CAPITAL CASE
EXECUTION DATE – JULY 15, 2020

No. 20-

IN THE

Supreme Court of the United States

WESLEY IRA PURKEY,
Petitioner,

v.

WARDEN OF USP TERRE HAUTE,
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), this Court held that, for a state prisoner whose first opportunity to raise a claim of ineffective assistance of trial counsel is in an initial collateral-review proceeding, procedural default will not bar review of those claims in proceedings pursuant to 28 U.S.C. § 2254 when that default was the result of ineffective assistance of initial collateral-review counsel. Like the state prisoners in *Martinez* and *Trevino*, a federal capital prisoner generally cannot raise a claim of ineffective assistance of trial counsel on direct review; his first opportunity to raise such claims is on a motion under 28 U.S.C. § 2255. *See Massaro* v. *United States*, 538 U.S. 500, 508 (2003). To ensure that these claims are adequately developed and presented, federal capital prisoners are guaranteed counsel through post-conviction proceedings. 18 U.S.C. § 3599.

The question presented is: Whether and by what procedural mechanism federal capital prisoners who are in the analogous position of the state prisoners in *Martinez* and *Trevino*—*i.e.*, whose substantial claims of ineffective assistance of trial counsel were defaulted by ineffective § 2255 counsel—may seek review of such claims.

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PETITION FOR A WRIT OF CERTIORARI

Wesley Purkey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

Mr. Purkey was convicted and sentenced to death by a jury that undisputedly included one juror who was presumptively biased, because she had suffered a similar assault as the victim of Mr. Purkey's alleged crime, at the same age, and even shared the same name. His trial counsel had the juror questionnaire reflecting that bias yet did nothing to prevent that juror from deliberating and voting to sentence Mr. Purkey to death. That is clear structural error as a matter of law. In addition, his trial counsel put on only a meager mitigation case

after a halfhearted investigation that omitted generations of important family history and failed to develop the extensive abuse Mr. Purkey suffered at home, at school, or at church at the hands of his parish priest. Yet *no* court has ever reviewed those claims on its merits—a fact the Seventh Circuit found "troubling"—because Mr. Purkey also received ineffective assistance at his § 2255 proceeding. As a result, Mr. Purkey's right to the effective assistance of counsel at trial—the "bedrock" principle of our system of criminal justice—has never been vindicated.

This confluence of circumstances is identical to the situations that prompted this Court in *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), to hold that where a state prisoner receives ineffective assistance at his initial-review collateral proceeding, some further opportunity for review of substantial claims of ineffective assistance of trial counsel must be made available. For federal prisoners, the principle articulated in *Martinez* and *Trevino* is no less applicable. Here, Mr. Purkey sought review of his substantial ineffective assistance of trial counsel claims under § 2241, on the ground that § 2255 counsel's ineffectiveness rendered the § 2255 proceeding inadequate to test his conviction and sentence. The Seventh Circuit's rejection of that claim contravenes this Court's decisions in *Martinez* and *Trevino* and implicates a conflict among the circuits as to whether and how federal prisoners are protected by those decisions, if at all.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-27a) is unreported and is available at 2020 WL 3603779. The opinion of the district court (App. 29a-56a) is also unreported and is available at 2019 WL 6170069.

JURISDICTION

The court of appeals entered judgment on July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. §§ 2241, 2255. They are reproduced in the Appendix to this brief.

STATEMENT

A. Trial Court Proceedings

Mr. Purkey was convicted and sentenced to death in the U.S. District Court for the Western District of Missouri on one count of kidnapping resulting in death, in violation of 18 U.S.C. § 1201. *See* App. 4a-6a. The charge stemmed from the 1998 kidnapping, rape, and murder of sixteen-year-old Jennifer Long. *See* App. 3a-4a. Mr. Purkey was represented by lead counsel Frederick Duchardt, who has had more clients sentenced to death in the federal system than any other attorney, and at times by Laura O'Sullivan. *See* App. 4a; Rose, *Death row: the lawyer who keeps losing*, The Guardian (Nov. 24, 2016), https://bit.ly/3fwVDIp. Trial counsel was constitutionally ineffective at every stage of the proceeding.

Most notably, trial counsel was ineffective during jury selection. Mr. Duchardt failed to object to the seating of a juror whose striking similarities to the victim constituted a clear basis for a challenge for cause. App. 20a. Juror 13 disclosed on her juror form that she had been the victim of an attempted rape, that at the time of her assault she had been the same age as the victim, and that she even shared the victim's first

name. *Id.* A prospective juror with such striking similarities to the victim of the alleged crime is presumed biased as a matter of law. *See, e.g.*, *Smith* v. *Phillips*, 455 U.S. 209, 221-224 (1982) (O'Connor, J., concurring).[1] Yet Mr. Duchardt failed to move to strike her or even to inquire whether she could set her presumptive bias aside. The case proceeded to trial with Juror 13 empaneled (App. 20a)—a structural error that infected the entire trial.

Trial counsel was also ineffective during the penalty phase of the trial. Mr. Duchardt did not adequately develop the record of the unrelenting mental, physical, and sexual abuse by his parents, teachers, and clergy that Mr. Purkey endured throughout his childhood, his history of traumatic head injury, and his extensive history of substance abuse. Despite asking the court for funding for one, trial counsel did not hire a dedicated mitigation expert. Dist. Ct. App. 2115-2116, 2129.[2] Instead, he hired a personal friend as a fact investigator and asked him to conduct the mitigation investigation, even though the friend lacked the specialized qualifications required of a mitigation expert for a capital case.

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[1] The law was clear on that point in the Eighth Circuit (where Mr. Purkey was tried) at the time of Mr. Purkey's trial and conviction, so there is no question that counsel was ineffective for failing to strike her. *See Fuller* v. *Bowersox*, 202 F.3d 1053, 1056 (8th Cir. 2000) ("For habeas corpus purposes, such 'bias may be found either by an express admission, or by proof of specific facts which show such a close connection to the facts at trial that bias is presumed.'"); *see also United States* v. *Tucker*, 243 F.3d 499, 509 (8th Cir. 2001); *Mann* v. *Thalacker*, 246 F.3d 1092, 1097 (8th Cir. 2001).

[2] The Appendix appended to Mr. Purkey's petition for a writ of habeas corpus in the District Court is cited herein as "Dist. Ct. App."

Dist. Ct. App. 1182, 1188-1190, 1194, 1438. Because of the inadequate investigation, the jury only heard scant evidence of Mr. Purkey's history of alcohol and drug dependence and history of physical abuse. While § 2255 counsel presented additional evidence of Mr. Purkey's history of sexual abuse by his mother, *see* App. 8a, no one has ever heard the critical evidence developed by § 2241 counsel of generations of important family history and any mention of the extensive abuse Mr. Purkey suffered outside his home while at school or at church at the hands of his parish priest, *see* Dist. Ct. App. 78-88, 507-522, 545.

Mr. Purkey, still represented by trial counsel, appealed; the Eighth Circuit affirmed. *United States* v. *Purkey*, 428 F.3d 738 (8th Cir. 2005).

B. § 2255 Proceedings

In 2007, Mr. Purkey, represented by new counsel, timely filed a motion for relief pursuant to 28 U.S.C. § 2255 in the U.S. District Court for the Western District of Missouri. App. 6a. Initial-review collateral counsel raised a limited set of ineffective-assistance claims, but failed to raise the biased juror and extensive overlooked mitigation evidence relating to the intergenerational trauma in the Purkey family and Mr. Purkey's years-long history of abuse at church and school. *See* App. 6a, 20a-22a. Importantly, however, despite the importance of the evidence of Mr. Purkey's history of trauma and mental illness, § 2255 counsel did not hire any new experts to examine him. Dist. Ct. App. 496-500.

Without holding an evidentiary hearing, the district court concluded Mr. Purkey had not met his burden under either the deficient-performance or preju-

dice prongs of *Strickland* v. *Washington*, 466 U.S. 668 (1984). C.A. Supp. App. 79.[3] The court relied heavily on a 117-page sworn affidavit from Mr. Duchardt that affirmatively advocated against Mr. Purkey's claims and offered numerous false claims regarding the investigation and trial. *See* C.A. Supp. App. 71-79. The Eighth Circuit affirmed. C.A. Supp. App. 31.

C. § 2241 Proceedings

On August 27, 2019, Mr. Purkey, again represented by new counsel, filed a petition for habeas corpus in the U.S. District Court for the Southern District of Indiana—the district in which he is confined—pursuant to 28 U.S.C. § 2241.[4] The petition challenged Mr. Purkey's conviction and sentence on several grounds, including

[3] The Supplemental Appendix appended to the Brief for Petitioner-Appellant before the Seventh Circuit (ECF No. 10) is cited herein as "C.A. Supp. App."

[4] On July 25, 2019, the U.S. Department of Justice announced that it would resume executions after a 16-year hiatus. DOJ, Press Release No. 19-807, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, https://bit.ly/2Z8y8Qg. Mr. Purkey's execution date was set for December 13, 2019. In November 2019, U.S. District Court for the District of Columbia preliminarily enjoined his execution (and three others) under the new protocol, which the court held contravened the requirements of the Federal Death Penalty Act. *Roane* v. *Barr*, No. 19-mc-145 (D.D.C. Nov. 20, 2019), ECF No. 50. The Government appealed the injunction and, on April 7, 2020, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit vacated it. *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois* v. *Barr*, No. 19-1348, 2020 WL 3492763 (U.S. June 29, 2020). Immediately after the mandate issued from the D.C. Circuit, and while a petition for a writ of certiorari was pending before this Court, the Government set a new execution for Mr. Purkey of July 15, 2020.

that he had received ineffective assistance of trial counsel because trial counsel failed to strike a biased juror and failed to present critical mitigation evidence. The mitigation evidence presented in Mr. Purkey's § 2241 petition went "well beyond the evidence that post-conviction counsel presented [to the Eighth Circuit]." App. 22a, 25a.

With respect to jurisdiction, Mr. Purkey argued that this was not a prohibited "second or successive" § 2255 petition, and that he was permitted to file a § 2241 petition by operation of the Savings Clause of § 2255(e). App. 12a. As a general rule, a federal prisoner who wishes to attack his conviction or sentence must do so by motion brought pursuant to § 2255(a) in the federal district where he was sentenced. A "second or successive motion" is generally not permitted, unless the movant can point to either (1) "newly discovered evidence" that would undermine his conviction, or (2) a new, retroactive "rule of constitutional law … that was previously unavailable." 28 U.S.C. § 2255(h). However, the Savings Clause, codified in § 2255(e), creates an exception to the bar on successive habeas applications where "it … appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention." Under those circumstances, a federal prisoner may file a petition for a writ of habeas corpus under § 2241 in the federal district where he is confined. Citing *Martinez* and *Trevino*, Mr. Purkey argued that a federal prisoner—who, due to the ineffective assistance of § 2255 counsel, was denied a reasonable opportunity to present his substantial ineffective assistance of trial counsel claim—may seek relief under § 2241. *See* App. 18a. Under those circumstances, he argued, § 2255 is "inadequate or ineffective" to test the

legality of his conviction and sentence, thus triggering the Savings Clause of § 2255(e). *See* App. 18a-19a.

On November 20, 2019, the district court denied Mr. Purkey's petition, concluding that it was barred by § 2255(h), which generally prohibits the filing of "second or successive" federal habeas petitions. *See* App. 53a-55a. The court further held that the Savings Clause codified in § 2255(e) was not available to Mr. Purkey. Even if Mr. Purkey's initial § 2255 counsel was constitutionally ineffective, the court reasoned, that would not render the initial § 2255 proceedings "inadequate or ineffective" to test the legality of Mr. Purkey's detention within the meaning of the Clause. *See* App. 51a-55a. In reaching that conclusion, the district court distinguished *Martinez* and *Trevino*, where the Supreme Court held that procedural default does not bar federal habeas review of a state prisoner's substantial claims of ineffective assistance of trial counsel when that default was the result of ineffective assistance of initial-review collateral counsel. Those decisions, the district court said, did not "involve the Savings Clause" and therefore were "not controlling." App. 49a.

On July 2, 2020, the Seventh Circuit affirmed. The court (Wood, Brennan, St. Eve, JJ.) recognized that a federal prisoner who receives ineffective assistance of § 2255 counsel is functionally in the same position as the state prisoners in *Martinez* and *Trevino*. However, unlike those state prisoners, "the availability of further relief … is not a simple matter of federal common law," but is instead "governed by statutes." App. 25a. To benefit from the Savings Clause in § 2255(e), the court reasoned, "there must be a compelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem." App. 20a (emphasis added). Mr. Purkey could not make such a show-

ing because at the time he filed his § 2255 petition, the court found, "nothing *formally* prevented him from raising each of the three errors he now seeks to raise in his petition under 2241." App. 20a (emphasis added).

The court nonetheless explained that Mr. Purkey's underlying ineffective assistance of trial counsel claims were "serious"—specifically, those concerning Juror 13 and the inadequate mitigation case—and that it found "troubling" the fact that no court had ever considered those claims. App. 20a, 22a, 25a. The court emphasized that it had "rejected those points not on the merits, but because of [its] understanding of the safety valve language," but recognized that if its "reading of the safety valve is too restrictive, there would be significant issues to litigate." App. 26a. For that reason—and in recognition that Mr. Purkey had moved with appropriate dispatch in filing his § 2241 petition, that Mr. Purkey "faces categorically irreparable injury—death" absent a stay, that a stay would "not substantially harm the government, which has waited at least seven years to move forward with Purkey's case," and that "the public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case"—the Seventh Circuit issued a brief stay "to permit the orderly conclusion of the proceedings" in that court. App. 26a-27a.

Less than 36 hours after the Seventh Circuit issued its decision, at approximately 2 a.m. on July 4, the Government filed a petition for rehearing seeking to immediately vacate the stay. On July 6, the Seventh Circuit issued an order directing Mr. Purkey to respond to the Government's petition by 12 p.m. on July 10, which Mr. Purkey did. Rather than wait for the Seventh Circuit to decide its petition, however, the Government filed another emergency motion with this Court on Satur-

day, July 11, asking this Court to vacate the stay entered by the Seventh Circuit, primarily on the ground that the panel had not found likelihood of success on the merits, as required by *Nken* v. *Holder*, 556 U.S. 418 (2009).

