CAPITAL CASE
EXECUTION IMMINENT
EXECUTION SCHEDULED FOR DECEMBER 13, 2018, 6:00 p.m.

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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JOSE ANTONIO JIMENEZ,

Petitioner,

vs.

JULIE JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED--CAPITAL CASE

1. Where a numerically-second § 2254 motion raises an actionable *Brady/Giglio* violation that (a) the government suppressed until after the conclusion of the defendant's numerically-first § 2254 motion, and (b) the defendant could not have discovered until the government revealed it, does the Constitution and this Court's precedent require that the numerically-second § 2254 motion not be subjected to the "gatekeeping" requirements of a "second or successive" motion?

2. Whether the State's failure to "set the record straight" under *Banks v. Dretke* when it has withheld favorable information and/or evidence or presented false or misleading testimony during depositions denying the existence of exculpatory material, and the State's failure to "set the record straight" continues for 24 years through collateral proceedings including a first 2254 petition, can the State's failure to honor its due process obligation serve to preclude the filing of a "second in time" habeas petition under *Panetti v. Quarterman* when the *Giglio/Brady* violations are discovered by happenstance over the State's objection nearly 24 years after a defendant's trial and 11 years after the first 2254 petition was denied?

3. Is the Eleventh Circuit's rule – that no matter the circumstances leading up to the late discovery of exculpatory information, any *Brady* or *Giglio* claim that arises after the first-in-time habeas petition is filed is to be considered "second or successive" – consistent with the exceptions noted by this Court in *Panetti v. Quarterman*?

4. Whether nine years after a 2254 petition filed by a petitioner under sentence of death has been denied, a state supreme court's announcement that the reference in the capital sentencing statute used to impose petitioner's sentence, facts that a judge was to consider before imposing a death sentence are actually elements of capital murder which the State must prove beyond a reasonable doubt under *In re Winship* in order for a defendant to be death eligible, is a second habeas petition asserting that the petitioner's death sentence stands in violation of due process under *Fiore v. White* and *Bunkley v. Florida*, or a "second in time" petition under *Panetti v. Quarterman*?

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

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Petitioner, **JOSE ANTONIO JIMENEZ,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

PENDING EXECUTION DATE - December 13, 2018

On November 15, 2018, the Governor rescheduled Petitioner's execution for December 13, 2018.

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Jimenez v. Secretary*, and is Attachment A to this petition. The Eleventh

Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The district court's order dismissing Mr. Jimenez's petition is Attachment C to this petition. The Florida Supreme Court's October 4, 2018, opinion is Attachment D to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on December 13, 2018

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

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

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROCEDURAL CONTEXT FOR INSTANT CERTIORARI PETITION

The Petitioner, Jose Antonio Jimenez, is a death-sentenced inmate in the State of Florida. In 1994, he was tried and convicted of one count of first degree murder and one count of

burglary with assault in Dade County, Florida. A penalty phase proceeding followed. The advisory jury returned a unanimous death recommendation as to his conviction for first degree murder. On direct appeal, the Florida Supreme Court affirmed both the convictions and the death sentence. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998).

Following the affirmance of his convictions and death sentence, Jimenez sought both state and federal collateral relief from both his conviction and his sentence of death. The history of his robust state collateral litigation, which is not necessarily germane to the issues presented herein, is set forth in the Florida Supreme Court's most recent opinion affirming the denial of the postconviction motion Jimenez filed under the pending death warrant. *See Jimenez v. State*, 2018 WL 4784203 (Fla. Oct. 4, 2018), *cert. filed*, U.S. Sup. Ct. Case No.18-6970. The course of Jimenez's federal habeas litigation is described in the Eleventh Circuit opinion that gives rise to the instant petition, *see* Attachment ***, as well as in its prior opinion affirming the denial of Jimenez's first-in-time habeas petition. *See Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337 (11th Cir.), *cert. denied*, 552 U.S. 1029 (2007).

