[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15128
Non-Argument Calendar

D.C. Docket No. 1:18-cv-25165-DMM

JOSE ANTONIO JIMENEZ,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 13, 2018)

Before ED CARNES, Chief Judge, TJOFLAT, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Jose Antonio Jimenez, a Florida prisoner under a sentence of death, appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court promptly considered his petition, which he filed on December 10, and dismissed it for lack of jurisdiction on December 12, 2018, at approximately 9:45 a.m. Jimenez filed a notice of appeal shortly thereafter.[1] He is scheduled to be executed on December 13, 2018, at 6:00 p.m., very soon after the issuance of this decision.[2] After careful consideration, we affirm the district court's dismissal for lack of jurisdiction. We also deny Jimenez's motion for a stay of execution, since he cannot demonstrate a substantial likelihood of success on his petition.

I. Background

Jimenez was sentenced to death in 1994 after a jury convicted him of first-degree murder based on the following facts, as set forth by the Florida Supreme Court in his first appeal:

> On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a

[1] We **GRANT** Jimenez's motions for enlargement of brief, to submit brief without tables, and for leave to file reply to Appellee's response to application for stay of execution. We likewise **GRANT** the State's motion to file corrected answer brief.

[2] Due to the expedited nature of this litigation and the need to allow Jimenez time to seek certiorari if he desires to do so, we issue a somewhat abbreviated opinion, though we have carefully and thoroughly considered the issues Jimenez raises.

> neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
>
> Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach.[3]

Jimenez v. State, 703 So. 2d 437, 438 (Fla. 1997).

Soon after his arrest, Jimenez was indicted on one count of first-degree murder and one count of burglary with an assault and battery in an occupied dwelling. In October 1994, a jury found him guilty on both counts and unanimously recommended the death penalty. The trial court accepted the jury's recommendation and sentenced Jimenez to death for the murder conviction. The court sentenced Jimenez to a consecutive life sentence for the burglary conviction. On direct appeal, the Florida Supreme Court affirmed his conviction and sentence. *Id.* at 442. On May 18, 1998, the United States Supreme Court denied his petition for a writ of certiorari, and his sentence became final. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

In January 2000, Jimenez filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850.[4] He argued that his burglary conviction

[3] Jimenez continues to dispute these facts and maintain his innocence.

[4] Rule 3.850 provides for motions to vacate, set aside, or correct sentence. Fla. R. Crim. P. 3.850.

could not stand in light of *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). The trial court denied the motion, and the Florida Supreme Court affirmed that decision, concluding that *Delgado* did not apply retroactively. *Jimenez v. Florida*, 810 So. 2d 511, 512-13 (Fla. 2001). Jimenez filed a petition for writ of certiorari, which the United States Supreme Court denied. *Jimenez v. Florida*, 535 U.S. 1064 (2002).

Jimenez later filed several motions under Florida Rule of Criminal Procedure 3.851[5] and petitions for writ of habeas corpus challenging his conviction and sentence, all of which were denied. *See, e.g.*, *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003); *Jimenez v. Crosby*, 905 So. 2d 125 (Fla. 2005); *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337 (11th Cir. 2007); *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008); *Jimenez v. State of Florida*, 153 So. 3d 906 (2014).

As relevant to Jimenez's federal habeas application that is the subject of this appeal, on January 11, 2017, Jimenez filed another Rule 3.851 motion on the basis of the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The trial court denied that motion, and the Florida Supreme Court affirmed that decision. *Jimenez v. State*, 247 So. 3d 395 (Fla. 2018). Soon

[5] Rule 3.851 provides the grounds for collateral relief after death sentence has been imposed and affirmed on direct appeal. Fla. R. Crim. P. 3.851.

afterwards, Governor Rick Scott signed Jimenez's death warrant and set his execution for August 14, 2018.