On July 13, the Seventh Circuit panel issued an order denying the Government's request to vacate the stay. *See* App. 61a. The panel clarified that, in granting the stay, it "concluded that Purkey has made a strong argument to the effect that, under … *Martinez* … and *Trevino* …, a habeas corpus petitioner who has *never* been able to test the effectiveness of his counsel under the Sixth Amendment can overcome his procedural default in failing to do so in his first and only motion under section 2255" and that, for that reason, he "would be entitled to a hearing on the merits using the vehicle of section 2241." App. 60a. Accordingly, the panel explained, "we deem Purkey's chances of success on this point to be strong enough to satisfy *Nken*'s first requirement[.]" App. 60a-61a. The panel reiterated that it found "serious" the argument that, if Mr. Purkey cannot press his claims in a § 2241 petition, "he could literally go to his death without ever having the opportunity first to demonstrate that his Sixth Amendment rights were violated, and second, if he succeeds, to have a new trial untainted by that failing," explaining that "all defendants, including capital defendants, have a right to constitutionally effective counsel" and "[t]he information proffered in Purkey's section 2241 petition gives us concern that Purkey never received such counsel." App. 58a-59a.

With this in mind, the panel stated again that a "brief stay is necessary to complete our proceedings in an orderly way," including the resolution of a forthcoming petition for panel or en banc rehearing from Mr.

Purkey. App. 59a. Although the stay "would expire at the earliest … on Monday, August 24" (which the panel recognized is "a few weeks after July 15, the government's desired execution date"), the panel noted that the Government had neither provided a "reason why we should fore-shorten the time" for proceedings to conclude in the Seventh Circuit, nor established "that it would experience difficulty in re-scheduling Purkey's execution date for a time after our court has completed its review." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON WHETHER AND BY WHAT PROCEDURAL MECHANISM FEDERAL PRISONERS WHOSE SUBSTANTIAL CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WERE DEFAULTED BY INEFFECTIVE § 2255 COUNSEL MAY SEEK REVIEW

In *Coleman* v. *Thompson*, 501 U.S. 722 (1991), this Court held that an attorney's negligence does not constitute cause to excuse procedural default in state post-conviction proceedings. In *Martinez* v. *Ryan*, 566 U.S. 1 (2012), however, this Court recognized an equitable exception to that holding: The Court held that where, by virtue of the structure of a State's procedural framework, "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. The Court recognized that because many state-court systems "move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to

file such claims" and that a defendant's constitutional right to counsel—a "bedrock principle in our justice system"—will be difficult, if not impossible, to vindicate "[w]ithout the help of an adequate attorney." *Id.* at 11-13. But the Court limited its holding to state jurisdictions where ineffective assistance claims are *required* to be raised during initial collateral proceedings rather than on direct appeal.

The following year, the Court granted certiorari in *Trevino* v. *Thaler*, 569 U.S. 413 (2013), to clarify whether *Martinez*'s holding applied equally in jurisdictions where ineffective assistance of trial counsel claims were not prohibited outright during direct appeal proceedings, but where the state-court procedures made it "'virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim' on direct review." *Id.* at 423 (citations and brackets omitted). The Court held that it did. *See id.* at 428-429 (clarifying that *Martinez* also applies where the State's "procedural framework … makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" a substantial claim of ineffective assistance of trial counsel on direct appeal). As in *Martinez*, in *Trevino* the Court focused on the centrality of the effective assistance of trial counsel to our criminal justice system and, correspondingly, the importance of permitting prisoners a meaningful opportunity to develop and present substantial claims of ineffective assistance of trial counsel. *See id.* at 422-423; *see also Davila* v. *Davis*, 137 S. Ct. 2058, 2066 (2017) ("[T]he Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel.").

Martinez and *Trevino* by their terms considered only ineffective assistance of trial counsel claims by

state prisoners. This Court has never addressed their applicability to federal prisoners or, assuming they do apply, what procedural mechanisms are available to federal prisoners to vindicate the principles those decisions articulate. In the absence of guidance from the Court, the courts of appeals have reached divergent answers to this important question.

The Seventh Circuit in this case held that federal prisoners whose substantial claims of ineffective assistance of trial counsel were never reviewed by any court due to the ineffective assistance of § 2255 counsel may not resort to § 2241 to press those claims. As explained, the Seventh Circuit here held that, to benefit from the Savings Clause in § 2255(e), "there must be a compelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem" and that ineffective assistance of § 2255 counsel does not create such an impossibility. App. 20a (emphasis added). The court reached that conclusion notwithstanding its recognition that "*Martinez* and *Trevino* can be read to say that a person can overcome a procedural bar to bringing a claim of ineffective assistance of trial counsel in a federal court, if counsel in postconviction proceedings was him- or herself ineffective." App. 25a.[5]

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[5] In unpublished decisions, the Sixth and Third Circuits have held that *Martinez* and *Trevino* are inapplicable to federal prisoners trying use § 2241 to bring ineffective assistance of trial counsel claims. *See* Order 3, *Abdur-Rahiim* v. *Holland*, No. 15-5297, ECF No. 13-2 (6th Cir. Jan. 12, 2016) (refusing to apply *Martinez* and *Trevino* to a federal prisoner on the ground that those cases "deal[t] solely with the procedural default of ineffective-assistance-of-counsel claims in state habeas corpus proceedings" and "they have no bearing whatever on the § 2255(e) savings clause"); *Jack-*

However, in *Ramirez* v. *United States*, 799 F.3d 845 (7th Cir. 2015), the Seventh Circuit held that a federal prisoner who receives ineffective assistance of initial-review collateral counsel may use Federal Rule of Civil Procedure 60(b) to reopen his § 2255 proceedings to press substantial claims of ineffective assistance of trial counsel. The court explained:

> Because the federal courts have no established procedure … to develop ineffective assistance claims for direct appeal, the situation of a federal petitioner is the same as the one the Court described in *Trevino*: as a practical matter, the first opportunity to present a claim of ineffective assistance of trial or direct appellate counsel is almost always on collateral review, in a motion under section 2255.

Id. at 853; *see also id.* at 854 ("[I]n the great majority of federal cases, ineffectiveness claims must await the first round of collateral review."). The court found there was "no reason to distinguish between actions at the state level that result in procedural default and the consequent loss of a chance for federal review, and actions at the federal level that similarly lead to a procedural default that forfeits appellate review" and thus the holdings of *Martinez* and *Trevino* "'apply to all collateral litigation under 28 U.S.C. § 2254 or § 2255.'" *Id.* at 852, 854.

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man v. *Shartle*, 535 F. App'x 87, 89 n.5 (3d Cir. 2013) (per curiam) ("*Trevino* and *Martinez* deal with state prisoners' ability to bring ineffective assistance of counsel claims, despite being procedurally barred. They do not address the ability of federal prisoners to use § 2241 to bring ineffective assistance of counsel claims."); *see also United States* v. *Sheppard*, 742 F. App'x 599, 601 (3d Cir. 2018) (per curiam).

By contrast, in *United States* v. *Lee*, 792 F.3d 1021 (8th Cir. 2015), the Eighth Circuit refused to permit a federal prisoner resort to Rule 60(b) under analogous circumstances. There, a federal capital prisoner filed an initial § 2255 petition asserting that his trial counsel was ineffective. His court-appointed § 2255 counsel, however, failed to present available evidence to support his claim, and his petition was dismissed for lacking evidentiary support. Lee filed a *pro se* motion under Rule 60(b), arguing that under *Martinez* and *Trevino*, he was entitled to one opportunity to present his substantial claim of ineffective assistance of trial counsel, but had been denied it by ineffective assistance of § 2255 counsel. The district court treated Lee's Rule 60(b) motion as a second or successive habeas petition and dismissed it. The Eighth Circuit affirmed, holding that *Martinez* and *Trevino* were "inapposite" to Lee, a federal prisoner, because those cases "involved federal habeas review of state court decisions under § 2254." *Id.* at 1024.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *MARTINEZ* AND *TREVINO*

The Seventh Circuit's decision contravenes this Court's decisions in *Martinez* and *Trevino*. Prisoners—and in particular, those facing a sentence of death—must have at least one reasonable opportunity to challenge the effectiveness of their trial counsel. Where a prisoner must wait until initial-review collateral proceedings to pursue an ineffective assistance of trial counsel claim that has "some merit," and where counsel at those initial-review proceedings is absent or ineffective, the constitutional right to effective assistance of trial counsel—"a bedrock principle in our justice system"—will be difficult, if not impossible, to vindicate.

Martinez, 566 U.S. at 12-14; *see also Trevino*, 569 U.S. at 428-429. That is the central premise of this Court's decisions in *Martinez* and *Trevino*.

A federal prisoner with substantial claims of ineffective assistance of trial counsel, who lacked effective assistance of initial-review collateral counsel, is in the exact same position as the state prisoners in *Martinez* and *Trevino*. In the normal course, a federal prisoner first files a direct appeal, where he is entitled to counsel. *See* Fed. R. Crim. P. 44(a); *Vinyard* v. *United States*, 804 F.3d 1218, 1224-1225 (7th Cir. 2015). But the timing for direct appeals required under the federal rules precludes bringing adequately developed claims of ineffective assistance of trial counsel. Indeed, the federal courts of appeals have actively discouraged federal prisoners from bringing those claims on direct appeal. *See Ramirez*, 799 F.3d at 853 ("Raising ineffective assistance on direct appeal is imprudent … unless the contention is made first in the district court and a full record is developed.").

A motion pursuant to § 2255 thus provides the federal prisoner's first real opportunity to raise claims of ineffective assistance of trial counsel. *See Massaro* v. *United States*, 538 U.S. 500, 508 (2003). But where that proceeding is "undertaken … with ineffective counsel," the collateral review proceeding "may not [be] sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 14. That is because, as this Court recognized in *Martinez*, ineffective assistance of trial counsel claims are difficult if not impossible to mount "[w]ithout the help of an adequate attorney." *Id.* at 11-13. Yet, under the constraints of § 2255, that is the only chance a federal prisoner—even one sentenced

to death—will get to present substantial claims of ineffective assistance of trial counsel.

In the Antiterrorism and Effective Death Penalty Act of 1996, Congress restricted the availability of "second or successive" habeas petitions under § 2255 to situations where the movant can point to either "newly discovered evidence" that would undermine his conviction, or a new, retroactive "rule of constitutional law … that was previously unavailable." 28 U.S.C. § 2255(h). But, in doing so, Congress did not alter the Savings Clause of § 2255(e)—an implicit acknowledgment that § 2241 would be available in some cases other than the two narrow circumstances identified in § 2255(h).

For a federal prisoner—and in particular, for a federal capital prisoner—whose substantial claim of ineffective assistance of trial counsel was not presented in his § 2255 petition due to the ineffective assistance of § 2255 counsel, § 2241 must be available. Under those circumstances, because § 2255 counsel was ineffective, the prisoner is denied "an *opportunity* to bring his argument," and thus the "'*remedy* by motion'" under § 2255 is "'inadequate or ineffective'" to test the legality of his detention. *Prost* v. *Anderson*, 636 F.3d 578, 584-585 (10th Cir. 2011) (Gorsuch, J.). This is not to say that because the prisoner was denied *relief*, § 2255 is inadequate or ineffective. Rather, it is the denial even of an *opportunity* to present substantial claims of ineffective assistance of trial counsel that renders the *remedy* inadequate or ineffective to test the legality of the conviction and sentence. *See id.* Indeed, under those circumstances (as here), *no* court will ever review the prisoner's substantial claims of ineffective assistance of trial counsel before he is put to death. For that reason, the Seventh Circuit's conclusion that to benefit from the Savings Clause in § 2255(e), "there must be a com-

pelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem"—and that ineffective assistance of § 2255 counsel does not create such an impossibility—is incorrect. App. 20a (emphasis added). Where a federal capital prisoner has ineffective § 2255 counsel, raising substantial claims of ineffective assistance of trial counsel is—for all practical purposes—impossible. Accordingly, the principles this Court articulated in *Martinez* and *Trevino* require that such prisoners be given the opportunity to raise such claims in a petition under § 2241.

III. THE QUESTION PRESENTED IS IMPORTANT AND MERITS THIS COURT'S IMMEDIATE REVIEW

The effective result of the circuits' disparate approaches is that federal capital prisoners in some jurisdictions who receive ineffective assistance of § 2255 counsel have no reasonable opportunity at all to present substantial claims of ineffective assistance of trial counsel. Whether and by what procedural mechanism such prisoners can press their ineffective assistance of trial counsel claims is important and worthy of this Court's review, for at least four reasons: (1) the importance of the right at stake; (2) the creation of an unwarranted disparity between state and federal prisoners; (3) this issue is likely to recur; and (4) the issue is not likely to percolate further. *See* S. Ct. R. 10(c).

1. The right to effective assistance of trial counsel is the "bedrock" of our criminal justice system. *Martinez*, 566 U.S. at 12; *see also Davila*, 137 S. Ct. at 2066-2067. Without effective assistance of trial counsel, no defendant can receive a fair trial. *See generally Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963) (characterizing as an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a

fair trial unless counsel is provided for him"); *see also Martinez*, 566 U.S. at 12 ("[T]he right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged."). The necessity that a defendant receive effective assistance of trial counsel—while present in every criminal prosecution—is of heightened importance in a capital case, where the defendant's very life is at stake and defense counsel must be attuned to issues not present in non-capital cases.

Equally true is the proposition "the initial-review collateral proceeding, if undertaken … with ineffective counsel, may not [be] sufficient to ensure … proper consideration [of] a substantial claim" of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 14. That is because "[c]laims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Id.* at 11. Accordingly, as this Court has recognized, "[t]o present a claim of ineffective assistance at trial …, a prisoner likely needs an effective attorney." *Id.* at 12. Again, the need for effective assistance of collateral counsel to ensure the presentation of ineffective assistance of trial counsel claims is particularly acute in capital cases, given the immense stakes. Congress recognized as much in ensuring that capital defendants (unlike most federal prisoners) would have the right to counsel not only through trial and direct appeal, but also in post-conviction proceedings. 18 U.S.C. § 3599; *see Martel* v. *Clair*, 565 U.S. 648, 658-660 (2012).

