No. _____

IN THE

Supreme Court of the United States

BRYAN FREDERICK JENNINGS,

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

LINDA McDERMOTT
Counsel of Record
JOHN ABATECOLA
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2244(b) bars a second-in-time federal habeas petition raising a *Brady* claim based on evidence that the State failed to disclose until after the resolution of petitioner's first federal habeas petition?

2. Whether this Court's holding in *Panetti v. Quarterman* is limited to *Ford*-based competency to be executed claims?

3. Whether this Court's analysis in *Banister v. Davis* compels the determination that the Eleventh Circuit's interpretation of *Panetti* is erroneous as a matter of law?

LIST OF RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Direct Appeal

Jennings v. State, 413 So. 2d 24 (Fla. 1982)
Supreme Court of Florida, No. 59299
April 8, 1982; Remanded for new trial

Second Direct Appeal

Jennings v. State, 453 So. 2d 1110 (Fla. 1984)
Supreme Court of Florida, No. 62600
July 12, 1984; Affirmed denial

Jennings v. Florida, 470 U.S. 1002 (1985)
Supreme Court of the United States, No. 84-5396
February 25, 1985; Remanded for reconsideration

Jennings v. State, 473 So. 2d 204 (Fla. 1985)
Supreme Court of Florida, No. 62600
May 23, 1985; Remanded for new trial

Third Direct Appeal

Jennings v. State, 512 So. 2d 169 (Fla. 1987)
Supreme Court of Florida, No. 68835
August 27, 1987; Affirmed guilt and death sentence, reversed other convictions

State Collateral Proceedings

Jennings v. State, 583 So. 2d 316 (Fla. 1991)
Supreme Court of Florida, Nos. 75689, 74926
June 13, 1991; Affirmed conviction but remanded to trial court for additional discovery

Jennings v. State, 782 So. 2d 853 (Fla. 2001)
Supreme Court of Florida, No. SC93056
March 22, 2001; Affirmed denial

Jennings v. State, 36 So. 3d 84 (Fla. 2010) (successive postconviction motion)
Supreme Court of Florida, No. SC08-1812
February 3, 2010; Affirmed denial

Jennings v. State, 91 So. 3d 132 (Fla. 2012) (successive postconviction motion)
Supreme Court of Florida, No. SC11-817
May 25, 2012; Affirmed denial

Jennings v. State, 192 So. 3d 38 (Fla. 2015) (successive postconviction motion)
Supreme Court of Florida, No. SC13-2248
August 28, 2015; Affirmed denial

Jennings v. State, 265 So. 3d 460 (Fla. 2018) (successive postconviction motion)
Supreme Court of Florida, No. SC17-500
October 4, 2018; Affirmed denial

Federal Habeas Review

Jennings v. Crosby, 392 F. Supp. 2d 1312 (N.D. Fla. 2005)
United States District Court for the Northern District of Florida
No. 5:02CV174-RH
September 29, 2005; Petition denied

Jennings v. McDonough, 490 F.3d 1230 (11th Cir. 2007)
United States Court of Appeals for the Eleventh Circuit
No. 05-16363
July 3, 2007; Affirmed denial

Certiorari Review

Jennings v. Florida, 470 U.S. 1002 (1985)
Supreme Court of the United States, No. 84-5396
February 15, 1985; Remanded to the Florida Supreme Court for reconsideration

Jennings v. McNeil, 552 U.S. 1298 (2008)
Supreme Court of the United States, No. 07-9002
March 31, 2008; c*ert denied*

Jennings v. Florida, 139 S.Ct. 2019 (2019)
Supreme Court of the United States, No. 18-8323
May 13, 2019; *cert denied*

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Petitioner Bryan Jennings respectfully urges this Honorable Court to issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

DECISION BELOW

The Eleventh Circuit's decision appears as *Jennings v. Secretary, Florida Department of Corrections*, 108 F. 4th 1299 (11th Cir. 2024), and is reproduced in the Appendix at A1.

