CASE NO. 24-6406

In The
Supreme Court of The United States

BRYAN FREDERICK JENNINGS,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

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Capital Case

QUESTIONS PRESENTED

1. Whether a second-in-time § 2254 petition raising *Brady* and *Giglio* claims is a second or successive petition subject to § 2244(b)'s restrictions.

2. Whether this Court's holding in *Panetti v. Quarterman* extends to *Brady* and *Giglio* claims.

3. Whether this Court's analysis in *Banister v. Davis*, which distinguished Rule 59(e) motions from Rule 60(b) motions, abrogates *Tompkins*.

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The Eleventh Circuit's decision appears as *Jennings v. Sec'y, Fla. Dep't of Corr.*, 108 F. 4th 1299 (11th Cir. 2024).

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals affirmed the district court's denial of habeas relief. The instant petition was filed with this Court on January 23, 2025. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Respondents agree that the statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Following reversals of his 1980 and 1982 convictions,[1] Petitioner, Bryan F. Jennings, in 1986, was tried, convicted, and sentenced to death for first-degree murder, kidnapping with intent to commit sexual battery, sexual battery, and burglary in connection with the 1979 abduction and death of six-year old Rebecca Kunash. In its decision affirming Petitioner's convictions and death sentence, the Florida Supreme Court summarized the facts of the murder and the facts that supported the trial court's aggravation and mitigation findings as follows:

> In the early morning hours of May 11, 1979, Rebecca Kunash was asleep in her bed. A nightlight had been left on in her room and her parents were asleep in another part of the house. Jennings went to her window and saw Rebecca asleep. He forcibly removed the screen, opened the window, and climbed into her bedroom. He put his hand over her mouth, took her to his car and proceeded to an area near the Girard Street Canal on Merritt Island. He raped Rebecca, severely bruising and lacerating her vaginal area, using such force that he bruised his penis. In the course of events, he lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge- hammer onto the ground fracturing her skull and causing extensive damage to her brain. While she was still alive, Jennings took her into the canal and held her head under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) years of age.

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[1] The Florida Supreme Court vacated Petitioner's first conviction and death sentence ("1980 trial") on direct appeal finding Petitioner's confession admitted properly but determining he had been "denied cross-examination of a vital and material witness," and remanding for a new trial. *Jennings v. State*, 413 So. 2d 24, 25-26 (Fla. 1982) ("*Jennings I*"). After the second trial ("1982 trial"), the Florida Supreme Court affirmed the conviction and death sentence, rejecting Petitioner's complaint that his confession was admitted in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Jennings v. State*, 453 So. 2d 1109, 1111 (Fla. 1984) ("*Jennings II*"). This Court disagreed and vacated the conviction. *Jennings v. Florida*, 470 U.S. 1002 (1985) (mem.). Based on that decision, the Florida Supreme remanded for a new trial. *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).

Jennings v. State, 512 So. 2d 169, 175-76 (Fla. 1987).

In 1989, Jennings' motion for postconviction relief was denied. The Florida Supreme Court affirmed the denial, *Jennings v. State*, 583 So. 2d 316, 319 (Fla. 1991) but found that he had been denied public records in error and permitted him time to file another motion for postconviction relief arising out of the disclosure of additional public records. After receipt of the State Attorney's trial file, Jennings filed a motion for postconviction relief, and an evidentiary hearing was held. Again, postconviction relief was denied, Jennings appealed, and the Florida Supreme Court affirmed. *Jennings v. State*, 782 So. 2d 853 (Fla. 2001).

Having been denied relief in state court, Jennings filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Florida. The United States District Court denied federal habeas relief. *Jennings v. Crosby*, 392 F. Supp. 2d 1312 (N. D. Fla. 2005). The United States Eleventh Circuit Court of Appeals affirmed. *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007). Certiorari was denied on March 31, 2008. *Jennings v. McNeil*, 552, U.S. 1298 (2008).

Jennings thereafter filed his first successive rule 3.851 motion on April 8, 2008. This was denied summarily, and the Florida Supreme Court affirmed the trial court's order denying said motion. *Jennings v. State*, 36 So. 3d 84 (Fla. 2010).