Accordingly, where, as here, counsel in § 2255 proceedings is ineffective in failing to investigate and develop substantial claims of ineffective assistance of trial

counsel, those claims will never be reviewed by *any* court. It was this very concern that motivated this Court in *Martinez* and *Trevino* to create an equitable exception to *Coleman* for state prisoners. Such a rule will result in federal capital defendants being executed without ever having a meaningful opportunity to test the legality of their conviction and sentence, when that conviction and sentence was tainted by the ineffective assistance of trial counsel.

2. Federal capital prisoners who have been denied effective assistance of § 2255 counsel are in the exact same position as the state prisoners who benefit from *Martinez* and *Trevino*, as § 2255 proceedings are federal prisoners' first opportunity to raise ineffective assistance of trial counsel claims. *See Massaro*, 538 U.S. at 508. Denying resort to § 2241 under analogous circumstances, then, creates an unjustified distinction between state and federal prisoners that uniquely disfavors the latter. Such a distinction is particularly unjustified given that Congress provided with respect to state prisoners that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254," 28 U.S.C. § 2254(i), but did not include any such limitation in § 2255 for federal prisoners. And, unlike federal habeas review of state prisoners' defaulted claims, permitting federal prisoners to raise in a § 2241 petition substantial ineffective assistance of trial counsel claims defaulted by ineffective § 2255 counsel presents no comity concerns.

Moreover, as the Court has repeatedly emphasized, there is a constitutional imperative for a reliable determination of guilt in capital cases. *See, e.g.*, *Spaziano* v. *Florida*, 468 U.S. 447, 456 (1984) ("We reaffirm our commitment to the demands of reliability in decisions

involving death[.]"); *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason, rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (footnote omitted)). For that reason, the rationale for *Martinez* and *Trevino*—that a fair trial requires effective assistance of trial counsel, and that the integrity of our system of justice requires that meaningful review of substantial claims of ineffective assistance of trial counsel—is manifestly present here.

3. This issue is important, given that the federal government has—for the first time in nearly two decades—begun scheduling executions. Currently, four prisoners (including Mr. Purkey) are scheduled for execution, but there are nearly 60 prisoners on federal death row, some of whom face the possibility of execution despite their having substantial claims of ineffective assistance of trial counsel that have never been reviewed by any court.[6] Accordingly, the question of whether federal capital defendants with substantial claims of ineffective assistance of trial counsel, who received ineffective assistance of § 2255 counsel, can press such claims in petitions brought under § 2241, is bound to recur. The lower courts would benefit from this Court's guidance on that question.

4. Lastly, even though the question is likely to recur, a circuit split is not likely to develop on this question. That is because of the approximately 60 federal

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[6] *See* Death Penalty Information Center, Federal Death Penalty, https://bit.ly/2CaugVI (visited July 15, 2020).

death row prisoners, nearly all of them are incarcerated at the U.S. Penitentiary in Terre Haute, Indiana.[7] A small handful of federal death row prisoners are currently incarcerated at the U.S. Penitentiary in Florence, Colorado, but each will be transferred to Terre Haute once an execution date is set.[8] Because § 2241 petitions must be filed in the district where the prisoner is incarcerated, nearly all claims of this type must be brought in the U.S. District Court for the Southern District of Indiana (the district in which Terre Haute sits), where the Seventh Circuit's decision will bar consideration.

IV. THIS CASE IS AN IDEAL VEHICLE

This case is a good vehicle to resolve the important question presented by this petition because Mr. Purkey has substantial claims of ineffective assistance of trial counsel that have never been reviewed by any court—challenges so "serious" that a panel of the Seventh Circuit issued a stay of his execution on the ground that those claims "are worthy of further exploration." App. 25a-26a.

As explained, Mr. Purkey was convicted and sentenced to die by a juror who was presumed biased as a matter of law—who had suffered a similar assault as the victim of Mr. Purkey's alleged crime, at the same age, and even shared the same name. Juror 13 disclosed all of this on her juror questionnaire, but trial counsel failed to object to the seating of this juror, or

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[7] *See id.*

[8] Trigg, *Federal Execution Decision Hardly Shocks ISU Crime, Policy Expert*, Tribune Star (July 25, 2019), https://bit.ly/308HOcK.

even to inquire of her further. The seating of Juror 13 was a fundamental structural defect that deprived Mr. Purkey of his constitutional right to a trial by an impartial tribunal. Trial counsel also failed to present an adequate mitigation case, meaning that the jury was not in possession of important facts about Mr. Purkey's history of trauma and mental health; had the jury been in possession of that information, there is a reasonable probability that it would have changed the jury's sentencing recommendation.

Mr. Purkey's § 2255 counsel managed to raise none of these issues and for that reason Mr. Purkey's substantial claims of ineffective assistance of trial counsel have never been considered by any court. This petition is the perfect vehicle for clarifying that, under these circumstances, § 2255 is "inadequate or ineffective" to test a capital prisoner's conviction and sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-3318

WESLEY IRA PURKEY
Petitioner-Appellant,
v.

UNITED STATES OF AMERICA, *et al.*,
Respondents-Appellees.

Argued June 16, 2020
Decided July 2, 2020

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 2:19-cv-00414-JPH-DLP – **James P. Hanlon**, *Judge*.

OPINION

Before WOOD, *Chief Judge*, and BRENNAN and ST. EVE, *Circuit Judges*.

WOOD, *Chief Judge*. Accuracy and finality are both central goals of the judicial system, but there is an inherent conflict between them. Suppose later information comes to light in a criminal case, and that information reveals potential factual or constitutional errors in the original proceeding. Do we privilege accuracy and re–open the case, or do we privilege finality and leave the errors unexamined? And if we do permit a second look, is a third or fourth also proper? The case

before us presents just such a question, and the stakes could not be higher. We must decide whether Wesley Purkey, who sits on federal death row at the U.S. Penitentiary in Terre Haute, Indiana, has run out of opportunities to challenge his conviction and death sentence for kidnapping and murder. Purkey urges that his proceedings up to now have been undermined by ineffective assistance of counsel, first at the trial level, and then on collateral review. The United States argues that Purkey already has had an opportunity to challenge the effectiveness of trial counsel and, under the governing statutes, he has come to the end of the line. The district court ruled for the government. We conclude that this is not one of those rare cases in which the defendant is entitled to another day in court, and so we affirm the district court's judgment.

I

We can be brief about the underlying facts, since we are concerned almost exclusively about procedure in this appeal. On January 22, 1998, Purkey (then 46 years old) saw Jennifer Long at a grocery store in Kansas City, Missouri. He asked her if she wanted to party with him. She accepted the invitation and got into Purkey's pickup truck. At the time, Long was 16 years old; she commented to Purkey that she had been at her high school but had left after an argument with some friends.

Matters almost immediately took a bad turn: Purkey told Long that he needed to stop off briefly at his house in nearby Lansing, Kansas, but Long objected. Purkey then threatened her by removing a boning knife from the glove box and placing it under his thigh, while telling her that he would not let her out of the truck. He drove her across the state line to his home,

where he raped her, stabbed her repeatedly with the boning knife, and ultimately killed her.

In order to conceal the murder, Purkey stored Long's body in a toolbox for a few days; he later dismembered it and burned the pieces in his fireplace. What he could not destroy, he dumped into a septic lagoon.

That was not Purkey's only murder during 1998. In October, he killed 80–year–old Mary Ruth Bales using only the claw end of a hammer. This took place in Kansas, where he was quickly caught and placed in custody. In December 1998, while awaiting trial in the Bales case, Purkey sent a letter to Detective Bill Howard of the Kansas City, Kansas, police department, stating that he wanted to talk about a kidnapping and homicide that had occurred earlier that year. Purkey also insisted that an FBI agent come along. His reason was this: he realized that he faced a life sentence in Kansas for the Bales murder, but he thought that if he were convicted on federal charges, he would also receive a life sentence, but he could serve it in a federal facility. It apparently did not occur to him that the death penalty is possible for certain federal crimes.

Purkey had several conversations with Detective Howard and FBI Special Agent Dick Tarpley. In each of them, he said that he planned to plead guilty in the Bales case. He also expressed a willingness to confess to another murder in exchange for a life sentence in federal prison. Howard and Tarpley promised to inform the U.S. Attorney in Kansas of Purkey's offer, but they made no other commitment. Purkey then confessed that nine months earlier, he had kidnapped a young woman named Jennifer in Kansas City, Missouri, transported her to his home, and had raped, killed, dismembered, and disposed of her. Howard and Tarpley

passed this information along to the U.S. Attorney, who indicated that if Purkey cooperated further, he might be willing to prosecute the case.

Purkey did cooperate, by taking Howard and Tarpley to the crime scene, showing them the septic pond where he had deposited the remains, giving handwritten and oral confessions, and identifying Long's photograph from a lineup. Purkey was under the impression that he was negotiating for a life sentence, but Howard and Tarpley denied that any such deal was on the table. And indeed, on October 10, 2001, after Purkey pleaded guilty in Kansas court to the Bales murder, a grand jury in the Western District of Missouri indicted him for the kidnapping, rape, and murder of Long, in violation of 18 U.S.C. §§ 1201(a), 1201(g), and 3559(d). The U.S. Attorney filed a notice that the government planned to seek the death penalty. See 18 U.S.C. § 3593(a).

II

A

At the trial, Purkey was represented by Attorneys Frederick Duchardt, Jr. (principal counsel) and Laura O'Sullivan. Because Purkey had repeatedly confessed that he kidnapped Long (four times, by the government's count), his defense depended on the jury's accepting his contention that he had lied when he said that he took her by force, and that the truth was instead that he thought she was a prostitute who willingly accompanied him from Missouri to Kansas. He testified that he had fabricated the claim of force because he wanted to be prosecuted in federal court. The government responded with certain statements from Purkey's suppression hearing, at which he admitted that he took Long across state lines against her will, to impeach his

trial testimony. Purkey's lawyers made no effort to exclude this evidence, which he now says was ultimately used not just for impeachment, but (impermissibly) to prove the truth about coercion. The jury was not persuaded by Purkey's account; on November 5, 2003, it returned a verdict of guilty.

The penalty phase of the trial began shortly thereafter, on November 10, 2003. Purkey's lawyers submitted evidence on 27 mitigating factors, though as we will see, current counsel believe that their work fell short of the constitutional minimum. Experts testified that Purkey both had organic brain damage, principally stemming from severe injuries suffered in car accidents, and that his mental capacity was diminished. The government offered evidence in opposition to the alleged mitigating factors, and it also introduced evidence of six statutory and four non–statutory aggravating factors. See 18 U.S.C. § 3592(c) (listing 16 statutory aggravating factors and permitting consideration of any other aggravating factor for which the defendant received notice). The jury found that the government had proven the existence of all six statutory factors. See 18 U.S.C. §§ 3592(c)(1), (2), (3), (4), (6), and (11). It also found three of the four non–statutory factors: loss because of personal characteristics and impact on the family; previous vicious killing of Bales; and substantial criminal history.

The penalty question was submitted to the jury on November 19, 2003; it returned a death sentence on the same day. Although the verdict form included space for findings on mitigating factors, the jury left that section blank. When the jury announced its verdict, defense counsel initially objected to this omission and the court offered to send the jury back for further deliberations. But the government objected, and defense counsel dropped the point without further comment. The

court thus never resolved the question whether the blank form meant that the jury neglected to address the question of mitigation, or if it meant that it thought about the subject and concluded that there was nothing to report. The court formally imposed a sentence of death and entered its judgment on January 23, 2004.

Purkey appealed to the Eighth Circuit, which affirmed the conviction and sentence. *United States v. Purkey*, 428 F.3d 738 (8th Cir. 2005) (*Purkey I*). The Supreme Court denied Purkey's petition for a writ of certiorari. *Purkey v. United States*, 549 U.S. 975 (2006). Purkey then filed a motion for postconviction relief under 28 U.S.C. § 2255.

B

Purkey raised two primary claims in his section 2255 proceedings: (1) ineffective assistance of trial counsel in 17 different particulars, in violation of his Sixth Amendment rights; and (2) several alleged violations of his due process rights during the trial (namely, government misconduct during the trial, insufficient evidence to find kidnapping beyond a reasonable doubt, and error in the jury's failure to address the question of mitigating evidence). He urged the district court to give him an evidentiary hearing on the ineffectiveness–of–counsel claim. In order to respond to that charge, the government submitted a 117-page affidavit from attorney Duchardt, in which Duchardt defended his work.[1] Purkey asserted that the court could not take

[1] The district court ordered the preparation of that affidavit in response to a motion from the government. See *Purkey v. United States*, No. 06-8001-CV-W-FJG, 2008 WL 11429383 at *2 (W.D. Mo. Feb. 1, 2008). In the same order, the court denied Purkey's counsel's motion to compel the Federal Bureau of Prisons (BOP) to provide Purkey with necessary psychiatric treatment, it

Duchardt's word on these points, and worse, that Duchardt had misrepresented certain things and had violated his duty of confidentiality to Purkey. The district court decided, however, that Purkey had failed to overcome the presumption that Duchardt's actions reflected trial strategy. It therefore denied relief under section 2255. *Purkey v. United States*, No. 06-8001-CV-W-FJG, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009) (*Purkey II*).

Through counsel, Purkey moved to alter or amend the court's rejection of his section 2255 motion; at the same time, he filed a pro se motion "to Withdraw Habeas Proceedings and Set an Expeditious Execution Date." *Purkey v. United States*, No. 06-8001-CV-W-FJG, 2009 WL 5176598 (W.D. Mo. Dec. 22, 2009) (*Purkey III*). The district court denied the motion insofar as it sought reconsideration of the denial of relief under section 2255, and it permitted Purkey to withdraw the pro se motion seeking the abandonment of his section 2255 request and an early execution date. Nearly a year later, the court issued a lengthy opinion in which it denied Purkey's request for a certificate of appealability. *Purkey v. United States*, No. 06-8001-CV-W-FJG, 2010 WL 4386532 (W.D. Mo. Oct. 28, 2010) (*Purkey IV*).

Turning to the Eighth Circuit, Purkey was successful in obtaining a certificate of appealability "to review whether Purkey received effective assistance of counsel during the penalty phase of the trial and whether the district court abused its discretion by denying relief without conducting an evidentiary hearing." *Purkey v.*

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denied Purkey's pro se motion seeking leave to dismiss counsel and proceed pro se, and it gave the government an extension of time in which to respond to the motion under section 2255.