JURISDICTION

On July 22, 2024, the Eleventh Circuit entered its judgment affirming the district court's dismissal of Jennings' petition. App. A1. On September 25, 2024, rehearing was denied. App. A2. This Court granted Jennings an extension of time to file a petition for a writ of certiorari until January 23, 2025. This petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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 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.

28 U.S.C. § 2244(b)(2)(B) provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed unless—
>
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (B)(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.

STATEMENT OF THE CASE[1]

I. Procedural history

Bryan Jennings was indicted on May 16, 1979, in Brevard County, Florida with three counts of first-degree murder, kidnapping, three counts of sexual battery, burglary, and aggravated battery. R1. 1. While Jennings was convicted and sentenced to death, on direct appeal the Florida Supreme Court vacated the judgments and sentences and ordered a new trial. *Jennings v. State*, 413 So. 2d 24 (Fla. 1982).

Jennings' second trial was held in 1982. He was convicted and sentenced to death. R2. 1035. This time, the Florida Supreme Court affirmed the convictions and sentences. *Jennings v. State*, 453 So. 2d 1110 (Fla. 1984). However, on certiorari review, this Court vacated the judgement and remanded the case in light of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Jennings v. Florida*, 470 U.S. 1002 (1985). In turn,

[1] Citations in this petition are as follows: References to the records on direct appeal for each of Jennings' three trials are designated as "R." followed by the number of the trial. References to the records on appeal from the denial of each of Jennings' postconviction motions are designated as "PC-R." followed by the number of the postconviction appeal. All other references are self-explanatory or otherwise explained.

the Florida Supreme Court remanded for a new trial. *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).

In Jennings' third trial, which occurred in 1986, he was again found guilty, and the jury returned a recommendation of death by a vote of eleven to one. R3. 1295-1301, 3432. On direct appeal, the Florida Supreme Court affirmed the verdicts of guilt and the sentence of death. *Jennings v. State*, 512 So. 2d 169 (Fla. 1987). Jennings' petition for a writ of certiorari was denied on February 22, 1988. *Jennings v. State*, 484 U.S. 1079 (1988).

On October 23, 1989, Jennings filed a postconviction motion in the state circuit court, which included several *Brady*[2] claims. The state circuit court summarily denied relief and Jennings appealed. PC-R1. 436, 484. Thereafter, the Florida Supreme Court affirmed the circuit court's decision, but remanded the case to permit Jennings time to file another motion for postconviction relief arising out of the disclosure of additional public records. *Jennings v. State*, 583 So. 2d 316 (Fla. 1991).

Following the remand, the circuit court held an evidentiary hearing on two aspects of Jennings' *Brady* allegations and on an ineffective assistance of counsel claim. After the circuit court denied relief on March 18, 1998, the Florida Supreme Court affirmed the denial on appeal. *Jennings v. State*, 782 So. 2d 853 (Fla. 2001). Certiorari was denied on January 7, 2002. *Jennings v. Florida*, 534 U.S. 1096 (2002).

On October 2, 2002, Jennings filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. *Jennings v. Crosby,*

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

392 F. Supp. 2d 1312 (N.D. Fla. 2005). On September 29, 2005, the district court issued an order denying relief. *Id*. After briefing and oral argument, the Eleventh Circuit issued an opinion on July 3, 2007, affirming the denial of Jennings' petition. *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007), rehearing denied on August 24, 2007. Certiorari was denied on March 31, 2008. *Jennings v. McNeil*, 552 U.S. 1298 (2008).

Jennings thereafter filed a number of successive postconviction motions, each of which was denied by the state circuit court and affirmed on appeal by the Florida Supreme Court. *See Jennings v. State*, 36 So. 3d 84 (Fla. 2010); *Jennings v. State*, 91 So. 3d 132 (Fla. 2012); *Jennings v. State*, 192 So. 3d 38 (Fla. 2015); *Jennings v. State*, 265 So. 3d 460 (Fla. 2018).