Subsequently, Jennings filed a second successive postconviction relief motion on November 27, 2010, raising claims based on *Porter v. McCollum*, 130 S. Ct. 447 (2009), which the trial court summarily denied. The trial court also denied Jennings' motion to amend which was addressed to an affidavit signed by trial witness,

Clarence Muszynski. On appeal, the Florida Supreme Court affirmed. *Jennings v. State*, 91 So. 3d 132 (Fla. 2012) (unpublished opinion). However, the Florida Supreme Court gave Jennings 30 days to file another successive motion based on that affidavit nunc pro tunc to February 28, 2011. *Id.* at 132.

In response to the Florida Supreme Court's ruling, Jennings filed his third successive 3.851 motion on June 25, 2012, alleging discovery of new evidence. After an evidentiary hearing, the trial court denied said motion by written Order on June 5, 2013, finding that Muszynski's recantation testimony was "inherently incredible". The Florida Supreme Court affirmed on August 28, 2015, and denied rehearing on January 14, 2016. *Jennings v. State*, 192 So. 3d 38 (Fla. 2015). The Florida Supreme Court's affirmance was based upon the trial court's credibility findings regarding unsubstantiated recanting witness testimony from Muszynski, finding:

> In this successive postconviction proceeding, Jennings asserts claims based on new testimony from Clarence Muszynski, who testified in Jennings' third retrial as to statements that Jennings made to him. Specifically, Muszynski testified that Jennings told him
>
> > how he had broken into the sleeping victim's room, taken her outside and bashed her head on the pavement, driven her to a canal, raped her, and then held her underwater until she was drowned and where her body would be disposed of by "the sharks and the turtles and the fish and the animals of the sea. . . ."

Jennings, 512 So. 2d at 172.

> In this proceeding, Muszynski testified that he had a deal with the State to receive favorable treatment for himself and his then-spouse, which is in direct contradiction to his trial testimony that he had not made any deals. In all other respects, Muszynski has not varied from his original trial testimony. Each of his claims on appeal—based on newly discovered evidence, *Brady v. Maryland*, 373 S. 83 (1963), and *Giglio v.*

United States, 405 U.S. 150 (1972)—relate to this alleged deal with the State.

In a lengthy order after an evidentiary hearing, the trial court denied relief, finding that Muszynski's recantation testimony was "inherently incredible." As this Court has observed, "recantations are, as a general matter, 'exceedingly unreliable.' " *Spann v. State*, 91 So. 3d 812, 816 (Fla. 2012) (quoting *Bell v. State*, 90 So. 2d 704, 705 (Fla. 1956)). Because the trial judge "has a superior vantage point to see and hear the witnesses presenting the conflicting testimony," this Court is "highly deferential" to the trial court's "determination relating to the credibility of a recantation." *Id.* This Court reviews the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. *Melendez v. State*, 718 So. 2d 746, 747–48 (Fla. 1998).

In this case, the circuit court concluded that the testimony given by Muszynski lacked credibility. In making this assessment, the circuit court set forth the numerous ways in which Muszynski's testimony during the evidentiary hearing conflicted, stating as follows:

> This Court has carefully weighed and considered Muszynski's conflicting testimony at the evidentiary hearing. Muszynski testified that Jennings spoke to him and confessed to him before Muszynski allegedly spoke to the State about a bargain. Muszynski testified that he spoke to attorney Howard Johnson from the State Attorney's Office before he gave the statement of June 25, 1979, to Wayne Porter, detailing the Defendant's confession, and before he started to work to get Defendant Jennings' trust.
>
> Muszynski then testified that Agent Wayne Porter was "the first one that came and seen me on a tape recorder" for the interview of June 25, 1979. He testified this was before he talked to Howard Johnson (the assistant state attorney who set up his "deal").
>
> On October 23, 2012, Muszynski's testimony continued. He stated that he "had all conversations with Howard Johnson and Wayne Porter" on behalf of the State.
>
> Clearly, this statement is also in conflict with his affidavit, wherein he claimed that he also had many conversations

> with assistant state attorney Chris White about befriending Jennings and getting guidance about what information the State was seeking. He also testified that Mr. White never came to see him in Panama (Panama City was the site of the 1986 trial).