United States, 729 F.3d 860, 861 (8th Cir. 2013) (*Purkey V*). The certificate permitted "Purkey to challenge three aspects of Duchardt's performance in this proceeding: (1) his alleged failure to adequately prepare and present the testimony of three expert witnesses, (2) his alleged failure to adequately investigate and prepare two mitigating witnesses, which resulted in their testimony being more prejudicial than beneficial, and (3) his alleged failure to adequately investigate and present other mitigating evidence." *Id.* at 862.

The Eighth Circuit found that Duchardt had presented "a lengthy and detailed mitigation case" during the penalty phase. *Id.* at 863. Over two days, he offered testimony from 18 witnesses—family members, inmates, and religious counselors—all of whom stated that Purkey's parents had inflicted significant physical and emotional abuse on him. Both were alcoholics, his mother (and many others) humiliated him because he was a stutterer, and his mother sexually abused both him and his brother in the most graphic ways imaginable. Purkey's medical and mental health records were introduced; they showed that Purkey had a serious personality disorder and a below-average IQ. Although section 2255 counsel had more to offer, the Eighth Circuit found that the new material was "entirely cumulative." *Id.* at 865. Moreover, the court added, to the extent the proffered information did not cover the same ground as the penalty phase evidence, it could not conclude that there was a reasonable probability that the new evidence would have changed the result, given the particularly gruesome nature of the crime. *Id.* at 866. Finally, it saw no abuse of discretion in the district court's decision not to hold an evidentiary hearing. Purkey sought certiorari from this decision, but the Supreme Court denied review. 574 U.S. 933 (2014).

C

That set the stage for the current proceedings—and we mean to use the plural, because there are three moving pieces, although we are involved in only one of them. As are all federal prisoners under a sentence of death, Purkey is housed in the U.S. Penitentiary in Terre Haute, Indiana. For many years—to be exact, since March 18, 2003, when Louis Jones, Jr. was executed—the federal government has not carried out any executions. But policy changed in the current Administration, which is moving quickly to resume executions. On July 25, 2019, the government issued a notice scheduling Purkey's execution for December 13, 2019. Losing no time, on August 27, 2019, Purkey filed a detailed petition under 28 U.S.C. § 2241 in the Southern District of Indiana challenging the constitutionality of his conviction and death sentence. We refer to this as the "Habeas Corpus" case; it is the one presently before us. Second, on October 21, 2019, Purkey filed a complaint in the District of Columbia challenging the execution protocol that the Bureau of Prisons (BOP) proposes to use. We refer to this as the "Execution Protocol" case. Finally, on November 11, 2019, Purkey filed another complaint in the District of Columbia, asserting that he was entitled to relief from the death penalty under the Supreme Court's ruling in *Ford v. Wainwright*, 477 U.S. 399 (1985). We refer to this as the *Ford* claim.

1

Before turning to the Habeas Corpus case, we say a word about the Execution Protocol litigation and the *Ford* claim. The impetus for the Execution Protocol litigation came from the fact that the Federal Death Penalty Act of 1994 (FDPA) calls for federal executions

to be done "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). At the time the Department of Justice announced that it had scheduled Purkey's execution for December 13, 2019, there was a consolidated action pending in the district court for the District of Columbia. In that case numerous death–row inmates (some of whom also had fixed execution dates) challenged the execution protocol that BOP planned to use for them. The Protocol, adopted in 2019, calls for BOP to use a single drug, pentobarbital, to carry out executions. See *Matter of Federal Bureau of Prisons' Execution Protocol Cases*, Nos. 19-mc-145 (TSC) *et al.*, 2019 WL 6691814 (D.D.C. Nov. 20, 2019).

The details of this litigation need not detain us. What is important is that the D.C. district court preliminarily enjoined the Department of Justice from moving ahead under the 2019 Protocol, noting among other things that it had taken DOJ eight years to come up with the Protocol, that the defendants had a strong interest in litigating the legality of their executions, and that a minor additional delay would not irreparably injure the government. The initial dates thus came and went with no executions. The government promptly appealed, however, and a divided panel of the Court of Appeals for the District of Columbia Circuit vacated the injunction and remanded the case to the district court. See *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020). The majority held that the FDPA does not compel the DOJ to follow every last detail of the relevant state's execution procedures, and that the Department did not violate the Administrative Procedure Act, because this matter is exempt from notice–and–comment rulemaking. The inmates immediately filed a petition for a writ of certio-

rari, which was docketed as No. 19-1348 under the name *Bourgeois v. Barr*. On June 29, the Supreme Court denied the petition along with an application for a stay. We have no role in the Execution Protocol litigation.

2

Purkey's *Ford* claim is, by definition, an individual one. In it, he asserts that he is now afflicted with dementia (Alzheimer's type) and schizophrenia, and that these conditions have worsened over the time he has been in prison, to the point that he no longer appreciates why he faces execution. The government contests these assertions. *Ford* holds that the Eighth Amendment bars the execution of a person who, as of the planned time for death, is "insane." See 477 U.S. at 410 (plurality opinion of Marshall, J.), 421-22 (Powell, J., concurring in the judgment). See also *Panetti v. Quarterman*, 551 U.S. 930 (2007) (confirming *Ford* holding and holding that a *Ford* claim is not ripe until execution is imminent). On February 24, 2020, the government filed a motion to dismiss the *Ford* claim, or in the alternative to transfer it from the District of Columbia (where Purkey filed it) to the Southern District of Indiana. Purkey filed his motion in opposition on March 16, and the government responded on March 20. To date, the district court has not yet ruled on the motion.

In the midst of all this, the Department of Justice issued a statement on June 15 resetting Purkey's execution date for July 15, 2020. Purkey responded with a motion filed on June 22 for a preliminary injunction barring the execution. The government's response to that motion was due on June 29, and Purkey's reply is due on July 2. We have no current role in the *Ford* litigation.

That brings us to the case before us, which Purkey brought under the basic habeas corpus statute, 28 U.S.C. § 2241. We held oral argument in this case on June 16, a date that had long been scheduled as of the time the government issued the new execution schedule on June 15. The most important question we must answer is whether Purkey is entitled to use section 2241. Only if the answer is yes may we reach the merits of the claims he wishes to bring.

In the great majority of cases, the exclusive post-conviction remedy for a federal prisoner is the one Purkey already has invoked: a motion under 28 U.S.C. § 2255. Strict procedures govern the way such a motion must be presented. First, there is a one–year statute of limitations, which runs from one of four dates specified in the statute. See 28 U.S.C. § 2255(f). The only relevant date in Purkey's case is the first: "the date on which the judgment of conviction becomes final." Purkey met that deadline; his section 2255 motion was the subject of the district court's decisions in *Purkey II* through *IV* and the Eighth Circuit's ruling in *Purkey V*. Second, a federal prisoner is limited to one motion under section 2255 unless he receives permission to file a second or successive motion from the appropriate court of appeals. See 28 U.S.C. § 2255(h). The criteria for authorization are draconian: they are met only if there is compelling newly discovered evidence of innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *Id.* Purkey concedes that he cannot satisfy either of these criteria.

Finally, the statute recognizes a narrow pathway to the general habeas corpus statute, section 2241, in the

provision that has come to be called the "safety valve." Here is what it says:

> *An application for a writ of habeas corpus* in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, *shall not be entertained* if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

28 U.S.C. § 2255(e) (emphasis added). We thus turn to the question whether Purkey's case fits within the narrow confines of the safety valve.

III

This court has had a number of opportunities to consider the safety valve, but three cases are central: *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001); and *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (*en banc*). The district court, regarding these three as defining the limits of the safety valve, examined each of them and concluded that Purkey's situation was distinguishable. We do not agree with the idea that those cases rigidly describe the outer limits of what might prove that section 2255 is "inadequate or ineffective to test the legality" of a person's detention, but as we will see, Purkey's case does not require us to move beyond what we already have done.

Our first occasion to find the safety valve applicable occurred in *Davenport*, a case that actually involved two defendants, Davenport and Nichols. The part of

the opinion pertinent here involved Nichols. He had been convicted of using a firearm in the commission of a drug offense, in violation of the version of 18 U.S.C. § 924(c) that existed in 1990. After his conviction and a failed motion under section 2255, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), which held that "use" for purposes of section 924(c) did not include mere possession. Because Nichols's case had involved only possession, Nichols sought relief under the All Writs Act, 28 U.S.C. § 1651. The district court rejected that motion as an attempt to evade the need to obtain permission from the court of appeals to file a successive section 2255 motion. 147 F.3d at 607.

We noted that Nichols's situation fell outside the narrow rules under which a second or successive motion may be authorized: he did not claim to have any new evidence, nor was there a new rule of *constitutional* law that applied to his case. Instead, the Supreme Court had cut the legs out from under the interpretation of his statute of conviction, leaving him in prison for actions that (as clarified by the Court) did not constitute a crime. Under those circumstances, we held that

> A procedure for postconviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense.

Id. at 611. We went on to add three qualifications to that holding. First, "the change of law has to have been made retroactive by the Supreme Court." *Id.* Second, "it must be a change that eludes the permission in section 2255 for successive motions." *Id.* And third,

"'change in law' is not to be equated to a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *Id.* at 612. None of these qualifications applied to Nichols's case, and so we held that he was entitled to proceed under section 2241.

The circumstances in Garza were even more unusual than those in *Davenport*. Like Purkey, petitioner Garza was on federal death row awaiting execution. He had been convicted on a number of charges, including three counts of killing in furtherance of a continuing criminal enterprise, in violation of 18 U.S.C. § 848(e). The wrinkle was this: the murders in question had occurred in Mexico, and he had never been charged or convicted there for them. Instead, the jury in his U.S. prosecution had found beyond a reasonable doubt at the capital sentencing phase of his trial that he had committed the murders. See 18 U.S.C. § 3593(c) (requiring the government to prove aggravating factors beyond a reasonable doubt). After Garza exhausted his direct appeals and his motion under section 2255, he turned to the Inter–American Commission on Human Rights for relief. This Commission, established pursuant to the Organization of American States (to which the United States is a party), exists to hear this type of claim. This was the earliest point at which Garza could seek relief, because the Commission requires applicants to exhaust national remedies. The Commission concluded that "Garza's death sentence was a violation of international human rights norms to which the United States had committed itself." 253 F.3d at 920.

Garza followed up in the district court with a petition under section 2241; he conceded that he did not satisfy the criteria for a successive motion under section 2255. We concluded that he was entitled to use section

2241, because it would have been impossible under the Inter–American Commission's exhaustion rule to have sought relief there in time to include its findings in either his direct appeal or his original section 2255 motion. The treaty on which he relied does not give rise to private rights of action, and so he could not invoke it in his original case. But, he contended, the Commission's process did create private rights. We found that this was not such an outlandish claim that our jurisdiction was defeated, although when we reached the merits in his case, we concluded that the Commission had only the power to make recommendations to the U.S. government, which remained free to take them or leave them. That was not enough to justify a stay of his execution, and so we denied his petition.

The last case in this line is *Webster*, which was decided by the *en banc* court. Once again, the result hinged on the availability of section 2241 (via the safety valve) for a federal prisoner who had completed his direct appeals and had unsuccessfully pursued a motion under section 2255. Webster found himself on death row after being convicted of the federal crime of kidnapping resulting in death and related offenses. 784 F.3d at 1124. Turning to section 2241, he sought to present "newly discovered evidence that would demonstrate that he is categorically and constitutionally ineligible for the death penalty under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall* [*v. Florida*, 572 U.S. 701 (2014)]." *Id.* at 1125. At the trial, a central question was whether Webster was so intellectually impaired that he should not be subject to the death penalty. The defense introduced evidence of Webster's school records, intelligence testing, and inability to fake test results. The government responded with lay witnesses who all said that Webster "did

not seem mentally retarded to them," *id.* at 1130, and experts who said that Webster was able to perform adequately in school and beyond. Throughout, the government urged that Webster was faking his mental limitations in an effort to avoid the death penalty.

Years after his conviction and the denial of his section 2255 motion, new counsel discovered evidence that gravely undermined the government's theory. It turned out that Webster's trial counsel had asked the Social Security Administration for records on Webster and had been told that there were none. That was wrong. In fact, the Administration had records dating from a year *before* his crime in which Webster had been described as someone whose "[i]deation was sparse and this appeared to be more of a function of his lower cognitive ability than of any mental illness." *Id.* at 1133. The same doctor concluded that Webster was both "mentally retarded and antisocial," and that there was no evidence of malingering. *Id.* There were other records to the same effect.

This was a game–changer for Webster. As we pointed out in the opinion, there was no question of late fabrication of the new evidence, and (taking the facts favorably to Webster), his lawyer had diligently sought evidence from that very source—the Social Security Administration. Counsel had no duty to continue pestering the Administration after he had been informed that it had nothing; he was entitled to take the government at its word. Moreover, these records were far from cumulative. They directly contradicted the government's assertion at trial that Webster had concocted a story of mental disability solely to avoid the death penalty. A jury aware of those records could conclude that Webster is categorically ineligible for capital punishment under the Supreme Court's decision in *Atkins*.

Much more, therefore, than garden–variety newly discovered evidence was at play. See 784 F.3d at 1140. Only by using the safety valve could Webster test the constitutionality of his capital sentence.

Purkey recognizes that his case does not fit the profile of any of the three we have just discussed, but he argues that at a broader level, he has presented the same type of problem and we should thus extend our earlier cases to his situation. In essence, he argues that section 2255 is structurally inadequate to test the legality of a conviction and sentence any time a defendant receives ineffective assistance of counsel in his one permitted motion. He recognizes that he faces a problem in the line of Supreme Court decisions holding that there is no right to counsel in collateral proceedings, and thus no right to effective assistance of counsel. See *Coleman v. Thompson*, 501 U.S. 722 (1991). But, he points out, *Coleman* is not the last word on this subject. In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), the Supreme Court recognized that a state prisoner whose first opportunity (either *de jure* or *de facto*) to raise an ineffectiveness–of–counsel argument is in state post–conviction proceedings can avoid procedural default in a later action under 28 U.S.C. § 2254 if he can show ineffectiveness of post–conviction counsel. And, he adds, this court held in *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), that a federal prisoner could seek to reopen an action under section 2255 using Federal Rule of Civil Procedure 60(b) on reasoning that is analogous to *Martinez* and *Trevino*.

