DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

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JOSE ANTONIO JIMENEZ,

***Petitioner*,**

vs.

JULIE L. JONES, SECRETARY,
Florida Department of Corrections, et al.,

Respondents.

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APPLICATION FOR STAY OF EXECUTION

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COMES NOW, the Petitioner, **JOSE ANTONIO JIMENEZ**, by and through undersigned counsel and requests that this Honorable Court to grant a stay of his execution currently set for December 13, 2018, at 6:00 PM.

This stay application is made in connection with Mr. Jimenez's petition for certiorari review of the Eleventh Circuit Court of Appeals opinion of December 13, 2018. Mr. Jimenez's appeal to the Eleventh Circuit concerned the issue of whether his second in time petition for writ of habeas corpus fell within the narrow circumstances under, 28 U.S.C. § 2244(b)(2) and explained in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which permits for consideration of the petition as if it were an initial petition.

Mr. Jimenenz's specific constitutional violations concerned: 1) 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. And, 2) 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).

Because this Court in *Panetti* did not identify any specific circumstances, other than a competency to be executed claim, Courts of Appeals have attempted to interpret this Court's acknowledgment that there are exceptions to AEDPA's "second or successive" bar:

> 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 Sixth Circuit addressed an exception in *In re Jones*, 652 F.3d 603 (6th Cir. 2010). In *Jones*, petitioner brought an ex post facto challenge to a statutory change regarding parole which was made after a first habeas petition had been litigated. The Sixth Circuit found that *Panetti* allowed the second in time petition because the "ex post facto claim was unripe when [the] initial petition was filed — **the events giving rise to the claim had not yet occurred**." *Id*. at 605 (emphasis added).

The Eleventh Circuit, in *Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011), 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 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*, 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. *Tompkins v. Sec'y Fla Dep't of Corr.*, 557 F.3d 1257 (11th Cir. 2009). As to the *Gardner*, *Brady* and *Giglio* claims, the Court 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."

Later, in *Scott v. United States*, 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. *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). 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*'s 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 *Tompkins'*s 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.

Mr. Jimenez submits that *Tompkins* got it wrong, as did the Eleventh Circuit in the opinion issues today in his case which affirmed the district court on the basis of *Tompkins*. Additionally, Mr. Jimenez has fully set forth in his petition for writ of certiorari, Initial Brief in the Eleventh Circuit and petition for writ of habeas corpus before the district court that his case is distinct from *Tompkins* both factually and legally. As such, Mr. Jimenez's case falls squarely within the reasoning of *Panetti*, *Boyd, Stewart* and *Jones*: the factual basis of the claims he raised were not know when he filed his initial petition and/or had not ripened.

Mr. Jimenez will suffer irreparable prejudice if his execution is not stayed to permit this

Court to give these issues presented full and deliberate consideration.

WHEREFORE, for the reasons set forth in the petition, Mr. Jimenez asks for a stay of execution to permit consideration of his case before his execution is carried out.

Respectfully submitted,

/s/. Martin J. McClain
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing supplemental brief has been furnished by United States Mail, first class postage prepaid, 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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