Order Denying Postconviction Relief at 10-11. The circuit court then addressed Muszynski's credibility as follows:

> The Court finds that Muszynski's "recantation" testimony and allegations of a deal to testify against Defendant Jennings are inherently incredible. The Court observed Muszynski furtively looking around the courtroom, as if to ensure that all eyes were on him and his grandstanding style testimony. At times, he paid little apparent attention to the questions asked of him but instead launched into a lengthy bragging soliloquy of his adventures as "a 007 agent" and his contacts with assistant state attorney "Howard Johnson" and with former State Attorney Douglas Cheshire (now deceased). His testimony was rambling and disjointed. Throughout the proceedings, he regularly sought to please defense counsel, seeking his approval after answering questions. His recollection of dates and the series of events was never absolute; instead, it ebbed and flowered, with no coherent thread. Based upon the demeanor and presentation of Clarence Muszynski, the Court finds that his testimony at the evidentiary hearing lacks credibility. As Mr. Muszynski himself stated, "It's unreal, man."

Id. at 11-12. Importantly, Muszynski testified that he made a deal with a prosecutor named "Howard Johnson," but presented no evidence to show that such a person had ever worked at the State Attorney's Office. In fact, the State presented two witnesses to establish the opposite: that no one by that name worked in the State Attorney's Office during the time in question.

The circuit court carefully reviewed each of the additional witnesses that Jennings presented and determined that such testimony did not add any support to Jennings' allegations. Upon a full review of the record, we conclude that competent, substantial evidence supports the circuit court's credibility assessments and factual determinations and that the circuit court did not err in its legal conclusions.

> Accordingly, we affirm the circuit court's order denying the successive motion for postconviction relief.

Jennings v. State, 192 So. 3d 38 (Fla. 2015).

On October 20, 2016, Jennings filed his fourth successive motion to vacate his death sentence alleging entitlement to relief pursuant to the recent *Hurst*[2] decisions as well as Florida's new sentencing statute. The circuit court denied the motion to vacate, and Jennings appealed to the Florida Supreme Court. On October 4, 2018, the Florida Supreme Court issued an opinion affirming the denial of the motion to vacate. *Jennings v. State*, 265 So. 3d 460 (Fla. 2018), *cert. denied,* 139 S. Ct. 2019 (2019).

Jennings returned to federal court in December 2018, filing a petition under 28 USC § 2254. Jennings included *Brady* and *Giglio* claims and argued that this petition was not second or successive under *Panetti v. Quarterman*, 551 U.S. 930 (2007). He also sought, in the alternative, relief under Federal Rule of Civil Procedure 60(b) from the district court's judgment denying his first § 2254 petition based on his new *Brady* and *Giglio* claims. *Jennings v. Inch*, Case No. 5:18-cv-00281-RH-MJF (N.D. Fla. Dec. 28, 2018), NDFL-ECF 1.

On March 6, 2020, the district court concluded that the law of the circuit required the dismissal of Jennings' petition for lack of subject-matter jurisdiction. *See*

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[2] While Jennings' motion for rehearing was pending, the Florida Supreme Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). Within a few months, the Florida Supreme Court rendered *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert denied*, 137 S. Ct. 2161 (2017), after which the state legislature revised Florida's capital sentencing statute pursuant to the high court's directives. *Perry v. State*, 210 So. 3d 630 (Fla. 2016), Fla. Stat. § 921.141 (2017).

Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1259–60 (11th Cir. 2009) (per curiam). The court also denied Jennings' Rule 60(b) motion and denied a certificate of appealability. NDFL-ECF 25. On June 10, 2020, the district court denied Jennings' motion to alter or amend this new judgment. NDFL-ECF 28. Jennings filed a notice of appeal on July 7, 2020. NDFL-ECF 29.