On August 6, 2018, Jimenez filed another Rule 3.851 motion on the basis of police records he received as a result of a public-records request but that he had not previously been provided. In his motion, he argued that the new documents demonstrated his conviction was obtained in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The court denied the motion. Jimenez appealed that decision to the Florida Supreme Court, which stayed his execution on August 10, 2018. On October 4, 2018, that court affirmed the denial of his August 6 Rule 3.851 motion and lifted the stay of execution. *Jimenez v. State*, __ So. 3d __, 2018 WL 4784203 (Fla. 2018). Jimenez petitioned the United States Supreme Court for a writ of certiorari to review that decision. *See Jimenez v. State*, U.S. Sup. Ct. Dkt. No. 18-6970. That petition is currently pending. *See id.*

On November 6, 2018, Florida voters approved Amendment 11, a proposed amendment to the Florida Constitution.

Nine days later, on November 15, 2018, Governor Scott rescheduled Jimenez's execution for December 13, 2018.

On December 3, 2018, Jimenez filed a petition for a writ of habeas corpus in the Florida Supreme Court, arguing that Amendment 11 rendered a prior change to

Fla. Stat. § 921.141 retroactive to his case and his sentence therefore illegal under Florida state law and a violation of the Due Process and Equal Protection Clauses. On December 12, 2018, the Florida Supreme Court denied the petition, noting that Amendment 11 would not go into effect until January 8, 2019, and would not automatically render the prior amendment to Fla. Stat. § 921.141 retroactive to his case. *Jimenez v. Jones*, SC18-1999, 2018 WL 6521339 (Fla. Dec. 12, 2018).

II. The Instant Application

On December 10, 2018, in the Southern District of Florida, Jimenez filed the instant application to vacate his convictions and sentences under 28 U.S.C. § 2254. His application raised three claims. First, he argued that *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)—which required that juries in capital cases unanimously find aggravating factors, that the aggravating factors were sufficient to impose death, that the aggravating factors outweighed the mitigating circumstances, and that the jury recommended a sentence of death before the sentence of death may be imposed—rendered his own sentence a violation of the Eighth Amendment and Due Process Clause. Second, he asserted that the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Finally, he contended that, in light of the Florida electorate's passage of Amendment 11 in

November of 2018, his sentence is illegal under Florida law and therefore violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In conjunction with his application under § 2254, Jimenez also filed a motion for a stay of execution with the district court.

As we have noted, on December 12, 2018, the district court dismissed Jimenez's application for lack of jurisdiction. The court noted that Jimenez did not contend that his arguments met the requirements of 28 U.S.C. § 2244(b)(2), and that he had not sought authorization from this Court under § 2244(b)(3). Instead, Jimenez argued that, under *Panetti v. Quarterman*, 551 U.S. 930 (2007), his application was not "second or successive" within the meaning of § 2244 and therefore did not need to meet those requirements. Applying *Panetti* and this Court's precedent to Jimenez's three claims, the district court disagreed and found that Jimenez's application was "second or successive." And since Jimenez had not obtained prior authorization from this Court to bring what the district court determined was a "second or successive" application, the court concluded it lacked jurisdiction to entertain the petition. The district court also declined to issue a certificate of appealability and denied Jimenez's motion for a stay of execution.

Jimenez now appeals the dismissal of his first and second claims for lack of jurisdiction.[6] Jimenez also filed a motion in this Court to stay execution.

[6] Jimenez does not appeal the dismissal of his third claim.

III. Discussion

We hold that the district court correctly dismissed Jimenez's first two claims for lack of subject-matter jurisdiction and affirm on the basis of the district court's well-reasoned opinion.[7] As the district court explained, all three of Jimenez's claims qualify as "second or successive" under 28 U.S.C. § 2244(b), as we have construed that term in binding precedent. *See Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009); *see also Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). And since Jimenez did not receive prior authorization from this Court to