With that much established, Purkey jumps from the ability to use Rule 60(b) to reopen a section 2255 case to the assumption that *any* federal prisoner whose counsel is ineffective during his initial section 2255 pro-

ceeding can show that a motion under section 2255 is inadequate or ineffective and thus that he is entitled to avail himself of section 2241. At oral argument, Purkey also offered a narrower version of this theory, applicable only to capital cases. Because defendants facing the federal death penalty have a statutory right to counsel in a section 2255 proceeding, see 18 U.S.C. § 3599(a)(2), Purkey reasons that ineffectiveness of that counsel deprives a defendant of effective collateral review and thus permits the defendant to resort to section 2241.

The government strenuously opposes this line of reasoning, which it sees as unraveling all of the restrictions Congress has imposed on collateral relief for federal prisoners. It also points out that there is a difference between lacking an opportunity to raise a claim, and having that opportunity but not using it effectively. At best, it concludes, Purkey is in the latter situation. He had and used the opportunity to raise his complaints about ineffective assistance of trial counsel during his section 2255 proceeding. The fact that new counsel have now uncovered even more instances of ineffective assistance is not surprising, but, it says, the same will be true in countless other cases. Vincit omnia finis.

IV

Although we do not believe that *Davenport*, *Garza*, and *Webster* create rigid categories delineating when the safety valve is available—and such a finding would be inconsistent with the standard–based language of section 2255(e)—we do think that the words "inadequate or ineffective," taken in context, must mean something more than unsuccessful. We said as much in *Webster*. 784 F.3d at 1136. In *Davenport*, that something more came from the structure of the statute. Statutory problems are simply not covered in section

2255, whether through oversight or through confidence that the safety valve would solve the rare problem that arises when, because of an intervening Supreme Court decision, a person discovers that he is in prison for something that the law does not criminalize. In *Garza*, that something more arose because of an international treaty whose machinery could not be invoked until after the person had exhausted national remedies. And in *Webster*, the combined facts of the Social Security Administration's alleged mis–information to counsel, counsel's diligence, the timing of the discovery of the critical evidence, and the constitutional ban on executing the mentally disabled had the effect of making section 2255 structurally unavailable and opening the door to the section 2241 proceeding. We need not speculate on what other scenarios might satisfy the safety valve, other than to say that there must be a compelling showing that, as a practical matter, it would be impossible to use section 2255 to cure a fundamental problem. It is not enough that proper use of the statute results in denial of relief.

At the time Purkey filed his motion under section 2255, nothing formally prevented him from raising each of the three errors he now seeks to raise in his petition under 2241. The first of those relates to the failure of trial counsel not to spot the fact that Juror 13 (whose first name was also Jennifer) had disclosed on her jury questionnaire that she too had been the victim of an attempted rape when she was 16 years old. Because trial counsel never noticed that glaring fact, he did not object to Juror 13's being seated, and she in fact served on the jury that convicted Purkey and voted for the death penalty.

We can accept as true the fact that Purkey's trial counsel missed this disturbing coincidence, and it may

be likely that if counsel had noticed it and moved to strike Juror 13 for cause, such a motion would have been granted. But that is not the proper question before us now. It is instead whether, having raised in his section 2255 motion 17 specific ways in which his trial counsel were ineffective, Purkey is now entitled to add additional allegations not by obtaining permission to file a successive section 2255 motion, but through section 2241. Purkey says yes and points to the fact that section 2255 counsel also missed the problem with Juror 13. But how far are we supposed to take that? What if we were now to permit a section 2241 proceeding, Purkey were to lose, and new counsel were to come in and discover that trial counsel also failed to make a meritorious *Batson* objection? Would the ineffectiveness of the first lawyers who litigated the section 2241 proceeding entitle him to a new section 2241 proceeding? If not, why not? And if so, what would stop a never–ending series of reviews and re–reviews (particularly since there is no numerical limit for section 2241)? Purkey has offered no satisfactory answers to these questions, and we can think of none.

Instead, as the law now stands, once a Sixth Amendment claim of ineffective assistance of counsel has been raised, as happened in Purkey's case, that is the end of the line. In evaluating applications for permission to file a second or successive petition under 28 U.S.C. § 2254 (the habeas corpus statute for state prisoners), we are required to dismiss a claim "that was presented in a prior application." 28 U.S.C. § 2244(b)(1). We apply the same rule to second or successive motions under section 2255. Pertinent here, if an applicant has already raised a Sixth Amendment ineffectiveness claim in an earlier application—even if the specific details of the ineffective performance are dif-

ferent—we must dismiss a new claim of ineffective assistance of the same lawyer. This rule flows from the Supreme Court's instruction to "consider the totality of the evidence before the judge or jury" in evaluating a claim of ineffectiveness, not each particular instance of ineffective performance in isolation. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

No system is perfect, and we find it troubling that these rules will leave some people under even a sentence of death (the ultimate irrevocable action) in the position of never having received effective assistance of counsel in the critical respect. It is thus worth nothing that nothing prevents Congress from changing the rules, especially for capital cases, to ensure that the ultimate penalty is not carried out on someone who fell through the cracks and did not get the quality of legal assistance to which the Constitution entitles him. But, as we noted at the outset, in a human institution there is always some risk of error. All we can do is to strive to minimize it and to follow the law to the best of our ability.

Our analysis of Purkey's second proposed argument for his section 2241 petition is similar. Current counsel have undertaken a much more comprehensive search for, and analysis of, the extensive mitigating evidence than trial counsel or section 2255 counsel had performed. The section 2241 petition sets out this evidence over nearly 100 pages. Most of this evidence goes well beyond the evidence that post–conviction counsel presented in *Purkey II* and that the Eighth Circuit discussed in *Purkey V*. We agree with Purkey that the efforts of trial counsel to build a case for mitigation fell short of what current counsel have now found. But the critical question, as the Eighth Circuit noted in *Purkey V*, is whether there is a reasonable

probability that this evidence would have changed the jury's sentencing recommendation, or if, on the other hand, it was essentially cumulative.

At this point, we must comment that we are disturbed that the jury left blank the spaces on the verdict form for its consideration of Purkey's many trial arguments in mitigation, and that trial counsel did not insist that the case be returned to the jury for completion of those blanks when he had the chance. If the jury really meant that it thought that Purkey had failed to carry his burden on each and every point, it should have been required to say so. Once it was focusing on mitigation, however, it may have found some points in Purkey's favor. There is no doubt, even based on only the trial evidence, that Purkey has had a hideous life. It was for the jury to balance aggravating and mitigating factors, but it is hard to know whether it did that.

Once again, however, this fault was apparent to everyone from the minute the jury returned its verdict. Trial counsel commented on it; original appellate counsel knew about it; and section 2255 counsel knew about it. We have no idea at this remove why counsel did not preserve this point throughout these proceedings. What we do know is that lawyers must pick and choose among issues, and it is not out of the question that Purkey's lawyers thought it better to focus on more promising arguments. Even if they did not analyze this point, we are left with the fundamental problem for Purkey: the mechanisms of section 2255 gave him an opportunity to complain about ineffective assistance of trial counsel, and he took advantage of that opportunity. There was nothing structurally inadequate or ineffective about section 2255 as a vehicle to make those arguments.

Finally, Purkey would like to argue that section 2255 counsel fell below the standards established by the Sixth Amendment (and perhaps section 3599(a)(2)) when counsel omitted any challenge to the use of Purkey's testimony at his suppression hearing. Recall that Purkey had confessed several times to both local police and the FBI that he had "kidnapped" Long, meaning that he had taken her across state lines without her consent. At the suppression hearing (according to Purkey), trial counsel advised him to stick with that story, even though trial counsel knew that it was untrue and that Purkey believed that Long had gone with him willingly. This is somewhat convoluted, in our view, but as best we understand it, Purkey complied with counsel's advice at the suppression hearing and continued to maintain that he had coerced Long into driving to Kansas with him. At the suppression hearing, Purkey also wanted to show that this confession was involuntary, because he gave it only in the erroneous belief that the government was prepared to seek a lighter sentence in federal court if he confessed.

At the trial Purkey gave the jury a new version of events: he thought Long was a prostitute, she went willingly with him not only into the truck but from Missouri to Kansas, and only then did the murder occur. Obviously that would have invited prosecution from Kansas, but the link necessary for federal jurisdiction would have disappeared (or so Purkey thought). When Purkey presented his account, however, the government impeached his testimony with his statements at the suppression hearing. Trial counsel did not object, nor did he object when the government used the same statements to prove the truth of the matter in its closing argument.

These too are arguments about effectiveness of counsel that were apparent from the start. The question of Long's willingness to travel with Purkey was relevant, but it was up to the jury to decide whether to believe his confessions or his recantation. The record shows that both stories were on the record, and so the government was entitled to use his earlier version as impeachment. If it strayed over the line, that is a problem, but it is too late to correct it (and it is not clear to us that this would have been prejudicial, in light of all the evidence against Purkey at the trial).

V

Purkey has raised serious arguments in this appeal—particularly his points about Juror 13 and the failure to conduct an adequate mitigation investigation—and we do not mean to minimize them even though we have ruled against him. He is correct that the Supreme Court's decisions in *Martinez* and *Trevino* can be read to say that a person can overcome a procedural bar to bringing a claim of ineffective assistance of trial counsel in a federal court, if counsel in postconviction proceedings was him- or herself ineffective. The idea of an entitlement to *one* untainted opportunity to make one's case is deeply embedded in our law. Purkey argues that he has yet to have that one opportunity. He also asks why it should matter if, in *Martinez* and *Trevino*, the ineffective lawyer was engaged in a state-court proceeding, whereas here, the ineffective lawyer was engaged in a federal-court proceeding, particularly after our ruling in *Ramirez*.

But the problem is that the availability of further relief for someone in Purkey's position is not a simple matter of federal common law. It is governed by statutes. In this case, the pertinent statute is 28 U.S.C.

§ 2255(e), a statute that played no part in *Ramirez*. For the reasons we have discussed, we conclude that Purkey is not entitled to raise his new arguments in a petition for a writ of habeas corpus under 28 U.S.C. § 2241. We thus AFFIRM the judgment of the district court.

Before concluding this opinion, however, we have one more piece of unfinished business to be resolved. As we noted earlier, 24 hours before the oral argument in this appeal, the government set Purkey's execution date for July 15, 2020. Purkey promptly moved for a stay of execution during the pendency of these proceedings. The government has opposed his motion.

The Supreme Court set forth the requirements for a stay in *Nken v. Holder*, 556 U.S. 418 (2009):

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434. Importantly, although the *Nken* Court held that something more than a "better than negligible" chance of success is necessary, it also stressed that the injury the applicant faced in its own case was not "categorically irreparable." *Id.* at 434-35. Although we have ruled against Purkey on the merits, we have emphasized that at least two of the points he has raised are worthy of further exploration—the seating of Juror 13, and the failure of trial counsel to conduct a proper mitigation analysis. We have rejected those points not on the merits, but because of our understanding of the safety valve language, 28 U.S.C. § 2255(e). If our read-

ing of the safety valve is too restrictive, there would be significant issues to litigate. And, unlike the alien in *Nken*, Purkey faces categorically irreparable injury—death. A brief stay to permit the orderly conclusion of the proceedings in this court will not substantially harm the government, which has waited at least seven years to move forward on Purkey's case. Finally, the public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case. Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.

For these reasons, we grant Purkey's motion on the following terms. His July 15, 2020, date of execution is temporarily stayed pending the completion of proceedings in the Seventh Circuit. This stay will expire upon the issuance of this court's mandate or as specified in any subsequent order that is issued.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. 2:19-cv-00414-JPH-DLP

WESLEY IRA PURKEY,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL,
Respondents.

Filed November 20, 2019

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Wesley Purkey is a federal prisoner on death row at the United States Penitentiary in Terre Haute, Indiana. He was sentenced to death 16 years ago in the United States District Court for the Western District of Missouri after a jury found him guilty of kidnapping and murdering Jennifer Long. The conviction and sentence were affirmed on direct appeal. Mr. Purkey sought postconviction relief under 28 U.S.C. § 2255 in the district court where he was convicted and sentenced. That request was denied by the district court and affirmed on appeal.

Mr. Purkey cannot bring a successive § 2255 motion in the court of conviction, so he seeks relief from this Court in the form of a 28 U.S.C. § 2241 petition that

raises eight claims. These claims, however, cannot be raised and adjudicated under § 2241 because they do not fall within any of the limited circumstances the Seventh Circuit has recognized when a federal prisoner may challenge a conviction and sentence by way of § 2241. Moreover, there is not a structural problem with § 2255 when applied to Mr. Purkey's case. For these reasons, Mr. Purkey's § 2241 action must be dismissed and his petition for a writ of habeas corpus denied.

I.

A full recitation of the facts and procedural background is set forth in the two opinions issued by the United States Court of Appeals for the Eighth Circuit following Mr. Purkey's appeals. *See United States v. Purkey*, 428 F.3d 738, 744-46 (8th Cir. 2005) ("*Purkey I*"); *United States v. Purkey*, 729 F.3d 860, 866-68 (8th Cir. 2013) ("*Purkey II*").

A. Factual Background

While the details of Mr. Purkey's crimes are not relevant to the ultimate resolution of his legal claims, a brief summary is appropriate for context.

Jennifer Long, a sixteen-year-old high school sophomore, disappeared in January 1998. *Purkey I*, 428 F.3d at 745. She was walking on a sidewalk in Missouri when Mr. Purkey picked her up in his truck and drove her to his house in Kansas. *Purkey II*, 729 F.3d at 866-67. Mr. Purkey raped her and, after she attempted to escape, "became enraged and repeatedly stabbed [her] in the chest, neck, and face with [a] boning knife, eventually breaking its blade inside her body." *Id.* Mr. Purkey dismembered her body with a chainsaw,

burned her remains in his fireplace, and dumped them into a septic pond. *Id.*

No one knew what happened to Jennifer Long until December 1998. *Purkey I*, 428 F.3d at 745. At that time, Mr. Purkey faced a life sentence for murdering eighty-year-old Mary Ruth Bales, whom Mr. Purkey bludgeoned to death with a hammer in her own home. *Purkey II*, 729 F.3d at 867–68. Mr. Purkey confessed to law enforcement that he had kidnapped, raped, and murdered Jennifer Long earlier that year. *Id.* He also admitted taking "extraordinary measures to dispose of the body, including dismembering it with a chain saw and burning the remains[.]" *Purkey I*, 428 F.3d at 745. Law enforcement recovered remnants of crushed human bones where Mr. Purkey told them he had disposed of them, and in his former house where the murder took place. Mr. Purkey led law enforcement to where he left her remains. *Id*; *Purkey II*, 729 F.3d at 867; Dkt. 33-1 at 76–78.