On July 23, 2020, Jennings filed an application for a COA, which was denied by the Eleventh Circuit on January 13, 2021. CA11-ECF 6, 11. Jennings filed a motion for reconsideration on February 3, 2021. CA11-ECF 12. On May 8, 2023, the Eleventh Circuit denied Jennings' application as it related to his 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 entered its judgment affirming the district court's dismissal of Jennings' petition:

> 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). If it is, then the district court correctly dismissed the petition for a lack of subject-matter jurisdiction. If it is not, then the district court erred.
>
> In answering this question, we are not "writing on a clean slate." *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018). Indeed, "our Circuit has already written all over this slate." *Id.* And the answer is clear: **a second-in-time § 2254 petition raising *Brady* and *Giglio* claims is a second or successive petition subject to § 2244(b)'s restrictions.** As the district court recognized, we decided this issue in *Tompkins*, 557 F.3d at 1260.

Jennings v. Sec'y, Fla. Dep't of Corr., 108 F.4th 1299, 1302 (11th Cir. 2024) (emphasis added). On September 25, 2024, Jennings' petition for en banc and panel rehearing was denied. CA11-ECF 43.

Jennings now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

Jennings' second-in-time habeas petition is "Second or Successive" within the meaning of 28 U.S.C. § 2244(b)(2).

I. Introduction

This Court reserves its certiorari jurisdiction primarily to resolve conflicts among the United States courts of appeals and state courts "concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). There is no disagreement that *Tompkins* is binding precedent in the Eleventh Circuit.[3] Nor is there any circuit split over the issue of whether *Panetti* made the second or successive application requirements inapplicable to *Brady* and *Giglio* claims. *See Evans v. Smith*, 220 F.3d 306, 324 (4th Cir. 2000) (concluding pre-*Panetti* that *Brady* claims are subject to § 2244(b)(2)(B)'s second or successive application restrictions).

As such, before filing his second or successive § 2254 petition in the district court, Jennings was required to move for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). Because Jennings failed to obtain an order authorizing the district court to consider his petition, *see* 28 U.S.C. § 2244(b)(3)(A), the district court was correct to dismiss it for lack of subject-matter jurisdiction.[4] *See Williams v. Chatman*, 510 F.3d 1290,1295 (11th Cir. 2007).

Jennings' argument does not identify any federal or state court conflict and instead amounts to nothing more than a meritless disagreement regarding the

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[3] *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018); *Jimenez v. Sec'y, Fla. Dep't of Corr.*, 758 Fed. Appx. 682 (11th Cir. 2018).

[4] Jennings does not argue that his case meets one of the exceptions set out in § 2244(b)(2).

Eleventh Circuit's application of this Court's precedent. *See Braxton*; see also Supreme Court Rule 10. None of Rule l0's considerations apply to the claims advanced by Jennings.

Even if this Court were to consider addressing the merits of Petitioner's argument, this case is a poor vehicle for resolving the alleged conflict. As to the merits of the case, the district court held:

> Jurists of reason also could debate whether (or perhaps agree that) the state violated *Brady* by withholding the information now at issue. Even so, the evidence against Mr. Jennings was strong. It is not fairly debatable whether this information, if available at trial, would have changed the verdict or sentence, or whether this violation is sufficient to undermine confidence in the outcome. Nor is it fairly debatable whether, if this petition is addressed on the merits, Mr. Jennings will be entitled to relief under the deferential standard that applies under 28 U.S.C. § 2254(d)(1) and (2). He will not be.

(NDFL-ECF 25 at 9).

Accordingly, Jennings' request for certiorari should be denied.

A. *Panetti v. Quarterman*

Jennings fully acknowledges that his petition is his second-in-time petition brought under 28 U.S.C. § 2254. He argues that his petition falls outside of § 2244's ambit because it falls within an exception to the prohibition on successive petitions established in *Panetti v. Quarterman,* 551 U.S. 930, 945 (2007). In *Panetti*, this Court held that a ripe *Ford*[5] claim brought for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application is not "successive," and thus § 2244(b) does not apply.