[7] The district court was under tremendous time pressure to resolve Jimenez's petition, so understandably, some scrivener's errors occurred in the district-court order. Since we affirm the district court on the basis of its well-reasoned opinion, we correct those errors here: (1) on page 5 of the order, the word "not" should be inserted as follows in the sentence that states, "The panel in *Tompkins* rejected the idea that claims involving discovery violations arising under *Brady* are not 'ripe' until the evidence is discovered; rather the Court explained that a claim is **not** 'ripe' in the *Panetti* sense when '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'"; (2) also on page 5, the bolded "or" in the following sentence should be "**and**" instead: "As such, the Court concluded that the petitioner's *Brady* and *Giglio* claims are covered by 2244(b)(2)(B), the newly discovered facts provision of the statute, which dictates that second or successive petitions should be dismissed unless the underlying facts 'could not have been discovered through the exercise of due diligence' **or** 'would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty"; and (3) on page 10, the bolded "can" in the following sentence should be "**should**" instead: "Here, while jurists of reason may find it debatable that the Court was correct in its procedural ruling—indeed, as mentioned above there is an existing split within the panels in the Circuit as to whether or not newly discovered evidence *Brady* claims **can** be considered second or successive—it does not follow that jurists of reason would find it debatable that the Emergency Petition states a valid claim of the denial of a constitutional right." Additionally, we note for the record that while there is some disagreement among judges of this Court as to whether *Tompkins* should be the law of this Circuit, there is no intracircuit split on the question of whether *Tompkins* is, in fact, binding precedent. It, of course, is unless and until it is overruled en banc or by the Supreme Court.

file his second or successive application, the district court lacked jurisdiction to consider it. 28 U.S.C. § 2244(b)(2).

IV. Stay of Execution

Jimenez also applied for a stay of execution from this court. A stay of execution is "equitable relief" which a court may grant if the moving party shows that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *DeYoung v. Owens*, 646 F.3d 1319, 1324 (11th Cir. 2011). For the reasons we have explained above, Jimenez's petition lacks a substantial likelihood of success. We therefore deny his application for a stay of execution.

V. Conclusion

For the foregoing reasons, the district court's decision is **AFFIRMED** and Jimenez's application for a stay of execution is **DENIED**.

ED CARNES, Chief Judge, joined by TJOFLAT, Circuit Judge, concurring:

We write separately to express our continued agreement with this Court's decision in Tompkins that Brady and Giglio claims are subject to the second or successive application requirements set out in 28 U.S.C. § 2244(b). See Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1260 (11th Cir. 2009); see also Scott v. United States, 890 F.3d 1239 (11th Cir. 2018) (following the Tompkins decision). There is no disagreement that Tompkins is binding precedent in this circuit. Nor is there any circuit split over the issue of whether Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842 (2007) made the second or successive application requirements inapplicable to Brady and Giglio claims. All three other circuits that have decided the issue since Panetti agree with ours that the second or successive application requirements do apply to Brady and Giglio claims. See Blackman v. Davis, No. 16-11820, — F.3d —, 2018 WL 6191348, at *5 (5th Cir. Nov. 28, 2018) (stating that petitioner's contention that Brady and Giglio claims are not subject to § 2244(b)(2)(B)'s second or successive requirements has been "rejected conclusively" by the Fifth Circuit); In re Wogenstahl, 902 F.3d 621, 627–28 (6th Cir. 2018) (holding that petitioner's Brady claims were subject to § 2244(b)(2)(B)'s second or successive requirements because the claims were "not unripe at the time [the petitioner] filed his initial petition" even though the petitioner "was unaware" of the facts giving rise to the claims at that time); Brown

v. Muniz, 889 F.3d 661, 668–73 (9th Cir. 2018) (holding that Panetti's reasoning does not extend to Brady claims and that they are subject to AEDPA's second or successive requirements because "the factual predicate supporting a Brady claim existed at the time of the first habeas petition") (quotation marks and brackets omitted); see also In re Pickard, 681 F.3d 1201, 1205 (10th Cir. 2012) (declining to certify second or successive Brady and Giglio claims under § 2244 because they did not meet the requirements of § 2255(h)); 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 requirements and explaining that if they were not "AEDPA's purpose of achieving timely, final resolutions of claims in the interests of justice and out of respect for state judicial processes would surely be eroded under such a regime").

ROSENBAUM, Circuit Judge, concurring:

I write separately to express my continued disagreement with this Court's decision in *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009). For the reasons set forth in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018), an application containing 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" application within the meaning of the statute. Absent our prior decision in *Tompkins*, and to the extent that Jimenez advanced an actionable *Brady* violation in his present application, I would have remanded the case to the district court for further proceedings on that claim.

Under the time constraints, and in light of the fact that we are nonetheless bound by *Tompkins*, I do not opine on whether, in the absence of *Tompkins*, Jimenez's first claim would be "second or successive" under *Panetti v. Quarterman*, 551 U.S. 930 (2007).