The procedural context giving rise to the instant petition and the questions presented by Jimenez is as follows. On December 10, 2018, Jimenez filed a second-in-time petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida (DE:1). The petition raised three constitutional grounds for relief. First, it raised a due process

claim under *Fiore v. White*, 531 U.S. 225 (2001), *In re Winship*, 397 U.S. 358 (1970), and *Bunkley v. Florida*, 538 U.S. 835 (2003), that the Florida Supreme Court had rejected on June 28, 2018. *See Jimenez v. State*, 247 So.3d 395 (Fla. 2018), *cert. denied*, 2018 WL 4681996 (U.S. Dec. 3, 2018). His second claim was the *Giglio* and *Brady* claim that the Florida Supreme Court rejected without any evidentiary development on October 4, 2018. *See Jimenez v. State*, 2018 WL 4784203 (Fla. Oct. 4, 2018), *petition for cert. filed*, U.S. Sup. Ct. Case No. 18-6970. The third claim he pled in the petition was a legal argument he was still at the time in the process of exhausting in the Florida Supreme Court regarding the passage of a new Florida constitutional amendment and its potential effect on Jimenez's sentence.[1]

Aware that he had previously filed a federal habeas petition, Jimenez asserted in his second-in-time § 2254 petition that the district court had jurisdiction over each of his claims as they were "second-in-time" within the meaning of *Panetti v. Quarterman*, 551 U.S. 930 (2007). That is, Jimenez argued that they did not exist or were unripe at the time that his first-in-time petition was litigated and were therefore not a "second or successive" petition subject to dismissal pursuant to 28 U.S.C. §

[1]Subsequent to the filing of his second-in-time petition, the Florida Supreme Court issued an order denying the claim regarding the new constitutional amendment. *See Jimenez v. Jones*, Fla. Sup. Ct. Case No.18-1999 (Fla. Dec. 12, 2018). In light of the Florida Supreme Court's decision, Jimenez did not pursue that ground in his appeal to the Eleventh Circuit following the dismissal of his second-in-time petition by the district court. Thus, that ground was not before the Eleventh Circuit and it is not before this Court.

2244(b)(3)(A). He contended that under *Panetti,* claims that were not available to be presented in the first-in-time petition were not "second or successive" and the district court had jurisdiction to consider them as if they had been presented in an initial habeas petition.

Specifically as to the *Brady/Giglio* claim, Jimenez contended that the due process violations alleged in his second-in-time petition were not ripe at the time he filed his first habeas petition because the State had hidden the exculpatory information from him for more than 25 years. Subsequent to the signing of his death warrant in July, 2018, Jimenez sought public records from the North Miami Police Department (NMPD), the law enforcement agency involved in the homicide investigation. Despite the fact that the NMPD had, some 18 years earlier, provided to Jimenez what it represented was its entire file on the homicide and Jimenez's involvement in it, the NMPD, in complying with the July, 2018, records request, sent "its entire unredacted file" to the records repository, a centralized warehouse where records in Florida capital cases are maintained; the repository subsequently sent Jimenez's collateral counsel the "entire unredacted file" over the State's objection. *Jimenez,* 2018 WL 4784203 at *2. As the Florida Supreme Court explained:

> Although NMPD objected to and the postconviction court ultimately denied Jimenez's public records request to NMPD, NMPD sent its entire, unredacted file to the repository as a courtesy before the postconviction court entered its denial order so that there could be a comparison between it and NMPD's prior submission. The repository received NMPD's submission on July 25, 2018, and on July 30, 2018, Jimenez obtained an order from the postconviction court allowing him to access those

> records even though they had not been redacted, subject to a prohibition against releasing any confidential or exempt records without permission from the postconviction court. The records repository began emailing Jimenez's counsel the records that same day and also sent Jimenez's counsel a CD containing the records (over 1,000 pages), which was received the next day, July 31, 2018.

Id.

After collateral counsel received the unredacted file from NMPD, he and his investigator "saw handwritten documents that they did not recognize." *Id.* After a comparison was made between the NMPD's 1999 submission and its 2018 production, "Jimenez's counsel ultimately confirmed that 81 pages of handwritten records had not been previously disclosed." *Id.* Counsel "further confirmed that there was no indication in NMPD's prior submission that records had been withheld or public records exemptions claims." *Id.* It is the information contained in these 81 pages of handwritten notes that formed the basis for Jimenez's *Brady/Giglio* claims that he first raised in state court and then in his second-in-time § 2254 petition.[2]

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[2]The most noteworthy handwritten notes concerned the two lead detectives' meeting with Jimenez for 45 minutes upon Jimenez's arrest. The police reports and the testimony of the detectives indicated that the detectives informed Jimenez of the charges and let him read the affidavit in support of the warrant. He became angry seeing that someone had said he was a known burglary, he began to cry, and indicated he did not want to talk. At that late point, the detectives said Jimenez was given his *Miranda* warnings. When asked why was it that the *Miranda* warning were not administered until nearly 45 minutes had past, one of the detectives testified in a deposition that was because up until then Jimenez was not talking.