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

Jennings does not meet such an exception. Unlike the *Ford* claims at issue in *Panetti*, Jennings' *Brady/Giglio* claims were ripe when his initial petition was filed, as the events giving rise to the claim had already occurred.

B. The Eleventh Circuit's holding in *Tompkins* is consistent with this Court's interpretation of *Panetti* and § 2244

In *Panetti*, this Court created an exception to the prohibition on second habeas petitions for unripe claims. But as the Eleventh Circuit has explained, unripe claims that fall under the *Panetti* exception are rare. *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (stating that *Panetti* does not allow a petitioner to circumvent the stringent requirements placed on successive habeas petitions even when they rely upon new *Brady/Giglio* claims). The Eleventh Circuit explained that *Panetti's* holding was limited to *Ford* claims **and other types of claims where the claim is not ripe until a date certain.** The *Panetti* exception, however, did not extend to other types of claims where ripeness is not an issue. The Eleventh Circuit explained that 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." *Tompkins,* 557 F.3d at 1260. **Ripeness does not mean failure to uncover at an earlier date.**

Unlike a *Ford* incompetency-to-be-executed claim, the *Brady* and *Giglio* claims Jennings 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. As noted by *Tompkins*:

> Cutting and pasting language from the *Panetti* opinion and contorting that language's meaning, 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. That is not what the Supreme Court in *Panetti* meant by "ripe." Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh. *See id.* at 2854 (explaining that it is not possible to resolve a petitioner's *Ford* claim "before execution is imminent"). It is not ripe years before the time of execution because mental conditions of prisoners vary over time. *See id.* at 2852. 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.

Tompkins, 557 F.3d at 1260.

In *Stewart*, a defendant, after filing an initial § 2255 petition, obtained vacatur of a state conviction that was a necessary predicate for his sentence as a career offender under the Armed Career Criminal Act. *Stewart v. United States*, 646 F.3d 856, 858 (11th Cir. 2011). After getting the state conviction vacated, Stewart moved to correct his federal sentence through a second habeas petition, arguing that his career offender sentence was rendered invalid without the predicate conviction. *Id.* In explaining why Stewart could bring his second motion to vacate without its being considered "second or successive," this Court said:

> "[C]laims based on a factual predicate not previously discoverable are successive," but "[i]f ... the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive." *Leal Garcia*, 573 F.3d at 221, 222. We are not faced with a claim based on facts that were merely undiscoverable. Rather, Stewart has presented a claim, the basis for which did not exist before the vacatur of his predicate state

> convictions—after his first § 2255 motion had already been filed and dismissed.

Stewart, 646 F.3d at 863.

The *Stewart* decision reiterates that a second habeas petition will not avoid being characterized as "second or successive" simply because the factual predicate of a claim was previously undiscoverable. Rather, it is only defects that were wholly **nonexistent** at the time the petitioner filed his initial motion to vacate that will avoid being characterized as "second or successive" in a subsequent motion to vacate.

Jennings' broad and incorrect *Panetti* interpretation would open the gates to successive habeas litigation in district courts and would be counter to the finality that AEDPA was designed to promote. Jennings was long aware of Clarence Muszynski's role in his case and there was no reason Muszynski's "recantation"—incredible as it was—could not have been discovered and raised in his initial habeas petition. *Cf. Riechmann v. State*, 966 So. 2d 298, 307 (Fla. 2007) ("In short, the record is clear that the defense had long been aware of Veski's role in the case, including his claims of pressure from the prosecution. However, no legal justification for failing to assert this claim at an earlier time was offered to the trial court below to overcome the procedural bar for claims raised in successive postconviction motions.").

C. *Tompkins remains the law of the Eleventh Circuit*

Under the prior-panel-precedent rule, *Tompkins*' holding "is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). In foreclosing Jennings' argument that

Banister v. Davis, 590 U.S. 504 (2020), abrogated *Tompkins*, the Eleventh Circuit found that "[i]n *Banister*, the Supreme Court had no occasion to pass on the question we answered in *Tompkins*, and no occasion to disagree with the answer we provided. Thus, it cannot be said that *Banister* abrogated *Tompkins*." NDFL-ECF 25 at 13.