On December 28, 2018, Jennings filed a second-in-time petition for writ of habeas corpus in the federal district court, which included a claim based on favorable evidence that had been previously undisclosed by the State. *Jennings v. Inch*, Case No. 5:18-cv-00281-RH-MJF (N.D. Fla. Dec. 28, 2018), NDFL-ECF 1. The district court dismissed Jennings' petition for lack of jurisdiction on March 6, 2020, and thereafter denied his motion to alter or amend on June 10, 2020. NDFL-ECF 25, 28. Jennings timely filed a notice of appeal on July 7, 2020. NDFL-ECF 29.

On July 23, 2020, Jennings filed an application for a certificate of appealability (COA), which was denied on January 13, 2021. CA11-ECF 6, 11. Jennings filed a motion for reconsideration on February 3, 2021. CA11-ECF 12. The Eleventh Circuit, on May 8, 2023, denied Jennings' application as it related to an alternative Rule 60(b)

motion, but noted that Jennings "does not need a certificate of appealability" as to the dismissal of his petition for writ of habeas corpus. CA11-ECF 13.

After briefing and oral argument, the Eleventh Circuit issued an opinion on July 22, 2024, affirming the dismissal of Jennings' federal habeas petition for lack of subject-matter jurisdiction. *Jennings v. Secretary, Florida Department of Corrections*, 108 F.4th 1299 (11th Cir. 2024). Jennings filed a petition for en banc and panel rehearing, which the Eleventh Circuit denied on September 25, 2024. CA11-ECF 43.

II. Facts relevant to the questions presented

A. The trials and direct appeal

In Jennings' first two trials, the State relied on the testimony of jailhouse informant Allen Kruger to establish both Jennings' guilt and several aggravating factors to qualify him for the death penalty. R. 609-13; R2. 449-60. Kruger was deceased by the time of the third trial, so the State called another jailhouse informant, Clarence Muszynski, over the objections of defense counsel that Muszynski had been acting as a State agent during his alleged conversations with Jennings. R3. 623-82.

Muszynski testified to the details of the murder, claiming that Jennings had voluntarily revealed this information while they were both incarcerated at Brevard County Jail. R3. 624-25. On redirect, after defense counsel attempted to impeach Muszynski's stated motivations for testifying against Jennings, Muszynski denied being promised or given anything in exchange for his testimony, stating, "I would never." R3. 682. Instead, Muszynski's purported motive for coming forward was based

on Jennings' attitude. R3. 681. According to Muszynski, "The whole time he was telling me it was a big joke, nothing but laughing about the whole thing. . . It was unreal, as if it was nothing." R3. 681-82.

In closing arguments at the guilt phase, the prosecutor argued vigorously that the jury should believe Muszynski, stating that "in this case when you consider all the evidence, you know that he told the truth . . . . " R3. 1229. The prosecutor further bolstered Muszynski's "selfless" motive, stating that he came forward "[b]ecause this crime is so horrible, this crime is so distasteful that Mr. Muszynski could not listen to this and hear this man tell him and laugh about doing this, and not go to the authorities." R3. 1245-46. The prosecutor relied on Muszynski's testimony yet again in closing arguments at the penalty phase, emphasizing graphic details of the crime lifted directly from Muszynski's testimony while arguing that Jennings met the statutory aggravating factors of heinous, atrocious, or cruel ("HAC") and cold, calculated, and premeditated ("CCP"). R3. 1660-62. The prosecutor also argued that the account provided by Muszynski undermined the defense's argument that Jennings was severely intoxicated on drugs and alcohol on the night of the crime. R3. 1669.

After the jury returned its death recommendation, the presiding judge imposed a sentence of death, finding all three aggravating circumstances sought by the State. In support of the HAC and CCP aggravators, the court recited events provided in Muszynski's testimony as fact. R3. 3461.