However, the handwritten notes from this 45 minute time period show that Jimenez *did* talk about what he had done the

(continued...)

As to the *Fiore/Winship/Bunkley* ground raised in Jimenez's second-in-time habeas petition, Jimenez explained that, at the time of the victim's murder, Fla. Stat. § 921.141(3) provided: "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." If the court decides to impose a death sentence, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid*. The governing statute did not make a defendant eligible for death until "findings by the court that such person shall be punished by death." § 775.082(1) It for the trial court who was required to find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3).

In *Mills v. Moore*, 786 So. 2d 532, 538 (Fla. 2001), the Florida Supreme Court explained: "When section 775.082(1) is read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death." The statute was read to merely require the presence of one aggravator to render a defendant subject to a death sentence. *State v. Steele*, 921 So.

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[2](...continued)
Friday night in question, which neighbors he had talked to and who lived in what apartment. The notes also revealed that he told the detectives that he had knocked on the victim's door and hour before the homicide, but she was on the phone. In short, the notes show that the police detectives did not tell the truth in the police reports and in their trial and deposition testimony.

2d 538, 545-46 (Fla. 2005); *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003).

Then in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court construed the same language in § 921.141 to mean:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Id at 53.

> [**A]ll the findings necessary for imposition of a death sentence are "elements**" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death**.

Id. at 57-58.

It was the same statute, the same statutory language. However, that language was understood to mean that the statutorily identified facts were elements in *Hurst v. State* where the crime at issue occurred on May 2, 1998.

The Florida Constitution precluded a legislative change to a criminal statute from "affect[ing] **the prosecution or punishment of a crime** committed before [the amendment] took effect." *Whatley v. State*, 35 So. 80, 81 (Fla. 1903). "The statutory penalty in effect at the time a crime is committed ordinarily controls the

punishment at sentencing." *McKendry v. State*, 641 So. 2d 45, 49 (Fla. 1994) (Shaw, J., dissenting).

So in *Hurst v. State*, the Florida Supreme Court construed what the statute meant on May 2, 1998, as to what facts were elements. The same statute at issue in *Hurst v. State* was in place at the time of the homicide that Jimenez stands convicted of. Yet, neither the jury nor the judge in Jimenez's case were told that these statutorily identified facts elements. This claim did not become available for Jimenez to raise until the Florida Supreme Court's decision in *Hurst v. State*.

On December 10, 2018, the district court ordered the State to respond to Jimenez's second-in-time petition, and directed it file the state court record (DE:6). On December 11, 2018, the State filed its response but not the state court record (DE:9). On December 12, 2018, Jimenez filed a reply to the State's response, as well as a motion to compel the State to file and serve the state court record (DE:14, 15). Within minutes of the State later electronically filing the record (DE:16), the district court dismissed Jimenez's petition for want of subject-matter jurisdiction and denied a COA (DE:17). The district court denied Jimenez's motion to compel the filing of the state court record as moot, adding that the court found it "unnecessary" to review the record before dismissing Jimenez's petition (DE:19).[3]

[3]Later in the afternoon of December 12, 2018, the Florida Supreme Court entered an order denying Jimenez's habeas petition that contained the claim he had filed in his federal habeas despite the fact it was not exhausted. *Jimenez v. Jones*, SC18-
(continued...)

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF JIMENEZ'S SECOND-IN-TIME § 2254 PETITION AS "SECOND AND SUCCESSIVE." UNDER THE REASONING OF *PANETTI V. QUARTERMAN*, JIMENEZ'S CLAIMS ARE NOT "SECOND OR SUCCESSIVE" BECAUSE THEY WERE NOT RIPE AT THE TIME HE FILED HIS FIRST-IN-TIME § 2254 PETITION AND THUS ARE AN EXCEPTION TO § 2244 (B)(3)(A).