For a Supreme Court decision to undermine panel precedent to the point of abrogation, the "decision must be clearly on point" and "*clearly contrary*" to the panel precedent. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003) (emphasis in original) (quoting *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. Unit A Apr. 1981)). If, as in this case, the Supreme Court never discussed the Eleventh Circuit's precedent or commented on the precise issue before the prior panel, the precedent remains binding. *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) (alteration in the original) (quoting *United States v. Vega-Castillo*, 540 F.3d 1235, 1238 (11th Cir. 2008)); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) (quoting *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1223 (11th Cir. 2022)).

Banister applied its methodology in the context of "resolv[ing] a Circuit split about whether a Rule 59(e) motion to alter or amend a habeas court's judgment counts as a second or successive habeas application."[6] 590 U.S. at 511. In limiting the

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[6] Cases citing the *Banister* decision have been in relation to Rule 59(e) motions: *United States v. Webster*, No. 8:12-CR-426, 2024 WL 1051807, at *1 (D. Neb. Mar. 11, 2024); *Hutchins v. Lizarraga*, No. 17-CV-03921-BLF, 2021 WL 326909, at *1 (N.D. Cal. Feb. 1, 2021); *Lindsey v. Jenkins*, No. 21-3745, 2022 WL 20854727, at *7 (6th Cir. Dec. 1, 2022).

applicability of *Banister* to Jennings' case, the Eleventh Circuit noted the significant differences between a second-in-time § 2254 petition and a Rule 59(e) motion.

> For example, "[i]n timing and substance, a Rule 59(e) motion hews closely to the initial application" and "[s]uch a motion does not enable a prisoner to abuse the habeas process by stringing out his claims over the years." 590 U.S. at 517. A movant has only twenty-eight days after entry of judgment to file a motion to alter or amend the judgment under Rule 59(e) and he cannot raise any new issues that could have been raised before judgment was entered. *See id.* at 516. A second-in-time § 2254 petition, however, is often not so closely tied to the initial petition. For example, while the district court in *Banister* adjudicated the petitioner's Rule 59(e) motion in five days, *id.* at 517, Jennings filed the instant petition, which raised new issues, over ten years after his first round of collateral litigation in federal court ended.

NDFL-ECF 25 at 13-14. These differences mean that *Banister* cannot be understood to have abrogated *Tompkins*.

D. 28 U.S.C. § 2244

Jennings was not barred from litigating his *Brady/Giglio* claims; nor are any other petitioners. The habeas statute, as amended by the AEDPA, sharply limits a federal habeas court's consideration of any "second or successive" habeas petitions. *Tyler v. Cain*, 533 U.S. 656, 661 (2001), ***but it does not foreclose relief.***

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996, as codified at 28 U.S.C. § 2244(b), before leave to file a second or successive petition can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that satisfies the conditions in 28 U.S.C. § 2244(b),

> (2) 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)(1)–(2).

Pursuant to 28 U.S.C. § 2244(b)(2), Jennings had the opportunity to move in the Eleventh Circuit for an order authorizing consideration of his second-in-time § 2254 petition before he filed his petition in the district court. He chose not to. The restriction on second-in-time petitions is not "illogical" just because Jennings is unable to meet the gatekeeping requirements of the rule. Rather, cases like Jennings' are the reason the rule is in place.[7]

This Court should deny the Writ.

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[7] Jennings' broad and incorrect *Panetti* interpretation would open the gates to successive habeas litigation in district courts and would be counter to the finality that AEDPA was designed to promote. Jennings was long aware of this witnesses role in the case in his case and there was no adequate reason his 'recantation,' incredible as it was, was not raised in his initial habeas petition. Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007) ("In short, the record is clear that the defense had long been aware of Veski's role in the case, including his claims of pressure from the prosecution. However, no legal justification for failing to assert this claim at an earlier time was offered to the trial court below to overcome the procedural bar for claims raised in successive postconviction motions.").

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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