment 11 is January 8, 2019, it is not yet law. It is also not self-executing. It does not independently operate to reduce or alter any existing criminal punishment.

III. CERTIFICATE OF APPEALABILITY

The remaining issue before the Court is the issuance of a Certificate of Appealability. Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing § 2254 Cases (December 1, 2009). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As the Emergency Petition is denied on a procedural ground, the Petitioner must show both:

> (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). "Thus, when a COA request concerns a procedural ruling, the required showing must include both the procedural issue and the constitutional issue." *Lambrix V*, 851 F.3d at 1169; *see also Slack*, 529 U.S. at 484, 120 S.Ct. at 1604; *Buck*, 580 U.S. at ——, 137 S.Ct. at 777.

Lambrix v. Sec'y, Dep't of Corr., 872 F.3d 1170, 1179 (11th Cir.), cert. denied sub nom, *Lambrix v. Jones*, 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017). Here, while jurists of reason may find it debatable that the Court was correct in its procedural ruling—indeed, as mentioned above there is an existing split within the panels in the Circuit as to whether or not newly discovered evidence *Brady* claims can be considered second or successive—it does not follow that jurists of reason would find it debatable that the Emergency Petition states a valid claim of the denial of a constitutional right.

First, the arguments raised in Claim I have been foreclosed by the Eleventh Circuit, which has held that "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable. In *Lambrix V*, this Court already indicated that *Hurst* is not retroactively applicable on collateral review under federal law, and we hold here that no reasonable jurist would find that issue debatable." *Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017). Moreover, it is settled that "[t]he Florida Supreme Court's ruling—that *Hurst* is not retroactively applicable to Lambrix—is fully in accord with the U.S. Supreme Court's precedent." *Id.* at 1182–83; *see also Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), which is precedential to *Hurst*, is not retroactive).

Second, the reasonableness of the Florida Supreme Court as to Claim II is not debatable among jurists. Under the AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court

proceeding." 28 U.S.C. § 2254(d)(1)–(2). The Florida Supreme Court exhaustively analyzed the alleged Brady/Giglio evidence submitted by Petitioner and found his claim to be without merit, concluding that the evidence was either previously available to Petitioner, not exculpatory, or both. The Florida Supreme found that "the defendant's 'personal knowledge' of the evidence claimed to represent a *Brady* violation 'would in and of itself defeat his *Brady* claim, since by definition such evidence would not have been unlawfully 'suppressed' by the State.'" *Jimenez v. State*, 2018 WL 4784203, *9 (Fla. Oct. 4, 2018) (citing *Gorham v. State*, 494 So.2d 211, 212 (Fla. 1986)). As to Petitioner's *Giglio* claims, "a *Giglio* claim 'based on information that the defendant and defense counsel had at the time of trial' is barred." *Id.*

Finally, Claim III is unexhausted and is entirely without merit. The Court cannot find that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right as to this claim.

IV. APPLICATION FOR STAY

> "A stay of execution is equitable relief" which a court may grant "only if the moving party shows that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *DeYoung v. Owens*, 646 F.3d 1319, 1324 (11th Cir.2011) (internal quotation marks omitted).

Ferguson v. Sec'y, Fla. Dep't of Corr., 494 F. App'x 25, 27 (11th Cir. 2012). Here, the standard for a stay is, in part, a showing of a substantial likelihood of success on the merits of the claims, which is a higher standard than the one for a certificate of appealability. Because the Petitioner has not met the certificate of appealability standard, he necessarily has not met the standard for a stay. *See e.g.*, *Gore v. Crews*, 720 F.3d 811, 817 (11th Cir. 2013) (denying motion for stay of

execution when petitioner's claim was not debatable among jurists of reason and the district court should not have granted a COA).

For the foregoing reasons, it is

ORDERED and ADJUDGED that Jose Antonio Jimenez's Emergency Petition under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody and Incorporated Memorandum of Law (DE 1) is **DISMISSED** and his Emergency Application for a Stay of Execution (DE 7) is **DENIED**. A Certificate of Appealability shall not issue.

DONE AND ORDERED in Chambers at Miami, Florida, this 12 day of December, 2018.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Cc: Counsel of Record