On December 10, 2018, Jimenez filed a second-in-time § 2254 petition alleging three constitutional claims for relief. Ground One alleged that the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment required the Florida Supreme Court's construction of Fla. Stat. § 921.141 in *Hurst v. State,* 202 So.3d 40 (Fla. 2016), to be applied in his case under *Fiore v. White*, 531 U.S. 225(2001), *In re Winship*, 397 U.S. 358 (1970), and *Bunkley v. Florida*, 538 U.S. 835 (2003). Ground Two alleged newly-discovered violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). These due process violations were discovered by Jimenez's collateral counsel in public records disclosed for the first time by the North Miami Police Department (NMPD) on July 30, 2018.[4] Ground

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[3](...continued)
1999 (Fla. Dec, 12, 2018). As a result of this order, Jimenez did not pursue that ground in his appeal to the Eleventh Circuit.

[4]As the Florida Supreme Court noted in its recent opinion in Jimenez's case, the "NMPD had, ... more than 18 years before Jimenez's post-warrant request, submitted records to the records repository pursuant to the provisions of rule 3.852(h), that apply to cases like Jimenez's, in which the mandate affirming the conviction and sentence of death was issued prior to rule 3.852's effective date of October 1, 1998." *Jimenez v. State*, 2018 WL 4784203 at *2 (Fla. Oct. 4, 2018). Prior to 1998, state agencies were notified by the Florida Attorney General's Office to provide
(continued...)

Three of the petition alleged claims related to the recent passage of a new constitutional amendment in Florida; the dismissal of Ground Three is not a subject of this appeal as the Florida Supreme Court denied it on state law grounds.

A. *PANETTI v. QUARTERMAN*

The AEDPA curtailed a state prisoner's ability to file a second petition for a writ of habeas corpus in federal court. "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" certain, narrow circumstances exist. 28 U.S.C. § 2244(b)(2).[5] This Court addressed this provision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and explained:

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. *See Slack v. McDaniel*, 529 U.S. 473, 486, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (citing *Martinez-Villareal, supra*); *see also Felker v. Turpin*,

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[4](...continued)
public records in a particular case to the records repository; the records were thus not requested by the capital defendant but sent automatically by state agencies upon notification by the Attorney General's Office. The records disclosed by the NMPD in 2018 were not included in the NMPD's disclosure in 1999.

[5]The narrow circumstances set forth in the statute are: 1) "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 "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence [and the facts supporting the claim] "would be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A),(B).

> 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application. *See, e.g., Slack*, 529 U.S., at 487, 120 S.Ct. 1595 (concluding that a second § 2254 application was not "second or successive" after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); *see also id.*, at 486, 120 S.Ct. 1595 (indicating that "pre-AEDPA law govern[ed]" the case before it but implying that the Court would reach the same result under AEDPA); *see also Martinez-Villareal, supra*, at 645.
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> * * *
>
> Our earlier holding does not resolve the jurisdictional question in the instant case. *Martinez-Villareal* did not address the applicability of § 2244(b) "where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.*, at 645, 118 S.Ct. 1618, n. Yet the Court's willingness to look to the "implications for habeas practice" when interpreting § 2244 informs the analysis here. *Id.*, at 644, 118 S.Ct. 1618. We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.
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> * * *
>
> In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's "second or successive" bar. **There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.**

Panetti, 551 U.S. at 943-45, 947 (emphasis added).

The specific constitutional claim that the habeas petitioner raised in *Panetti* was one premised upon *Ford v. Wainwright*, 477

U.S. 399 (1986), *i.e.* that the petitioner was not competent to be executed as required by the Eighth Amendment. As this Court pointed out, such a claim could not ripen until the capital defendant had a scheduled execution. As a result, the petitioner in *Panetti* could not raise the *Ford* claim in his first federal habeas petition because there was no scheduled execution. This Court specifically concluded that the subsequent habeas petition raising a *Ford* claim was not a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244(b)(2). It is worth reiterating that after opening the door for the presentation of a *Ford* claim in a habeas petition that was not the first habeas petition filed by the petitioner, this Court in *Panetti* stated: "In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar. **There are, however, exceptions.**" *Panetti,* 551 U.S. at 947 (emphasis added). This use of the plural (exceptions) clearly suggested that there was not just one exception for habeas petitions raising *Ford* claims. Other exceptions to the usual circumstance barring a second in time habeas petition exist.[6]

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[6]In *Magwood v. Patterson*, 561 U.S. 320, 331-21 (2010), this Court referenced *Panetti* in the following fashion:

> Although Congress did not define the phrase "second or successive," as used to modify "habeas corpus application under section 2254," §§ 2244(b)(1)-(2), it is well settled that the phrase does not simply "refe[r] to all § 2254 applications filed second or successively in time," *Panetti v. Quarterman*, 551 U.S. 930, 944, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007); *see*

(continued...)