B. Procedural Background

Mr. Purkey was indicted for the kidnapping and murder of Jennifer Long on October 10, 2001, in the United States District Court for the Western District of Missouri. *See United States v. Purkey*, No. 4:01-cr-00308-FJG (W.D. Mo. Oct. 10, 2001), Dkt. 1. On November 5, 2003, a jury found Mr. Purkey guilty. *Id.*, Dkt. 461.

The separate penalty phase of the proceedings lasted seven days. Mr. Purkey's counsel presented 27 mitigating factors, including evidence of brain abnormalities and abuse as a child. Dkt. 23-37 at 94-97. The mitigation evidence included the testimony of 18 witnesses over two days. Dkt. 38-1; Dkt. 39-1; Dkt. 40-1; Dkt. 41-1; Dkt. 42-1. Finding the existence of all six

statutory aggravating factors, the jury recommended a sentence of death. *Purkey*, No. 4:01-cr-00308-FJG, Dkt. 487. The District Court sentenced Mr. Purkey to death on January 23, 2004. *Id.*, Dkt. 505.

Mr. Purkey appealed his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. He raised several challenges to the pretrial proceedings, jury selection, and the guilt and penalty phases. *Purkey I*, 428 F.3d at 746–64. One of those challenges—which is similar to claims before this Court—was that the District Court erred by accepting the mitigating factors portion of the verdict without requiring the jury to write out their specific findings. *Id.* at 763. The Eighth Circuit rejected Mr. Purkey's claims and affirmed his conviction and sentence. *Id.* at 764. Mr. Purkey's petition for writ of certiorari was denied by the United States Supreme Court on October 16, 2006. *See Purkey v. United States*, 127 S. Ct. 433 (2006).

On November 25, 2006, Mr. Purkey initiated post-conviction proceedings by filing a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in the United States District Court for the Western District of Missouri. *See Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). The same District Judge who presided over Mr. Purkey's trial presided over his § 2255 motion.

Mr. Purkey made 17 allegations of ineffective assistance against his trial counsel—Frederick Duchardt, Jr. and Laura O'Sullivan. *Id.* at *1-3. Mr. Duchardt submitted a 117-page affidavit to "refute" Mr. Purkey's claims. *Id.* at *2. The District Court substantially relied on Mr. Duchardt's affidavit in rejecting the ineffective assistance of counsel claims. *Id.* Mr. Purkey also

alleged several due process violations. *Id.* at *3-5. The District Court rejected these claims as well and denied Mr. Purkey's § 2255 motion. *Id.* at *6. The District Court later denied Mr. Purkey's Rule 59(e) motion to alter or amend the judgment, *see Purkey v. United States*, 2009 WL 5176598, *3 (W.D. Mo. Dec. 22, 2009), and his request for a certificate of appealability, *see Purkey v. United States*, 2010 WL 4386532, *10 (W.D. Mo. Oct. 28, 2010).

Mr. Purkey sought a certificate of appealability from the Eighth Circuit on several claims, *see* Dkt. 48-13, but the Eighth Circuit granted Mr. Purkey a certificate of appealability on only two of them, *see Purkey II*, 729 F.3d at 861; Dkt. 48-14. First, the Eighth Circuit permitted Mr. Purkey to raise three issues regarding the ineffectiveness of his trial counsel during the penalty phase: "(1) his alleged failure to adequately prepare and present the testimony of three expert witnesses, (2) his alleged failure to adequately investigate and prepare two mitigating witnesses, which resulted in their testimony being more prejudicial than beneficial, and (3) his alleged failure to adequately investigate and present other mitigating evidence." *Purkey II*, 729 F.3d at 862. These issues are similar to the second claim Mr. Purkey raises in this Court. Second, the Eighth Circuit permitted Mr. Purkey to challenge whether the District Court abused its discretion by denying relief without an evidentiary hearing. *Id.*

The Eighth Circuit rejected both of Mr. Purkey's claims. It reasoned that it need not decide whether Mr. Purkey could establish deficient performance—and consequently did not consider Mr. Duchardt's affidavit—because Mr. Purkey could not establish prejudice given the "particularly gruesome" nature of the crime. *Id.* at 862-68 & n.2. As to whether the District Court

should have held an evidentiary hearing, the Eighth Circuit reasoned that Mr. Purkey could not establish prejudice even taking his evidence as true, so it was not an abuse of discretion to decline to hold an evidentiary hearing. *Id.* at 869.

Mr. Purkey petitioned for panel rehearing, Dkt. 48-15, which the Eighth Circuit denied on December 17, 2013, Dkt. 48-16. The Supreme Court denied Mr. Purkey's petition for writ of certiorari on October 14, 2014. *See Purkey v. United States*, 135 S. Ct. 355 (2014).

On July 25, 2019, the Department of Justice set Mr. Purkey's execution date for December 13, 2019. He filed the instant habeas petition under 28 U.S.C. § 2241 on August 27, 2019. He filed an amended petition on September 12, 2019. The petition was fully briefed on October 28, 2019.

II

Mr. Purkey raises eight claims in his § 2241 petition:

(1) trial counsel provided ineffective assistance by failing to challenge Juror 13;

(2) trial counsel provided ineffective assistance by failing to investigate, develop, and present compelling mitigation evidence;

(3) Mr. Duchardt perpetrated a fraud on the Court during the § 2255 proceedings by submitting an affidavit containing false and misleading statements to undermine Mr. Purkey's ineffective assistance of counsel claims;

(4) Mr. Purkey's death sentence violates the Eighth Amendment because there is a substantial possibility

that the jury instructions led the jury to believe that they could not consider certain mitigating evidence;

(5) Mr. Purkey's death sentence violates the Sixth Amendment because the jury did not find beyond a reasonable doubt each fact necessary to impose a death sentence;

(6) imposition of the death penalty under the Federal Death Penalty Act violates the Eighth Amendment;

(7) imposition of the death penalty on individuals such as Mr. Purkey who suffer from a severe mental illness violates the Eighth Amendment; and

(8) trial counsel provided ineffective assistance by improperly advising Mr. Purkey before he testified at the pre-trial suppression hearing. *See* Dkt. 23.

The United States takes the position that the Court cannot reach the merits of these claims because Mr. Purkey cannot raise them in a § 2241 petition. Dkt. 49. That's true if Mr. Purkey cannot meet the requirements of 28 U.S.C. § 2255(e)—commonly referred to as the Savings Clause. *See Webster v. Daniels*, 784 F.3d 1123, 1135 (7th Cir. 2015) (en banc). Mr. Purkey argues that some of his claims meet these requirements. Dkt. 23; Dkt. 58.

III

The Court begins its analysis by examining the statutory framework governing federal prisoners' post-conviction challenges. The Court next assesses whether Seventh Circuit precedent requires or allows Mr. Purkey's claims to proceed under the Savings Clause. The Court then turns to Mr. Purkey's arguments for recognizing a new category of claims that can be brought via § 2241.

C. Statutory Framework for Federal Prisoner Seeking Postconviction Relief

The only way a federal prisoner may pursue postconviction relief in a separate civil action is under 28 U.S.C. §§ 2255 and 2241.

1. Section 2255

"As a general rule, a federal prisoner wishing to collaterally attack his conviction or sentence must do so under § 2255." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). Congress has placed limitations on a federal prisoner's ability to bring a § 2255 action. First, such action can only be brought in the court which imposed the sentence. 28 U.S.C. § 2255(a). Second, a federal prisoner is limited to bringing one § 2255 motion, unless the court of appeals for the district where the action is filed determines that a second or successive motion contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

2. The Savings Clause and Section 2241

Congress created within § 2255 a narrow exception to the "general rule" that requires a federal prisoner to bring a collateral attack under § 2255—the Savings Clause. Under the Savings Clause, a prisoner can seek

a writ of habeas corpus through an action under § 2241 if the prisoner can show "that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Unlike a § 2255 action, which must be brought in the district where the sentence was imposed, a § 2241 action must be brought in the district where the prisoner is in custody. *Webster*, 784 F.3d at 1124.

Consistent with the "general rule," the Savings Clause "steers almost all prisoner challenges to their convictions and sentences toward § 2255" and away from § 2241. *Shepherd*, 911 F.3d 861, 862 (7th Cir. 2018). Consequently, a federal prisoner may seek relief under § 2241 "[o]nly in rare circumstances where § 2255 is inadequate or ineffective to test the legality of the prisoner's detention …." *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014) (citations and quotations omitted). To determine whether Mr. Purkey's petition presents such a "rare circumstance," the Court looks to Seventh Circuit precedent.

D. Instances Where the Seventh Circuit has Found the Savings Clause to Apply

Determining whether § 2255 is inadequate or ineffective is a "very knotty procedural issue" of "staggering" complexity. *Chazen*, 938 F.3d at 855-56. While it is "hard to identify exactly what [the Savings Clause] requires," *id.* at 863 (Barrett, J., concurring), several guiding principles have emerged from the cases.

Section 2255 is inadequate or ineffective as applied to a specific case only where there is "some kind of structural problem with section 2255." *Webster*, 784 F.3d at 1136. A structural problem requires "something more than a lack of success with a section 2255 motion." *Id.* It must "foreclose[] even one round of ef-

fective collateral review, unrelated to the petitioner's own mistakes." *Poe v. LaRiva*, 834 F.3d 770, 773 (7th Cir. 2016) (citation and quotation omitted). Section 2255 is inadequate or ineffective where the court finds that the federal prisoner did not have "a reasonable opportunity [in a prior § 2255 proceeding] to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Chazen*, 938 F.3d at 856 (alteration in original) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)).

Applying these principles, the Seventh Circuit has found a structural problem with § 2255 in three instances:

1. When a claim is based on a new rule of *statutory* law made retroactive by the Supreme Court. *See Davenport*, 147 F.3d at 610.
2. When a claim is based on a decision of an international tribunal that could not have been raised in an initial § 2255 motion. *See Garza v. Lappin*, 253 F.3d 918, 920 (7th Cir. 2001).
3. When a claim is based on limited types of new evidence that "would reveal that the Constitution categorically prohibits a certain penalty." *Webster*, 784 F.3d at 1139.

See id. at 1135–36 (analyzing *Davenport*—which contains the Seventh Circuit's "most extensive treatment" of the Savings Clause—and *Garza* when setting out the Seventh Circuit's Savings Clause precedents); *see also Fulks v. Krueger*, 2019 WL 4600210, *3 (S.D. Ind. Sept. 20, 2019). The parties appear to agree that these three cases identify the structural problems with § 2255 recognized by the Seventh Circuit. *See* Dkt. 49 at 38–42; Dkt. 58 at 7–9.

1. *Davenport*

In *Davenport*, the Seventh Circuit found a structural problem in § 2255 because § 2255(h) does not permit federal prisoners to file a second or successive § 2255 motion raising claims based on new *statutory* law. The petitioner sought the benefit of a Supreme Court decision changing the Seventh Circuit's interpretation of a statute that existed at the time of his first § 2255 motion. *Davenport*, 147 F.3d at 610. Because the Supreme Court changed the governing law after the petitioner's § 2255 proceedings had concluded, he "could not [have] use[d] a first motion under [§ 2255] to obtain relief on a basis not yet established by law." *Id.* Nor could he have received authorization to file "a second or other successive motion [under § 2255(h)] … because the basis on which he [sought] relief [was] neither newly discovered evidence nor a new rule of *constitutional* law." *Id.* (emphasis added); *see Poe*, 834 F.3d at 773 ("Where *Davenport* recognized a structural problem in § 2255(h) is in the fact that it did not permit a successive petition for new rules of *statutory* law made retroactive by the Supreme Court."). This structural problem was fixed in *Davenport* "by effectively giving such prisoners the relief that they would have had if § 2255(h)(2) had included them." *Chazen*, 938 F.3d at 864 (Barrett, J., concurring).

The Seventh Circuit has "developed a three-part test implementing Davenport's holding." *Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019). The petitioner must establish that:

> (1) the claim relies on a statutory interpretation case, not a constitutional case and thus could not have been invoked by a successive § 2255 motion; (2) the petitioner could not have

> invoked the decision in his first § 2255 motion and the decision applies retroactively; and (3) the error is grave enough to be deemed a miscarriage of justice.

Id.

2. *Garza*

In *Garza*, the Seventh Circuit again found a structural problem with § 2255 rooted in § 2255(h). After the conclusion of the petitioner's first § 2255, he received a decision from the Inter-American Commission on Human Rights finding that his rights were violated during the penalty phase of his criminal trial. *Garza*, 253 F.3d at 920. The petitioner wished to use this decision to challenge his death sentence. *Id.* Notably, the petitioner could not have petitioned the Inter-American Commission on Human Rights for relief until he had exhausted his "national remedies"—that is, until after he had filed a § 2255 motion. *Id.* Because it was "literally impossible" for the petitioner to have raised his claim in his § 2255 motion, there was a structural problem with § 2255 in that it did not "provide[] an adequate avenue for testing Garza's present challenge to the legality of his sentence." *Id.* at 922–23. Simply put, the petitioner could not have raised his claim in his initial § 2255, nor, as in *Davenport*, could he have received authorization to file a second or successive § 2255 motion under § 2255(h). *Id.* at 923.

3. *Webster*

In *Webster*, the Seventh Circuit held for the first and only time that the Savings Clause was met for a constitutional claim. The petitioner in *Webster* sought to challenge his death sentence as barred by *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment forbids the execution of a person

with an intellectual disability. Although the petitioner had raised an *Atkins* claim in his § 2255 proceeding, he wished to present "newly discovered evidence" to support that claim in his § 2241 petition. *Webster*, 784 F.3d at 1125.