The Florida Supreme Court also relied in substantial part on the integrity of Muszynski's testimony when upholding Jennings' death sentence on direct appeal. The court quoted the portion of the trial court's sentencing order which outlined the salient details of the crime, details which stemmed primarily from Muszynski's testimony. *See Jennings*, 512 So. 2d at 175-76. Based on these details, the Florida Supreme Court concluded that "[t]he record fully supports" the trial judge's finding of the aggravating circumstances. *Id.* at 176.

B. Limited disclosure of exculpatory information prior to Jennings' first federal habeas petition

Based on disclosures made in response to public records requests, Jennings' initial postconviction motion in state court included *Brady* claims asserting the State had withheld evidence relating not just to Muszynski, but also to other aspects of the State's case against Jennings. The exculpatory evidence included (1) prosecutors' notes regarding Kruger that could have been used to impeach his and Muszynski's testimony, PC-R2. 1152; (2) a taped statement of witness Judy Slocum, in which she gave a description of Jennings' intoxicated condition in the hours directly before the crime and her interaction with Jennings, PC-R. 310-14; Def. Ex. 2; (3) an October 22, 1985 letter from Muszynski asking the State to get him an attorney so he would be able to communicate with the prosecutor for "any possible assistance you may require of me," PC-R. 322; Def. Ex. 2; and (4) field notes regarding other suspects, PC-R2. 633-35.

C. New evidence of Muszynski's involvement with the State

Since the resolution of Jennings' first federal habeas petition, additional exculpatory evidence which the State previously failed to disclose has been uncovered: (1) Muszynski's confidential presentence investigation (PSI) report showing the State's leverage over him because it was seeking a judicial override for death in his case while Jennings' case was still pending, PC-R5. 70-71; (2) Muszynski's wife, Gail Muszynski, faced impending prosecution because of her actions in Muszynski's own murder case, and her direct benefit from his cooperation in Jennings' case, PC-R5. 127-32, 915; and (3) Muszynski's own benefits of receiving trustee status and conjugal visits with his wife because of his cooperation against Jennings, PC-R5. 45-46, 93. Based on the newly discovered exculpatory evidence, Jennings filed a successive motion for postconviction relief in 2011, asserting violations of *United States v. Henry*, 447 U.S. 264 (1980), *Brady v. Maryland*, and *Giglio v. United States*, 405 U.S. 150 (1972). PC-R5. 248-55.

During a 2012 evidentiary hearing, the state circuit court took judicial notice of the two prosecutions for perjury against Pamela Gail Carter Muszynski, Case No. 79-949-CF-A and Case No. 79-1102-CF-A, along with the confidential PSI conducted in Muszynski's own first-degree murder case. PC-R5. 70-71, 127-32. The PSI revealed that the State charged Gail with perjury, based on her statements made in Muszynski's case, prior to Jennings' first trial. PC-R5. 903.[3] The PSI further revealed

[3] The information from Gail's court file also set forth that Gail had provided a sworn statement on March 13, 1979, in which she stated that before the murder for which he was charged, Muszynski had told her, "I am going to have to kill him." PC-R5. 894.

that the prosecutor recommended a death sentence be imposed for Muszynski in light of the aggravating circumstances. PC-R5. 909.

Muszynski, who had been given access to the PSI back in 1979, PC-R5. 70, testified that he decided to cooperate with the State Attorney's office to secure favorable treatment for himself and his wife. PC-R5. 70-73. Based on the State's direction and coaching, Muszynski fostered a relationship with Jennings in jail for the purpose of getting a confession out of him. PC-R5. 73. In return for his work, the State made Muszynski a trustee, which came with perks like conjugal visits, during which Muszynski and Gail conceived their daughter. PC-R5. 45-46, 93. The State also rewarded the Muszynskis with leniency in Gail's pending felony prosecution for perjury; the court let her off with a slap on the wrist, withholding adjudication and sentencing her to five years of probation. PC-R5. 915.[4]

REASONS FOR GRANTING THE WRIT

I. Introduction

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) curtailed a state prisoner's ability to file a second petition for a writ of habeas corpus in federal court. 28 U.S.C. § 2244(b)(2) bars review of "a second or successive habeas corpus application" unless it (A) relies on a previously unavailable and retroactive "new rule

---

Then, on May 10, 1979, Gail testified before the prosecutor handling Muszynski's prosecution that "[n]o, he did not tell me that neither. And I know I told them when I first came down here, I told them that." PC-R5. 894.