B. THE ELEVENTH CIRCUIT COURT'S DECISIONS ON WHAT CIRCUMSTANCES CONSTITUTE SECOND-IN-TIME PETITIONS

The Eleventh Circuit has addressed the *Panetti* exceptions. In *Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011), the Eleventh Circuit considered "whether Stewart's numerically second § 2255 motion is 'second or successive'" when it raised a new claim challenging Stewart's career offender enhancement after the state court convictions underlying the enhancement were vacated. The state court convictions were vacated four years after Stewart's numerically first § 2255 had been dismissed as time-barred. *Id.* at 857-58. Stewart filed his numerically second § 2255 forty-five days after the state court convictions were vacated.

Applying *Panetti*, the Eleventh Circuit concluded that Stewart's numerically second § 2255 motion was not a second and successive motion because Stewart's claim had only just ripened. Thereafter, in *Boyd*, the Eleventh Circuit addressed *Stewart* and explained:

> [T]he bar on second or successive motions applies when, for example, **a petitioner could have raised his or her claim for relief in an earlier filed motion, but without a legitimate excuse, failed to do so**. *Stewart*, 646 F.3d at 859.

Boyd v. United States, 754 F.3d 1298, 1301 (11th Cir. 2014) (emphasis added). Thus, consistent with *Panetti*, the Eleventh

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[6](...continued)
id., at 947, 127 S.Ct. 2842 (creating an "exceptio[n]" to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application)....

Circuit recognized that when a factual basis for a claim did not exist at the time of a petitioner's first petition for writ of habeas corpus, a second in time petition was "not second or successive and § 2255(h)'s gatekeeping provision did not apply." *Id.* at 1302.

However, in *Tompkins v. Sec'y, Dep't. of Corrections*, 557 F.3d 1257 (11th Cir. 2009), the Eleventh Circuit was presented with an appeal from the district court's dismissal of a second-in-time § 2254 petition that included a claim pursuant to *Gardner v. Florida*, 430 U.S. 349, (1977); a claim about ex parte communication between the sentencing judge and prosecutor; claims of violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); a claim that execution after such a long delay would violate Tompkins' constitutional rights; and a claim involving lethal injection procedures. As to the *Gardner*, *Brady* and *Giglio* claims, the Eleventh Circuit found the claims precluded by the bar on "second or successive" petitions: "Tompkins would have us hold that any claim based on new evidence is not 'ripe' for presentation until the evidence is discovered, even if that discovery comes years after the initial habeas petition is filed." *Tompkins*, 557 F.3d at 1260. The court set forth its reasoning: "the *Gardner*, *Brady*, and *Giglio* claims Tompkins wants to raise are claims that can be and routinely are raised in initial habeas petitions. The violation of constitutional rights asserted in these kinds of claims occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition."

In *Scott v. United States,* 890 F.3d 1239 (11th Cir. 2018), the Eleventh Circuit addressed the issue of a district court's denial of a second-in-time §2255 motion by a federal prisoner who discovered potentially exculpatory evidence that had been withheld by the government prior to trial. The panel initiated its discussion by setting out the scenario raised by Scott's circumstances:

> An actionable *Brady* violation—where the government withholds evidence that reasonably probably changes the outcome of a defendant's trial—deprives the defendant of a fundamentally fair trial. Yet because of the nature of a *Brady* violation, a defendant, through no fault of his own, may not learn that such a violation even occurred until years after his conviction has become final and he has already filed a motion for post-conviction relief concerning other matters.

Scott, 990 F.3d at 1243.

Ultimately, the Eleventh Circuit in *Scott* determined that it could not distinguish *Tompkins*' reasoning from the facts presented in Scott's case and thus, under the prior-precedent rule, it was bound to apply *Tompkins* to hold that "a second-in-time collateral motion based on a newly revealed *Brady* violation is not cognizable if it does not satisfy one of AEDPA's gatekeeping criteria for second-or-successive motions." *Id.*

Despite being obliged to apply the *Tompkins'* rule, in the *Scott* panel's view, "*Tompkins* got it wrong" because

> it eliminates the **sole fair opportunity** for these petitioners to obtain relief. In our view, the Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, do not allow this. Indeed, they require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA.