The Seventh Circuit found that "there is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty." *Id.* at 1139. The structural problem identified by the Seventh Circuit was based on at least two concerns. First, § 2255(h)(1) only allows a second or successive § 2255 motion if newly discovered evidence meets a certain threshold to demonstrate that the petitioner is not guilty of the *offense*. *Id.* at 1134–35, 1138. It does not allow for such motions if the petitioner presents newly discovered evidence that the petitioner is ineligible to receive his *sentence*. *Id.* Second, Congress could not have contemplated whether claims of categorical ineligibility for the death penalty should be permitted in second or successive § 2255 motions because the relevant cases—*Atkins* and *Roper v. Simmons*, 543 U.S. 551 (2005)[2]—had not been decided when § 2255 was enacted. *Webster*, 784 F.3d at 1138 ("[T]he fact that the Supreme Court had not yet decided *Atkins* and *Roper* at the time AEDPA was passed supports the conclusion that the narrow set of cases presenting issues of constitutional ineligibility for execution is another lacuna in the statute."); *id.* at 1139 ("In Webster's case, the problem is that the Supreme Court has now established that the

[2] In *Roper*, the Supreme Court held it violates the Eighth and Fourteenth Amendments to impose "the death penalty on offenders who were under the age of 18 when their crimes were committed." 543 U.S. at 578.

Constitution itself forbids the execution of certain people: those who satisfy the criteria for intellectual disability that the Court has established, and those who were below the age of 18 when they committed the crime.").

Webster is the first and only time the Seventh Circuit permitted a constitutional claim to proceed through the Savings Clause. Indeed, the court "took great care to assure that its holding was narrow in scope." *Poe*, 834 F.3d at 774. It limited its holding to the narrow legal and factual circumstances presented in the case, stating explicitly that the case "will have a limited effect on future habeas corpus proceedings." *Webster*, 784 F.3d at 1140 n.9; *see Poe*, 834 F.3d at 774 ("[T]here is nothing in *Webster* to suggest that its holding applies outside the context of new evidence.").

To fall within *Webster's* holding, the new evidence must meet three conditions:

> First, the evidence sought to be presented must have existed at the time of the original proceedings. … Second, the evidence must have been unavailable at the time of trial despite diligent efforts to obtain it. Third, and most importantly, the evidence must show that the petitioner is constitutionally ineligible for the penalty he received. Because the Supreme Court has declared only two types of persons (minors and the intellectually disabled) categorically ineligible for a particular type of punishment, our ruling is as a matter of law limited to that set of people—those who assert that they fell into one of these categories at the time of the offense. These three limitations are

> more than adequate to prevent the dissent's feared flood of section 2241 petitions[.]

Webster, 784 F.3d at 1140 n.9. It's thus "a rare case" that qualifies. *Id.* at 1140.

In sum, the Seventh Circuit has found a structural defect in § 2255 in three instances, each limited to a narrowly identified specific type of claim.

E. Mr. Purkey's Claims Do Not Fit within Any of the Instances Where the Seventh Circuit Has Found the Savings Clause to Apply

Mr. Purkey's claims do not fall within the holdings of *Davenport*, *Garza*, or *Webster*. Mr. Purkey's claims are all constitutional rather than statutory, so none of them meet *Davenport's* first requirement. *See Poe*, 834 F.3d at 773 (explaining that *Davenport* "preclude[s] use of § 2241 for a constitutional case"). The structural defect in § 2255 identified in *Davenport*—that § 2255(h) does not permit successive § 2255 motions "for new rules of *statutory* law made retroactive by the Supreme Court," *id.*—therefore does not apply to any of his claims.

Mr. Purkey's claims do not fit within *Garza's* narrow holding. Unlike the petitioner's claims in *Garza*—which were based on the decision of an international tribunal and could not possibly have been raised in his initial § 2255 motion—Mr. Purkey's claims are common constitutional claims that can be raised in a § 2255 motion and thus do not implicate the structural concern identified in *Garza*. Notably, the Seventh Circuit has recognized that *Garza* involved "'very unusual facts' … [and thus] its applicability beyond those facts is limited." *Kramer v. Olson*, 347 F.3d 214, 218 n.1 (7th Cir. 2003) (quoting *Garza*, 253 F.3d at 921).

Last, Mr. Purkey's claims do not fall within *Webster's* narrow holding. Among other limitations, *Webster* only applies to claims that an individual is "categorically ineligible for the death penalty," such as claims under *Atkins* and *Roper*. *Webster*, 784 F.3d at 1138-40; *see id.* at 1140 n.9 ("Because the Supreme Court has declared only two types of persons (minors and the intellectually disabled) categorically ineligible for a particular type of punishment, our ruling is as a matter of law limited to that set of people—those who assert that they fell into one of these categories at the time of the offense.").[3] Only one of Mr. Purkey's claims meets this requirement—his claim that *Atkins* should be extended to preclude execution of those who are mentally ill. Dkt. 23 at 199. But Mr. Purkey does not present any argument that this claim meets the Savings Clause, let

[3] For the first time in his reply, Mr. Purkey presents a cursory argument for why the Savings Clause is met for Claim 4 (that the jury instructions led the jury to believe that they could not consider certain mitigating evidence) and Claim 6 (the death penalty violates the Eighth Amendment). *See* Dkt. 58 at 67-69. He argues that Claim 4 falls within *Webster* because he relies on new evidence—namely, juror affidavits that purportedly show that jurors misunderstood the jury instructions. *Id.* at 66-67. But, as explained, this claim does not meet *Webster's* third limitation.

As to Claim 6, he argues that this claim relies on new law—the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016)—and thus his claim falls within *Garza* and *Webster*. Dkt. 58 at 68-69. *Webster* is of no assistance for this claim, as it does not rely on new evidence. *Poe*, 834 F.3d at 774 ("[T]here is nothing in *Webster* to suggest that its holding applies outside the context of new evidence."). *Garza* is also of no assistance, as nothing in it suggests that simply relying on a new legal precedent can meet the Savings Clause. If it did, *Garza* would not be described by the Seventh Circuit as having only "limited" applicability beyond its "'very unusual facts.'" *Kramer*, 347 F.3d at 218 (quoting *Garza*, 253 F.3d at 921).

alone a specific argument that it meets the requirements of *Webster* by, for example, showing that the claim relies on newly discovered evidence that existed at the time of the original proceeding. *See* Dkt. 23; Dkt. 58. Accordingly, Mr. Purkey's claims cannot proceed through the Savings Clause via the structural defect in § 2255 identified in *Webster*.

Recognizing that his claims do not fall within the specific holdings of *Davenport*, *Garza*, or *Webster*, dkt. 58 at 7-8, Mr. Purkey argues that he can nonetheless meet the general Savings Clause test set forth in these cases. *Id.* at 7-9. In other words, Mr. Purkey asks this Court to extend the Seventh Circuit's Savings Clause precedents to new types of claims. The Court now turns to these arguments.

F. The *Martinez–Trevino* Doctrine Does Not Apply to Mr. Purkey's Case

Mr. Purkey's only fully developed Savings Clause argument is for his ineffective assistance of trial counsel claims (Claims 1, 2, and 8).[4] *See* Dkt. 23 at 11-19; Dkt. 58 at 6-19. Mr. Purkey argues that his ineffective assistance claims meet the Savings Clause because he "has not had a meaningful opportunity to present" them to any Court. Dkt. 23 at 15.

There is no dispute that Mr. Purkey could not have raised these ineffective assistance claims on direct appeal and that he cannot raise them now in a second or successive § 2255 motion. Dkt. 23 at 12, 15; Dkt. 49 at 36. Mr. Purkey could not have raised his ineffective as-

[4] Mr. Purkey does not advance any argument for why the Savings Clause is met for Claims 5 and 7, and the cursory arguments for why his other claims meet the Savings Clause are addressed in Section III.C above.

sistance claims on direct appeal because, except in rare circumstances, such claims "should be pursued in a collateral proceeding under 28 U.S.C. § 2255." *United States v. Moody*, 770 F.3d 577, 582 (7th Cir. 2014); *see United States v. Bryant*, 754 F.3d 443, 444 (7th Cir. 2014) ("A claim of ineffective assistance need not, and usually as a matter of prudence should not, be raised in a direct appeal, where evidence bearing on the claim cannot be presented and the claim is therefore likely to fail even if meritorious."). He cannot raise them now in a second or successive § 2255 motion because his claims do not meet the criteria in § 2255(h).

That leaves the failure to raise the claims in his initial § 2255 proceeding. Mr. Purkey maintains that he did not raise them because § 2255 counsel was ineffective.[5] Dkt. 23 at 13-18. Mr. Purkey argues that he may raise these claims now in this § 2241 action based on *Martinez v. Ryan*, 566 U.S. 1 (2012), *Trevino v. Thaler*, 569 U.S. 413 (2013), and *Ramirez v. United States*, 799 F.3d 845, 853 (7th Cir. 2015). Dkt. 23 at 16-17. The United States argues that neither the *Martinez–Trevino* doctrine nor *Ramirez* relate to the Savings Clause analysis, and that this Court should not extend the holdings of those cases to the entirely different legal question presented here. Dkt. 49 at 42-47.

1. The *Martinez–Trevino* Doctrine

The Court begins with the *Martinez–Trevino* doctrine. Both *Martinez* and *Trevino* involved state prisoners whose ineffective assistance of trial counsel claims were deemed procedurally defaulted by a federal

[5] Because Mr. Purkey's claims must be rejected for other reasons, the Court does not address whether § 2255 counsel provided ineffective assistance by not adequately investigating and presenting Mr. Purkey's ineffective assistance of trial counsel claims.

court because the claims were not properly raised in state court.

In *Martinez*, appointed postconviction counsel failed to raise an ineffective assistance claim in an Arizona collateral proceeding. Martinez's postconviction relief case was dismissed. About a year and half later, Martinez obtained new counsel and filed new ineffective assistance of counsel claims in a second Arizona collateral proceeding. The petition was dismissed because Martinez had not raised these claims in his first collateral proceeding. After exhausting all postconviction procedures available under Arizona law, Martinez sought habeas relief in federal court.

The District Court denied relief on the basis that Martinez had procedurally defaulted his ineffective assistance claims by not properly raising them in state court. After the Ninth Circuit affirmed, the Supreme Court granted certiorari to answer the "precise question" of "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." *Martinez*, 566 U.S. at 9. The Supreme Court held that if state law requires state prisoners to raise ineffective assistance of trial counsel claims "in an initial- review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel *or counsel in that proceeding was ineffective*." 566 U.S. at 17 (emphasis added).

In *Trevino*, the Court considered "whether, as a systematic matter, Texas affords meaningful review of a claim of ineffective assistance of trial counsel." *Tre-*

vino, at 425. Concluding it did not, the Court extended the holding of *Martinez* to jurisdictions like Texas where, although one can technically raise ineffective assistance of trial counsel claims on direct review, the "structure and design" of the system make that "virtually impossible." 569 U.S. at 416.

2. The Extension of the *Martinez–Trevino* Doctrine in the Seventh Circuit

In *Ramirez*, the Seventh Circuit addressed, to a limited extent, whether the *Martinez–Trevino* doctrine applies in the context of a federal § 2255 proceeding. The petitioner was a federal prisoner who failed to timely appeal the denial of his § 2255 motion because § 2255 counsel abandoned him. 799 F.3d at 847. Consequently, he was not able to obtain appellate review of his § 2255 proceeding. *Id.* at 849. The petitioner then "moved under Federal Rule of Civil Procedure 60(b)(6) for relief from the judgment," arguing "that postconviction counsel was ineffective for causing him to miss the appeal deadline." *Id.* at 848. The District Court denied the motion, believing that "there is no right to counsel on collateral review." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

The Seventh Circuit resolved two issues. It first found that the petitioner was not "trying to present a new reason why he should be relieved of either his conviction or sentence" but instead was "trying to reopen his existing section 2255 proceeding and overcome a procedural barrier to its adjudication." *Id.* at 850. Under these circumstances, the Seventh Circuit concluded that the petitioner's Rule 60(b)(6) motion was permitted and was "not a disguised second or successive motion under section 2255." *Id.*

The Seventh Circuit next concluded that the *Martinez–Trevino* doctrine applies to federal prisoners "who bring motions for postconviction relief under section 2255." *Ramirez*, 799 F.3d at 852. Therefore, under Rule 60(b)(6), the petitioner could argue that § 2255 counsel's abandonment allowed him to file an otherwise untimely appeal. *Id.* at 854 ("We see no reason to distinguish between actions at the state level that result in procedural default and the consequent loss of a chance for federal review [as happened in *Martinez* and *Trevino*], and actions at the federal level that similarly lead to a procedural default that forfeits appellate review.").

3. Mr. Purkey's Claims Cannot Proceed Under *Martinez*, *Trevino*, or *Ramirez*

Mr. Purkey argues that under *Ramirez*, he may now raise claims of ineffective assistance of trial counsel that were not raised in his § 2255 action due to ineffective assistance of § 2255 counsel. Acknowledging that he cannot bring a second or successive § 2255 action, Mr. Purkey argues that he nonetheless has the right to judicial review of his § 2255 proceeding. Dkt. 23 at 15-18. More specifically, he argues that he must be able to present his claims in a § 2241 action and that *Ramirez* supports opening this avenue of review.

The Court disagrees. *Martinez*, *Trevino*, and *Ramirez* do not involve the Savings Clause and thus are not controlling. Moreover, nothing in *Ramirez* suggests that its holding regarding *Martinez–Trevino* applies outside of the § 2255 context. The Seventh Circuit framed the second legal question in *Ramirez* as whether *Martinez* and *Trevino* "apply to some or all federal prisoners who bring motions for postconviction relief *under section 2255*." 799 F.3d at 852 (emphasis added). But this says nothing about whether *Martinez–Trevino* has any role in demonstrating whether

the Savings Clause is met and thus whether § 2241 is available. Further, applying *Martinez–Trevino* to the narrow circumstances of a Rule 60(b) motion in a § 2255 proceeding does not create a rule that federal prisoners must have an alternative way to raise ineffective assistance of postconviction counsel when § 2255 is closed. *Ramirez* does not address these questions at all. And unlike the petitioner in *Ramirez*, Mr. Purkey had appellate review of his § 2255 case. Applying it here would therefore require a substantial extension of *Ramirez*, and the Seventh Circuit has rejected other opportunities to do so. *Cf. Lombardo*, 860 F.3d at 559 (holding that *Ramirez* should not be extended to the equitable tolling context).

Moreover, *Ramirez* has been construed narrowly by the Seventh Circuit to the facts involving abandonment of counsel. *See Lombardo v. United States*, 860 F.3d 547, 559 (7th Cir. 2017) ("[N]otwithstanding its discussion of *Martinez* and *Trevino* and its embracing of the principles underlying those cases, *Ramirez's* holding is best construed as resting on [counsel] abandonment."); *see also Adams v. United States*, 911 F.3d 397, 404 n.2 (7th Cir. 2018) (citing *Ramirez* for the proposition that "[a]bandonment by counsel" can qualify as a procedural defect that can be raised in a Rule 60(b) motion following the denial of § 2255 relief).