[4] Gail testified at the evidentiary hearing that she was not worried about other charges because Muszynski had assured her that everything would be okay for her as he would take care of it. PC-R5. 156.

of constitutional law," or (B) contains newly discovered evidence sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the applicant guilty. This statutory provision was enacted in order to prevent inmates from abusing the writ through intentionally prolonged litigation or repeatedly filing frivolous claims. *See Panetti v. Quarterman*, 551 U.S. 930, 945-47 (2007).

In bringing his second-in-time petition to the district court, Jennings argued that applying § 2244(b)(2) to his filing would not serve its intended purpose. Jennings acknowledged that his petition was second-in-time, but asserted that under *Panetti*, there are exceptions to § 2244's restrictions on successive habeas petitions, specifically where a petitioner is raising a claim that was not ripe at the time of his initial petition. *See id*. at 943-45. Because the State actively blocked and continued to withhold evidence from Jennings throughout his state postconviction proceedings and initial federal habeas review, Jennings asserted that he could not have raised his current *Brady* claims at an earlier stage.

The district court rejected Jennings' argument, dismissing his § 2254 petition on procedural grounds. NDFL-ECF 25 at 3-4. The district court found it did not have jurisdiction to consider Jennings' petition because it was successive under § 2244. NDFL-ECF 25 at 3-4. The district court declined to apply the *Panetti* exception to Jennings' case because, "Under the law of the circuit, *Panetti* does not apply to *Brady* or *Giglio* claims." NDFL-ECF 25 at 4 (citing *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009)). The district court concluded, "*Tompkins*

is controlling and requires dismissal of Jennings's new § 2254 petition." NDFL-ECF 25 at 4.[5]

On appeal, the Eleventh Circuit framed the issue as follows: "Because Jennings did not move in this Court for an order authorizing consideration of his second-in-time § 2254 petition before he filed it in the district court, we must decide whether his petition is second or successive for the purposes of § 2244(b)." *Jennings v. Secretary, Florida Department of Corrections*, 108 F. 4th 1299, 1302 (11th Cir. 2024). Noting that it was not writing on a "clean slate," the panel concluded that it remained bound by *Tompkins* and therefore Jennings' second-in-time petition was second or successive. *Id.*

In a concurring opinion, Judge Pryor, joined by Judge Wilson, stated that but for the prior panel precedent rule, "I would conclude that a habeas petition alleging an actionable *Brady* violation that the petitioner, in exercising due diligence, could not have been expected to discover in the absence of the government's disclosure, is not a 'second or successive' petition within the meaning of 28 U.S.C. § 2244(b)." *Jennings*, 108 F. 4th at 1306 (Pryor, J., joined by Wilson, J., concurring). Judge Pryor reiterated her view, as explained in Judge Rosenbaum's opinion in *Scott v. United*

[5] Notably, the district court in its order observed that "Eleventh Circuit judges . . . have expressed conflicting opinions on whether a petition asserting a *Brady* claim based on newly discovered evidence is a second or successive petition under § 2244." NDFL-ECF 25 at 8. The district court continued, "*Tompkins* settles the law of the circuit on this, at least for now, but the law of the circuit is not immutable; it is sometimes changed by the Eleventh Circuit en banc or by the Supreme Court." NDFL-ECF 25 at 8.