> **Consequently, such a claim is cognizable, regardless of whether it meets AEDPA's second-or-successive gatekeeping criteria.**

Scott, 890 F.3d at 1243 (emphasis added). The *Scott* panel concluded that *Tompkins* "prohibits second-in-time collateral petition based on *all* types of *Brady* claims—actionable and inactionable, alike—simply because they are *Brady* claims." *Id.* Accordingly, Scott's § 2255 motion was found to be an impermissible "second or successive" motion under *Tompkins*, even though the *Scott* panel believed that the reasoning of *Tompkins* was "fatally flawed." *Id.* at 1258.

This conflict within the Eleventh Circuit calls for this Court to address due process violations like in Jimenez's case where rather than disclose, the State instead erroneously represented that it possessed no undisclosed favorable information in violation of *Napue v. Illinois*, 360 U.S. 264, 268 (1959), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Banks v. Dretke*, 540 U.S. 668 (2004).

C. THE DUE PROCESS CLAIM QUALIFIES AS AN EXCEPTION UNDER *PANETTI*

Here, at the time of his trial, direct appeal, state postconviction proceedings, and initial federal habeas corpus proceedings, the State failed to disclose information in its possession that was favorable to Jimenez. The information was only disclosed when Jimenez's death warrant had been signed and his execution imminent. Indeed, the recently disclosed evidence would also have been critical for the courts to review in terms

of conducting the constitutionally required cumulative analysis. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks,* 540 U.S. at 675-76. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696. However, that is exactly what occurred. Under *Panetti*, the presentation of these constitutional violations at this time after the discovery of the factual basis of a previously unripe claim does not render this "a second or successive" petition within the meaning of the AEDPA, particularly where the State erroneously claimed no favorable information had been withheld and never corrected that misrepresentation.

D. THE *FIORE v. WHITE* CLAIM QUALIFIES AS AN EXCEPTION UNDER *PANETTI*

Jimenez's *Fiore* claim did not exist before the Florida Supreme Court issued its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and construed § 921.141 to identify the elements of capital murder:

> [**A]ll the findings necessary for imposition of a death sentence are "elements**" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the

> mitigating circumstances, and **unanimously recommend a sentence of death.**

Id. 57. This aspect of *Hurst v. State* was discussed in *Asay v. State*, 210 So. 3d 1 (Fla. 2016):

> [O]ur retroactivity analysis in *Johnson* hinged upon our understanding of *Ring*'s application to Florida's capital sentencing scheme at that time. Thus, **we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime.**

Asay v. State, 210 So. 3d at 15-16 (emphasis added). Thus, in Florida, *Hurst v. State* changed the elements of capital murder.

In *Richardson v. United States*, 526 U.S. 813, 817 (1999), this Court observed:

> Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson v. Louisiana*, 406 U.S. 356, 369–371, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for higher degree of the offense to be proven by the State beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.").

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court indicated that substantive rulings regarding the scope of a criminal statute should be applied retroactively:

> **New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms**, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). **Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.** *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).[7]

While the construction of § 921.141 is a question of state law, how and to whom a state's substantive criminal law defining a criminal offense is applied must comport with the Due Process Clause of the Fourteenth Amendment under *Fiore v. White*, 531 U.S. 225 (2001), and *In re Winship*, 397 U.S. 358 (1970). *See Bunkley v. Florida*, 538 U.S. 835 (2003). A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule.

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[7]Jimenez's claim is **NOT** a Sixth Amendment claim under *Hurst v. Florida*, 136 S.Ct. 616 (2016). His claim arises from the statutory construction of § 921.141, Fla. Stat., set forth in *Hurst v. State* which identified the elements of capital murder, the degree of murder higher than first degree murder. A conviction of capital murder is necessary for range of punishment to increase to give the judge at sentencing the discretion to impose a death sentence. The circumstances in Florida are those that *Schriro v. Summerlin* noted would not be governed by *Teague v. Lane*.