For these reasons, the Court rejects Mr. Purkey's argument that ineffective assistance of trial counsel claims that rely on *Martinez–Trevino* meet the Savings Clause.[6] Mr. Purkey does not cite any federal court

[6] Mr. Purkey argues, in reply, that the *Martinez–Trevino* doctrine permits his fraud-on-the-Court claim (Claim 3) to proceed in this action. Dkt. 58 at 57-58. For the same reasons it does not

that has accepted this argument, and the federal courts that have considered this argument have rejected it. *See, e.g.*, *United States v. Sheppard*, 742 F. App'x 599 (3d Cir. 2018) (rejecting the petitioner's argument that *Ramirez* shows he meets the Savings Clause because he can raise the *Martinez–Trevino* issue in a Rule 60(b) motion in the underlying § 2255; "Section 2255 together with Rule 60(b) thus plainly is not inadequate or ineffective to test the legality of [the petitioner's] conviction and sentence such that he may resort to a § 2241 habeas corpus petition."); *Rojas v. Unknown Party*, 2017 WL 4286186, *6 (D. Ariz. May 16, 2017) ("*Martinez* and *Trevino* do not impact the [Savings Clause] analysis or otherwise apply to § 2241 petitions. Simply stated, *Martinez* and *Trevino* were based on the narrow ground of procedural default in the context of a § 2254 petition. The reasoning of these cases has never been extended or applied by any court to a § 2241 petition."); *see also Dinwiddie v. United States*, No. 2:18-cv-00149-JPH-MJD, Dkt. 25 (S.D. Ind. July 25, 2019); *Jackman v. Shartle*, 535 F. App'x 87, 89 n.5 (3d Cir. 2013).

The Court concludes that neither *Ramirez* nor any other precedent requires it to grant Mr. Purkey the relief he seeks.

G. There is No Structural Problem with § 2255 When Applied to Mr. Purkey's Case

To the extent that *Ramirez* may authorize, without requiring, the Court to extend *Ramirez*'s holding to the Savings Clause context, the Court declines to do so. There is no structural problem with § 2255 when applied to the facts of Mr. Purkey's case. While Mr.

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permit his ineffective assistance claims to proceed, the Court rejects this contention.

Purkey did not succeed with his § 2255 motion, a structural problem requires "something more than a lack of success with a section 2255 motion." *Webster*, 784 F.3d at 1136. It must "foreclose[] even one round of effective collateral review, unrelated to the petitioner's own mistakes." *Poe v. LaRiva*, 834 F.3d 770, 773 (7th Cir. 2016) (citation and quotation omitted). That's not the case here.

In his § 2255 action, Mr. Purkey made 17 allegations of ineffective assistance against his trial counsel. Those claims were heard and adjudicated by the District Court, and the denial of them was affirmed by the Eighth Circuit. The record demonstrates that Mr. Purkey had "'a *reasonable* opportunity [in a prior § 2255 proceeding] to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Chazen*, 938 F.3d at 856 (quoting *Davenport*, 147 F.3d at 609) (emphasis added); *see Davenport*, 147 F.3d at 609 ("Nothing in 2255 made the remedy provided by that section inadequate to enable Davenport to test the legality of his imprisonment. He had an unobstructed procedural shot at getting his sentence vacated."). A reasonable opportunity does not include the opportunity to years later second-guess the selection of the claims that were asserted in the § 2255 action, pick new or "better" claims, and have those claims subject to judicial review in another judicial district. Applied to the facts of Mr. Purkey's case, § 2255 is not inadequate or ineffective.

Moreover, allowing Mr. Purkey's ineffective assistance claims to be brought in a § 2241 proceeding would be contrary to the statutory framework Congress created for federal prisoners seeking postconviction relief. Congress amended § 2255 in 1996 as part of the Anti-

terrorism and Effective Death Penalty Act ("AEDPA"). Most relevant here, AEDPA limits federal prisoners to one § 2255 motion unless they receive authorization from the Court of Appeals to file a second or successive § 2255 motion. 28 U.S.C. § 2255(h). This limitation was designed to curtail the problem of "repetitive filings" from federal prisoners challenging their convictions. *Garza*, 253 F.3d at 922.

Congress chose to "steer[] almost all [federal] prisoner challenges to their convictions and sentences toward § 2255." *Shepherd*, 911 F.3d at 862. It did so by requiring § 2255 motions be filed in the district of conviction, *Light*, 761 F.3d at 812, and limiting federal prisoners' access to § 2241 by way of the Savings Clause. *See Davenport*, 147 F.3d at 609 ("The purpose behind the enactment of section 2255 was to change the venue of postconviction proceedings brought by federal prisoners from the district of incarceration to the district in which the prisoner had been sentenced." (citing *United States v. Hayman*, 342 U.S. 205, 212-19 (1952)).

Section 2255 "not only relieved the district courts where the major federal prisons were located from a heavy load of petitions for collateral relief; it also enhanced the efficiency of the system by assigning these cases to the judges who were familiar with the records." *Webster*, 784 F.3d at 1145.

The Savings Clause "must be applied in light of [§ 2255's] history." *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002); *see Unthank v. Jett*, 549 F.3d 534, 535 (7th Cir. 2008) (same). It cannot be interpreted so expansively that it undermines "the careful structure Congress has created." *Garza*, 253 F.3d at 921; *see Chazen*, 938 F.3d at 865 (Barrett, J., concurring) (expressing "skeptic[ism]" of an argument that, if accepted, "risks

recreating some of the problems that § 2255 was designed to fix").

In the limited instances where the Seventh Circuit has found the Savings Clause met, the Court crafted narrow holdings so as to not "creat[e] too large an exception to the exclusivity of section 2255." *Webster*, 784 F.3d at 1140; *see id.* at 1140 n.9. Here, that's not possible. The petitioners in *Davenport*, *Garza*, and *Webster* each presented a very specific "problem" based on a unique set of facts presented. In each case the relief granted was symmetrical, and thus inherently limited to a very small category of cases involving scenarios that could not or were not foreseen by Congress. In *Davenport*, for example, the petitioner's "problem" was that § 2255(h) did not permit a successive petition for new rules of statutory law. To fix this problem, the Seventh Circuit crafted a narrow exception with three specific requirements limiting when and how a petitioner could pass through this exception. *See Beason*, 926 F.3d at 935; *Davenport*, 147 F.3d at 610-12.

Here, there is no very specific "problem" based on a unique set of facts that could be remedied through a narrowly drawn rule that would apply to a very small category of cases. Mr. Purkey's "problem" is that after availing himself of the postconviction relief process created by Congress, including appellate review, he did not get the outcome that he wanted on his claims of ineffective assistance of counsel. But there is no "something more," *Webster*, 784 F.3d at 1136, so there is no structural problem with § 2255.

Unlike the limited types of claims that the Seventh Circuit has held to meet the Savings Clause in *Davenport* (statutory claims based on a retroactive change in the law), *Garza* (claims based on new decisions from

international tribunals), and *Webster* (*Atkins* or *Roper* claims based on newly discovered evidence that existed at the time of the original proceedings and could not be discovered through reasonable diligence), Mr. Purkey asks the Court to allow ineffective assistance of trial counsel claims to proceed through the Savings Clause on the basis that § 2255 counsel was ineffective. But unlike the relatively narrow categories of claims allowed to proceed in *Davenport*, *Garza*, and *Webster*, ineffective assistance of trial claims are ubiquitous. *See Burt v. Titlow*, 571 U.S. 12, 19 (2013) (emphasizing that ineffective assistance of counsel claims are "common" and have been "adjudicated in countless criminal cases for nearly 30 years"). To allow such a frequently litigated claim to be raised in a § 2241 petition would dismantle the very structure of § 2255. "If error in the resolution of a collateral attack were enough to show that § 2255 is inadequate or ineffective, many of the amendments made in 1996 would be set at naught." *Taylor*, 314 F.3d at 836.

IV

For the foregoing reasons, the claims Mr. Purkey presents in his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 are barred by the Savings Clause, 28 U.S.C. § 2255(e). His ineffective assistance of trial counsel claims (Claims 1, 2, and 8) are rejected for the reasons set forth in Sections III.D and III.E. His remaining five claims fail to fall within any of the Seventh Circuit's Savings Clause precedents, and Mr. Purkey does not advance any basis for extending those precedents to these claims. Accordingly, his petition is denied with prejudice. *See Prevatte v. Merlak*, 865 F.3d 894, 901 (7th Cir. 2017) (explaining that dismissals pursuant to § 2255(e) are with prejudice).

Because the Court has resolved Mr. Purkey's claims, his motion to stay his execution pending resolution of his claims, dkt. [4], is **denied** as moot. Final Judgment consistent with this Order shall issue.

SO ORDERED.

Date: 11/20/2019

/s/ James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-3318

WESLEY IRA PURKEY
Petitioner-Appellant,
v.

UNITED STATES OF AMERICA, *et al.*,
Respondents-Appellees.

Filed: July 13, 2020

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 2:19-cv-00414-JPH-DLP
James P. Hanlon, *Judge.*

ORDER

Before DIANE P. WOOD, *Circuit Judge*, MICHAEL P. BRENNAN and AMY J. ST. EVE, *Circuit Judge.*

Wesley Ira Purkey, a death-row inmate at the U.S. Penitentiary in Terre Haute, currently has a scheduled execution date of July 15, 2020, two days from now. As we explain further below, this court heard oral argument in Purkey's appeal from the district court's order denying him relief under 28 U.S.C. § 2241 on June 16, 2020. Recognizing the gravity of the matter, the court *sua sponte* expedited its consideration of the appeal and issued its opinion affirming the district court on Ju-

ly 2, 2020, just 16 days after oral argument. In that opinion, although we rejected Purkey's arguments on the merits, we recognized that at least two of them presented serious issues. Applying the approach dictated by *Nken v. Holder*, 556 U.S. 418 (2009), we concluded that a brief stay permitting the orderly conclusion of proceedings in this court was warranted. Sl. op. at 26–27. The government has taken two steps in response to that holding: first, it has asked us to reconsider this stay; and second, it has filed an application with the Supreme Court asking that court to set aside the stay. See *Watson v. Purkey*, U.S. No. 20A4 (filed July 11, 2020). We explain further in this order why we issued the temporary stay, which by its terms is limited to this litigation and does not affect any other cases Purkey has filed in other courts, and why we are not persuaded that it should be set aside.

Purkey's primary argument on appeal was that he received constitutionally inadequate assistance of counsel at his trial for the murder and kidnapping of Jennifer Long. Although a lawyer filed a motion on his behalf under 28 U.S.C. § 2255 in which he challenged trial counsel's effectiveness, Purkey is now attempting to assert that postconviction counsel was also ineffective in several critical respects. Barred from filing a successive motion under section 2255, he argues that his only recourse is to the general habeas corpus statute, 28 U.S.C. § 2241. If that door is closed to him, he contends, he could literally go to his death without ever having the opportunity first to demonstrate that his Sixth Amendment rights were violated, and second, if he succeeds, to have a new trial untainted by that failing. We found this to be a serious argument, although not one that we felt free to accept, given our understanding of the scope of the "safety valve" language in

28 U.S.C. § 2255(e). It is serious because all defendants, including capital defendants, have a right to constitutionally effective counsel. The information proffered in Purkey's section 2241 petition gives us concern that Purkey never received such counsel.

With that in mind, we turned in our July 2 opinion to the factors governing the issuance of a stay pending the orderly conclusion of proceedings in this court—proceedings that at a minimum may involve the filing of a petition for panel or en banc rehearing, see Fed. R. App. P. 40(a)(1)(A) (due within 45 days after entry of judgment if the United States is a party), and that require the issuance of the court's mandate, see Fed. R. App. P. 41(b) (occurring seven days after resolution of any petition for rehearing, or after the time for such a petition has elapsed). As the government has pointed out in its motion, our stay thus would expire at the earliest 52 days after our July 2 judgment, or on Monday, August 24 (since the last day falls on the weekend). That date is obviously a few weeks after July 15, the government's desired execution date.

This brief stay is necessary in order to complete our proceedings in an orderly way. The government has offered no reason why we should fore-shorten the time for the filing of a petition for rehearing, or why we should order the mandate to issue forthwith. Nor has it provided any reason to support a finding that it would experience difficulty in re-scheduling Purkey's execution date for a time after our court has completed its review.

Against this, the government relies heavily on its assumption that Purkey has failed to show a "strong" possibility of success on the merits of his claim, as required by the first factor identified in *Nken*. Its prima-

ry reason for this assumption is the fact that this court rejected Purkey's theory. But that cannot be enough—otherwise any applicant for a stay of judgment would automatically lose, because that applicant lost in the rendering court. Moreover, a close look at *Nken* shows that the Supreme Court in that case adopted the traditional approach toward stays, not one specially tailored to a particular underlying law (there, the immigration statutes). That is why it focused not just on the likelihood of success on the merits, but also on the irreparable harm the applicant would suffer. An immigrant such as Nken can continue to pursue many forms of relief even after removal, but once someone has been executed, that is the end. More broadly, the *Nken* Court held that the evaluation of a stay requires consideration of all four factors, not just the first two. That is what we did. We add that, in evaluating the law, we are not free to speculate about the way in which the Supreme Court would view a new situation, even if we were to think that there are compelling reasons to extend existing precedents.

But, to be clear, our stay reflects the fact that we concluded that Purkey has made a strong argument to the effect that, under the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), a habeas corpus petitioner who has *never* been able to test the effectiveness of his counsel under the Sixth Amendment can overcome his procedural default in failing to do so in his first and only motion under section 2255. Such a petitioner, the reasoning continues, would be entitled to a hearing on the merits using the vehicle of section 2241. Only the Supreme Court can tell us whether this is a proper application of its decisions, but we deem Purkey's chances of success on this point to be strong enough to satisfy

Nken's first requirement, and as we stated before, there can be no debate about the irreparable harm he will experience if the government executes him on Wednesday, July 15.

We therefore DENY the government's motion for reconsideration. All relevant deadlines associated with a petition for rehearing remain in place for Purkey.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

> **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> **(2)** He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> **(4)** He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state,

or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the

court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.