States, 890 F.3d 1239, 1249-54 (11th Cir. 2018), that *Tompkins* was wrongly decided. *Id.*[6]

II. This Court should grant certiorari to consider whether its decision in *Panetti v. Quarterman*, after subsequently being reaffirmed in *Banister v. Davis*, compels the determination that the Eleventh Circuit's precedent is erroneous as a matter of law.

A. *Panetti v. Quarterman*

In *Panetti*, this Court held that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented [t]here: a § 2254 application raising a *Ford*[7]-based incompetency claim filed as soon as that claim is ripe." 551 U.S. at 945. In so finding, this Court acknowledged that in the usual case, a petition filed second-in-time must meet the "second or successive" terms of § 2244 or else be barred by AEDPA. However, in analyzing the question of what constitutes a "second or successive" petition, this Court found that "[t]here are, however, exceptions" to the statutory bar. *Panetti*, 551 U.S. at 947. This Court observed that it "has declined to interpret 'second or

[6] In *Scott*, the Eleventh Circuit determined that under the prior panel 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." *Scott*, 890 F.3d at 1243. Nevertheless, the *Scott* panel was of the belief that "*Tompkins* got it wrong," explaining that the "*Tompkins*'s rule eliminates the sole fair opportunity for these petitioners to obtain relief." *Id.* at 1243. According to the panel, precluding the filing of a second-in-time petition based on a previously undiscoverable *Brady* violation is "doubly wrong," as it "rewards the government for its unfair prosecution and condemns the petitioner for a crime that a jury in a fair trial may well have acquitted him of." *Id.* at 1244. The *Scott* panel believed its view is supported by this Court's precedent. *Id.* at 1243.

[7] *Ford v. Wainwright*, 477 U.S. 399 (1986).

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." *Id*. at 944 (citing, *e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). Rather, the phrase "second or successive" is "not self-defining" and instead takes its full meaning from the Court's habeas case law, including those decisions predating AEDPA. *Panetti*, 551 U.S. at 943-44. After examining its own precedent, this Court assessed the following considerations found in the case law to decide whether a *Ford* claim was one such second-in-time exception: the implications for habeas practice; AEDPA's own purposes; and whether a type of later-in-time filing would have constituted an abuse of the writ. *Id*. at 943-47.

This Court in *Panetti* concluded that the statutory bar on "second or successive" applications does not apply to *Ford* claims after addressing the aforementioned factors. As to the implications of habeas practice and the purposes of AEDPA, this Court predicted that the State's approach of requiring a petitioner to preserve a future *Ford* claim in his first habeas petition would be "'far reaching and seemingly perverse.'" *Id*. at 943 (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998)). It would result in a legal scheme where "conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every § 2254 application." *Id*. This Court found that the empty formality of requiring petitioners to file premature claims does not "conserve judicial resources, 'reduc[e] piecemail litigation,' or 'streamlin[e] federal habeas proceedings.'" *Id*. at 946 (quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007)). Nor was AEDPA's concern for

finality implicated since federal courts would be unable to resolve *Ford* claims before execution was imminent. *Id*. Likewise, *Ford* claims could not constitute an abuse of the writ since the Court had confirmed that "claims of incompetency to be executed remain unripe at early stages of the proceedings." *Id*. at 947. Ultimately, this Court opted for the reasonable interpretation of § 2244 that did not "produce these distortions and inefficiencies." *Id*. at 943.

B. The Eleventh Circuit's misinterpretation of *Panetti* and § 2244 in *Tompkins*

During a pending death warrant and with an imminent execution date, petitioner Wayne Tompkins appealed from the district court's dismissal of a second-in-time § 2254 petition that included claims pursuant to violations of *Brady* and *Giglio*. *Tompkins*, 557 F.3d at 1259. Tompkins asserted that in accordance with *Panetti*, his petition was "not really a second or successive one." *Id*.

