No. 24-6406

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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. *Stewart* and *Riechmann* Support Granting the Writ of Certiorari.

In its Brief in Opposition, the State relies heavily on *Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011), and *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007), for the proposition that Jennings' second-in-time federal habeas petition is second or successive, but these cases instead demonstrate that Jennings' petition is not second or successive under *Panetti v. Quarterman*, 551 U.S. 930 (2007).

In *Stewart*, the petitioner filed a second-in-time federal habeas petition bringing a *Johnson*[1] claim after the Georgia court system vacated the underlying state convictions that served as the predicate for a career offender enhancement. *Stewart*, 646 F.3d 856 at 857-58. The district court dismissed the second-in-time petition, concluding that the petition was successive under AEDPA's gatekeeping provision. *Id.* at 858. The Eleventh Circuit granted a Certificate of Appealability to decide whether the district court erred in finding that the *Stewart* petitioner's second-in-time petition was second or successive "in light of Stewart's argument that the grounds he has asserted for challenging his sentence did not exist at the time he filed his previous motion to vacate." *Id*. Ultimately, the *Stewart* court found that Stewart's second-in-time petition was not second or successive because his "situation falls within what the Fifth Circuit recognized is a small subset of unavailable claims that must not be categorized as successive." *Id*. at 863 (citing *Leal Garcia v. Quarterman*, 573 F.2d 214, 222 (5th Cir. 2009)).

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[1] *Johnson v. United States*, 544 U.S. 295 (2005).

Notably, the Eleventh Circuit observed that the *Leal Garcia* court's analysis of ripeness in the context of second-in-time federal habeas petitions "is consonant with the Supreme Court's reasoning in *Panetti*." *Id*. "Applying the same reasoning" as the *Leal Garcia* court to the *Stewart* petitioner's case, the Eleventh Circuit found that "the facts indicating there might be flaws in Stewart's Georgia convictions existed in 2004, but the *basis* for his *Johnson* claim – the order vacating those predicate convictions – did not exist" until later. *Id*. (emphasis in original). Therefore, Stewart's second-in-time federal habeas petition was not second or successive under AEDPA's gatekeeping provision. *Id*.

Applying the same reasoning as *Panetti*, *Leal Garcia*, and *Stewart* to Jennings' case, the outcome is the same; Jennings' second-in-time petition is not second or successive because the basis for his *Brady* claim – Muszynski's statements revealing his false testimony about the benefits he received – did not exist at the time of his first federal habeas petition. Therefore, the *Stewart* and *Leal Garcia* courts' holdings, consistent with *Panetti*'s reasoning concerning a second-in-time federal habeas petition raising a *Ford* issue, support applying the same reasoning to Jennings' second-in-time petition because "nothing *Panetti* teaches us to consider so much as hints otherwise." *Scott v. United States*, 890 F.3d 1239, 1253 (11th Cir. 2018) (applying *Panetti* to a second-in-time federal habeas petition raising newly discovered *Brady* claims but ultimately finding itself constrained by prior Eleventh Circuit precedent incorrectly holding otherwise).

The State's flawed reasoning is based upon its argument that Jennings has been aware of Muszynski's role in his case and that there is no reason Muszynski's statements concerning his false testimony could not have been discovered and raised in Jennings' initial petition. This is wrong. The State overlooks that the reason Jennings did not and could not have raised the claim in his initial petition was due to the State's failure to disclosure several pieces of exculpatory evidence in violation of *Brady* until after the resolution of Jennings' first petition. *See* Petition for Writ of Certiorari at 8. Accordingly, because of the State's *Brady* violations, Jennings could not have discovered and subsequently presented these claims in his first petition because the State itself failed to disclose the evidence that provided the basis for these claims. Jennings' claims are not "based on facts that were merely undiscoverable." *Stewart*, 646 F.3d at 863. Jennings' claims are based on facts the State hid from him.

Similarly, the State relies on *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007), for the proposition that Jennings knew about Muszynski's role in his case and there is no adequate reason Muszynski's statements concerning his false testimony were not raised in Jennings' first petition. Again, Jennings did not include Muszynski's recantation in his initial petition because the State hid the relevant *Brady* evidence from existence that led to the truth concerning Muszynski's false testimony.

Additionally, *Riechmann* is readily distinguishable from Jennings' case. In *Riechmann*, the Florida Supreme Court considered whether the trial court erred in refusing to allow Officer Hilliard Veski's profered testimony at an evidentiary

hearing and refusing to conduct another evidentiary hearing on possible *Brady* and *Giglio* violations. *Riechmann*, 966 So. 2d at 305. The Florida Supreme Court found the claims were procedurally barred because defense counsel "had long been aware of Veski's role in the case," but "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." *Id.* at 307. The record made clear that Veski testified at a pretrial deposition about his role in the case and, before trial, "Veski informed Riechmann's trial counsel that he had testified falsely about the flashlight during the deposition and that he had refused to testify for the State at trial because of alleged improper pressures the State placed upon him." *Id.* at 305. In Jennings' case, the record clearly shows that Jennings' trial counsel – at each of his three trials – did not have the information from either the State or Muszynski about Muszynski's false testimony or benefits he was provided for his role in the prosecution of Jennings. Unlike in *Riechmann*, where the record was replete with details of the State's improper conduct and Veski's background, here the record is silent on the full extent of Muszynski's relationship with the State and the State's *Brady* violations until after the resolution of Jennings' first petition. *Riechmann* is inapposite to Jennings' case.