The analyses used to determine when a new procedural rule is to be applied retroactively do not apply to the issues Petitioner raises. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[B]ecause *Teague[v. Lane*, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

In *Fiore v. White*, 531 U.S. 225, 226 (2001), this Court addressed the import of the Due Process Clause in the context the substantive law defining a criminal offense:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

See Bunkley v. Florida, 538 U.S. 835, 841-42 (2003) ("The proper question under *Fiore* is not just whether the law changed. Rather, it is when the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling L.B. as the 'culmination' in the common pocketknife exception's 'century-long evolutionary process' was sufficient to resolve the Fiore question. 833 So.2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether L.B. correctly stated the common pocketknife exception at the time he was convicted."). In *Card v. Jones*, 219 So. 3d 47 (2017), *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016), death sentences were vacated and the cases remanded for new penalty phase proceedings at which the juries will be

called upon to determine whether Jim Card and Paul Johnson are guilty of capital murder for homicides committed in 1981. Thus, the substantive law set forth in *Hurst v. State* will be the governing substantive criminal law for homicides committed in 1981. The Due Process Clause requires the statutory construction announced in *Hurst v. State* to govern as to the homicide occurring in 1992 for which Jimenez was convicted of first degree murder. Since he was not and has not been convicted of capital murder, Jimenez's death sentence stands in violation of the Due Process Clause and the Eighth Amendment. Under the statutory construction set forth in *Hurst v. State*, the only sentence that can be imposed upon a defendant convicted of just first degree murder (not capital murder) is life imprisonment.

At the time of Jimenez's first habeas petition, the *Fiore* claim was not ripe; it did not exist. Under *Panetti v. Quarterman*, the district court has jurisdiction to hear Jimenez's *Fiore* claim because it is not a "second or successive" habeas application. It is merely a "second in time" habeas application. *See Boyd v. United States*, 754 F.3d at 1301; *In re Jones*, 652 F.3d at 605*; United States v. Obeid*, 707 F.3d at 902-03.

In *Bunkley v. Florida*, 538 U.S. 835 (2003), this Court reversed the Florida Supreme Court's decision in *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002). At issue in *Bunkley v. State* was whether he was entitled to relief from his conviction of armed burglary as a result of the Florida Supreme Court's decision in *L.B. v. State*, 700 So. 2d 370 (Fla. 1997), which construed the statutory provision defining what constituted a

"weapon," the possession of which was a necessary element of armed burglary. The statute provided that a common pocketknife was not a weapon for purposes of the criminal offense of armed burglary. In *L.B*, the Florida Supreme Court ruled that a knife with a blade of four inches or less was a common pocketknife under the statute, and thus not a weapon for purposes of armed burglary.

Bunkley v. State used the retroactivity analysis set forth in *Witt v. State* to concluded that the decision in *L.B.*, a case of statutory construction, was not retroactive and Bunkley could rely upon the decision since his convicction was final before *L.B.* was decided.

This Court vacated the decision in *Bunkley v. State* saying: "*Fiore* controls the result here. As Justice Pariente stated in dissent, 'application of the due process principles of *Fiore*' may render a retroactivity analysis 'unnecessary.' 833 So.2d, at 747. The question here is not just one of retroactivity." *Bunkley v. Florida*, 538 U.S. at 840. The Court elaborated:

> Although the Florida Supreme Court has determined that the *L.B.* decision was merely an "evolutionary refinement" in the meaning of the "common pocketknife" exception, it has not answered whether the law in 1989 defined Bunkley's 2 ½- to 3-inch pocketknife as a "weapon" under § 790.001(13). Although the *L.B.* decision might have "culminat[ed] ... [the] century-long evolutionary process," the question remains about what § 790.001(13) meant in 1989. 833 So.2d, at 745. If Bunkley's pocketknife fit within the "common pocketknife" exception to § 790.001(13) in 1989, then Bunkley was convicted of a crime for which he cannot be guilty-burglary in the first degree.

Bunkley v. Florida, 538 U.S. at 840-41.

The Florida Supreme Court's use of the *Witt* analysis to decide that the statutory construction of § 921.141 set forth in *Hurst v. State* without consideration of *Fiore v. White* and the Due Process Clause implications is contrary to well-established law, i.e. *Bunkley v. Florida*.

As explained in *Bunkley*, the question is when did Florida's substantive criminal law make it necessary for a fact finder to find that the statutorily identified facts set forth in § 921.141 had been established before a death sentence could be imposed.

In *Hurst v. State*, the Florida Supreme Court indicated that this fact finding had been a longstanding requirement:

> However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Id.* at 313, 111 S.Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).

Hurst v. State, 202 So. 3d at 53. The citation of *Parker v. Dugger* is particularly pertinent given that the decision issued in 1991, a year before the homicide at issue in Jimenez's case.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit Court of Appeals in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Lisa Marie Lerner,

Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on December 13, 2018.

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