In foreclosing Tompkins' argument, the Eleventh Circuit found that "[t]he *Panetti* case involved only a *Ford* claim, and the Court was careful to limit its holding to *Ford* claims." *Id*. at 1259. The *Tompkins* court explained that "[t]he reason the Court was careful to limit its holding is that a *Ford* claim is different from most other types of habeas claims." *Id*. The court elaborated, "*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*. (citation omitted). Conversely, the court found the violation of constitutional rights asserted in *Brady* and *Giglio* claims "occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition." *Id*. Thus, the Eleventh Circuit in *Tompkins* distinguished the claims by how it defined "ripeness": "The reason the

Ford claim was not ripe at the time of the first petition in *Panetti* is not that evidence of an existing or past fact had not been uncovered at that time. Instead, the reason it was unripe was that no *Ford* claim is ever ripe at the time of the first petition because 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*.

C. *Banister v. Davis*

Subsequent to the Eleventh Circuit's decision in *Tompkins*, this Court decided *Banister v. Davis*, 590 U.S. 504 (2020), which settled a circuit split on the issue of whether Rule 59(e) motions in habeas practice should be categorized as second or successive petitions. *Id*. at 511. Recalling its own precedent, this Court recognized the phrase "second or successive" is a term of art which is not self-defining. *Id*. (citing *Slack*, 529 U.S. at 486; *Panetti*, 551 U.S. at 943).

In conducting its analysis, this Court in *Banister* unequivocally reaffirmed the factors identified in *Panetti* that must be considered in determining whether a chronologically second petition is "second or successive": the implications for habeas practice when interpreting § 2244; AEDPA's own purpose; and the abuse of the writ doctrine. Based on these factors, both historical precedents and statutory aims, this Court concluded that Rule 59(e) motions are permitted in habeas proceedings, "[a]nd nothing cuts the opposite way." *Id*. at 513.

Banister's analysis confirms that the narrow interpretation of *Panetti* by the *Tompkins* court was fundamentally flawed. Pertinently, *Banister*'s implementation of the *Panetti* test in evaluating a second application outside of the *Ford* context

stands at odds with the Eleventh Circuit's restrictive interpretation in *Tompkins*, one which relied on "a new test not found in *Panetti,*" but instead was based on an erroneous description of the term "ripeness." *Scott*, 890 F.3d at 1256.[8]

D. "Illogical rule"[9]

As part of its review, this Court should also consider the irrationality and unfairness of barring a petitioner from litigating violations of his fundamental constitutional rights where the Government conceals its misconduct throughout the time in which said petitioner could have raised those violations in his initial § 2254 petition. Such an outcome is not supported by *Panetti*, as petitioner would be required to bring claims in an initial petition that are non-existent or speculative, rather than ripe. This would have negative "implications for habeas practice," *id.* at 943, without furthering AEDPA's goals of comity, finality, and federalism. And it would threaten a petitioner—while consequently rewarding the State for its unlawful actions—with "forever losing [his] opportunity for any federal review" of his constitutional claims. *See Panetti*, 551 U.S. at 945-46 (citation omitted).

---

[8] The Eleventh Circuit is not alone in getting the second-in-time analysis wrong. *See Storey v. Lumpkin*, 142 S. Ct. 2576 (2022) (Sotomayor, J., respecting denial of certiorari) (noting that "at least three other Courts of Appeals have adopted the same erroneous interpretation as the Fifth Circuit," and stating, "I trust that other federal courts will pay closer heed to *Panetti* and *Banister* when they confront this important issue." *Id.* at 2579.

[9] *See Bernard v. United States*, 141 S. Ct. 504, 506-07 (2020) (Sotomayor, J., dissenting from the denial of certiorari and application of stay) (stating that the "illogical rule" utilized by the Fifth Circuit, which is also utilized by the Eleventh Circuit, "perversely rewards the government for keeping exculpatory information secret until after an inmate's first habeas petition has been resolved."

CONCLUSION

Based on the foregoing, this Court should grant a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals in this case.

/s/ Linda McDermott
LINDA McDERMOTT
Counsel of Record
JOHN ABATECOLA
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org

DATED: JANUARY 20, 2025