In Jennings' case, the *Brady* claim set forth in his second-in-time petition did not exist until Muszynski revealed his false testimony and the benefits he received from the State. Through no fault of Jennings, this did not occur until after his first petition ran its course through the courts. Thus, under the logic of *Panetti*, as

demonstrated by the analysis of the similarly situated second-in-time federal habeas petitioner in *Stewart*, Jennings' second-in-time federal habeas petition is not second or successive under AEDPA's gatekeeping provision.

II. The State Misrepresents the Current State of the Circuit Courts of Appeals' Interpretations of Panetti and Banister.

Currently, precedent from the Circuit Courts of Appeals agrees with the Eleventh Circuit's view of *Panetti* and *Banister*. However, a unified misapplication of Supreme Court precedent is still misapplication. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 606 (2015) (holding that the residual clause of the Armed Career Criminal Act is unconstitutionally vague, overruling the Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits that had previously upheld its application). And, importantly, these issues are not as settled in the Circuit Courts of Appeals' case law as the State suggests. *See, e.g., Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) (noting that "*Tompkins*[2] got it wrong" but ultimately finding itself bound by *Tompkins* under the prior panel rule).

Indeed, in the opinion directly below, two judges of the three judge panel only concurred with the third judge, stating that if they were not bound by the prior panel precedent rule, they would "conclude that a habeas petition alleging an

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[2] The Eleventh Circuit previously held that *Panetti* does not apply to a second-in-time federal habeas petition raising *Brady*/*Giglio* claims because the constitutional violations asserted in these claims "occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition." *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257, 1259 (11th Cir. 2009).

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 v. Secretary, Department of Corrections*, 108 F.4th 1299, 1306 (11th Cir. 2024) (Pryor, J., and Wilson, J., concurring).

Likewise, other Circuit Courts of Appeals that have applied § 2244(b) to petitioners in Jennings' position have also issued subsequent panel decisions criticizing the analysis of prior panels. *See, e.g., Baugh v. Nagy*, No. 21-1844, 2022 WL 4589117 at *6 (6th Cir. 2022) (opining that "[u]pon further consideration, we respectfully believe that *Wogenstahl*[3] was incorrectly decided" and describing *Wogenstahl* as "ill-guided"); *see also Gage v. Chapell*, 793 F.3d 1159, 1165 (9th Cir. 2015) (acknowledging that the petitioner's "argument for exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit" but ultimately following circuit precedent that § 2244(b) applies); *see also Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) (disagreeing with *Tompkins*). These cases have found that "the *Panetti* factors – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine – compel the conclusion that second-in-time *Brady* claims cannot be 'second or successive.'" *Scott*, 890 F.3d at 1253.

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[3] Prior to deciding *Baugh*, a separate Sixth Circuit panel held that *Brady* claims are subject to § 2244(b)'s gatekeeping requirements because the factual predicate of the claim occurs before the filing of the petitioner's first habeas petition. *See In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018).

In sum, the Circuit Courts of Appeals are not as unanimous in their rejection of the argument raised in Jennings' appeal as the State's brief in opposition suggests, and this case is an appropriate vehicle for clarifying this issue.

III. The State's Interpretation of *Panetti* and 28 U.S.C. § 2244(b)(2) Would Foreclose Relief for Jennings and Similarly Situated Petitioners.

The State asserts that Jennings was not barred from litigating his *Brady* claims because he could have requested permission to file a second or successive petition. However, under the circumstances, such a rule is illogical because it "perversely rewards the government for keeping exculpatory information secret until after an inmate's first habeas petition has been resolved." *Bernard v. United States*, 141 S. Ct. 504, 506-07 (2020) (Sotomayor, J., dissenting from the denial of certiorari and application of stay).

The State's argument that petitioners in Jennings' position can still litigate their *Brady* claims by meeting the high bar of AEDPA's gatekeeping provisions and asking courts to authorize a second or successive federal habeas petition is a non sequitur; Jennings should not be required to meet this procedural hurdle because his claim is not second or successive under AEDPA. Under AEDPA, Jennings is entitled to habeas review of his conviction. Because "all the *Panetti* factors – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine – compel the conclusion that second-in-time *Brady* claims cannot be 'second or successive' for purposes of § 2244(h)," *Scott*, 890 F.3d at 1253, he is entitled to review without procedural hurdles that will hinder AEDPA's purposes and burden judicial and government resources with needless litigation. Instead, petitioners in

Jennings' position should be able to fully litigate their *Brady* claims when their petitions are not second or successive under AEDPA.

IV. Supreme Court Rule 10 Considerations Apply to Jennings' Claims.

The State incorrectly asserts that no Supreme Court Rule 10 considerations apply to Jennings' petition. Here, the Eleventh Circuit's decision below conflicts with this Court's decisions in *Bannister* and *Panetti*. And Jennings' petition, which asks this Court to settle whether AEDPA's gatekeeping provision bars a second-in-time federal habeas petition raising a *Brady* claim based on evidence that the State hid from the petitioner until the resolution of his first petition, is an important federal question with significant repercussions for federal criminal postconviction litigation. In other words, the Eleventh Circuit has "decided an important federal question in a way that conflicts with the relevant decisions of this Court." Supreme Court Rule 10(c). Although the considerations listed in Supreme Court Rule 10 are "neither controlling nor fully measuring the Court's discretion," the text of Supreme Court Rule 10(c) plainly applies to Jennings' petition. Therefore, review on writ of certiorari is appropriate in this case.

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.

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