CAPITAL CASE
EXECUTION SCHEDULED – JULY 15, 2020

No. 20A_____

IN THE

Supreme Court of the United States

WESLEY PURKEY,

Applicant,

v.

WARDEN OF USP TERRE HAUTE, UNITED STATES OF AMERICA,

Respondents.

APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Wesley Purkey is scheduled to be executed on **July 15, 2020, at 7:00 p.m. Eastern**. Mr. Purkey respectfully requests a stay of his execution pending this Court's disposition of his petition for a writ of certiorari.

As set forth below and in the petition for certiorari, Mr. Purkey's case presents an important question that merits this Court's review. 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. The basis for those decisions was this Court's recognition that prisoners must have at least one opportunity

for meaningful review of substantial claims of ineffective assistance of trial counsel, and meaningful review is unavailable when, in the first opportunity to raise those claims, counsel was absent or ineffective. 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. Yet the courts of appeals are divided on the question presented here: whether and by what procedural mechanism federal 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.

Here, the Seventh Circuit characterized Mr. Purkey's underlying ineffective assistance of trial counsel claims as "serious," but those claims have never been reviewed by any court. 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.

Given the fundamental importance of the right to trial counsel recognized in *Martinez* and *Trevino*, this Court is likely to grant certiorari to clarify that federal prisoners—or at the very least federal capital prisoners, who are guaranteed counsel in § 2255 proceedings—are equally entitled to meaningful review of substantial claims of ineffective assistance of trial counsel, presented by effective collateral counsel, and that § 2241 is an appropriate mechanism for relief when the remedy provided by § 2255 fails by virtue of the ineffective assistance of initial collateral-review counsel.

Even though this Court vacated the stay entered by the panel, a stay pending the disposition of Mr. Purkey's petition for a writ of certiorari is still warranted. The stay entered by the Seventh Circuit was specifically targeted to permit the orderly conclusion of proceedings before *that* court, and was premised on the panel's recognition that its reading of the Safety Valve may be "too restrictive," thus leaving open the possibility of en banc reversal. But the Court's ruling regarding *that* stay does not affect the prospect of certiorari. The Court should grant a stay so that it may consider the important issues raised in Mr. Purkey's petition before he is put to death.

JURISDICTION

The judgment of the Court of Appeals in Mr. Purkey's appeal arising out of his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2241, was entered on July 2, 2020. Pet. App. 56a. Mr. Purkey's petition for a writ of certiorari was filed on July 15, 2020. The government has set Mr. Purkey's execution for July 15, 2020. Pursuant to Supreme Court Rule 23.2, Mr. Purkey sought a stay of execution from the Court of Appeals. This Court has jurisdiction to entertain Mr. Purkey's petition for certiorari and application for a stay of execution under 28 U.S.C. § 1651(a).

BACKGROUND

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. Pet. App. 4a-6a. The charge stemmed from the 1998 kidnapping, rape, and murder of sixteen-year-old Jennifer Long. Pet. 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. Pet. App. 4a; Rose, *Death row: the lawyer who keeps losing*, The Guardian (Nov. 24, 2016). 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. Pet. 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 (Pet. 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. Dist. Ct. App. 1182, 1188-1190, 1194, 1438. Because of the inadequate investigation, the jury only heard scant evidence of Mr. Purkey's

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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."

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* Pet. 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 in the U.S. District Court for the Western District of Missouri for relief pursuant to § 2255. Pet. App. 6a. Mr. Purkey's § 2255 counsel raised a limited set of ineffective-assistance of trial counsel 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* Pet. App. 6a, 20a-22a. Importantly, 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 prejudice 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.

B. § 2241 Proceedings

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

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[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. 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.

beyond the evidence that post-conviction counsel presented [to the Eighth Circuit]." Pet. 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). Pet. 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. Pet. 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). Pet. 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* Pet. 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* Pet. 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." Pet. 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." Pet. 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." Pet. App. 20a (emphasis added). Mr. Purkey could not make such a showing 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." *Id.* (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. Pet. 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." Pet. 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. Pet. 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 Saturday, 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* Pet. App. 61. 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." Pet. 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[.]" Pet. 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." Pet. 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. Pet. 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 foreshorten 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.*

On July 15, 2020, this Court vacated the Seventh Circuit's stay.

REASONS FOR GRANTING THE STAY

Under *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), a stay of execution is warranted where there are "substantial grounds upon which relief might be granted." *Id* at 895. In determining whether to grant a stay, the Court considers whether there is: (1) "'a reasonable probability that four Members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction'"; (2) "'a significant possibility of reversal of the lower court's decision'"; and (3) "'a likelihood that irreparable harm will result if the execution is not stayed.'" *Id.* Each of these criteria is satisfied here.

The Seventh Circuit characterized Mr. Purkey's underlying ineffective assistance of trial counsel claims as "serious." 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 mention of the extensive abuse Mr. Purkey suffered outside his home while 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* and *Trevino* 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.

I. FOUR JUSTICES WOULD LIKELY VOTE TO GRANT CERTIORARI

There is a "'reasonable probability' that four Justices will consider the issue" presented by Mr. Purkey's petition for certiorari "sufficiently meritorious to grant certiorari." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citation omitted).

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.

A. 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. Pet. 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." Pet. App. 25a.[5]

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

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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"); *Jackman* 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).

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.

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.

B. 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"); s*ee 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 the 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* v. *United States*, 538 U.S. 500, 508 (2003). 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."). 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 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.

II. FIVE JUSTICES WOULD LIKELY REVERSE THE SEVENTH CIRCUIT'S DECISION BELOW

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.

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

7 *See id.*

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

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*, 538 U.S. at 508. 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 (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 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—is incorrect. Pet. 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. MR. PURKEY WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Irreparable harm is indisputably present when a stay of execution is sought. As this Court has explained, "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

In this capital case, Mr. Purkey has raised substantial challenges to the fundamental legality of his conviction and sentence—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." Pet. 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 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.

No court has had an opportunity to review these substantial claims on the merits. As a result, absent intervention from this Court, Mr. Purkey is going to be executed without his right to the effective assistance of trial counsel ever being vindicated.

CONCLUSION

This Court should enter an order staying Mr. Purkey's execution pending the Court's disposition of his petition for a writ of certiorari.

Respectfully submitted.

/s/ Alan E. Schoenfeld

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July 2020

CERTIFICATE OF SERVICE

I, Alan E. Schoenfeld, a member of the bar of this Court, hereby certify that on this 15day of July, 2020, I caused all parties requiring service in this matter to be served the accompanying Application for a Stay of Execution by email to the address below:

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I further certify that paper copies will be submitted to the Court and served on all parties requiring service by overnight courier on July 16, 2020, per discussion with the Clerk's Office.

/s/ Alan E. Schoenfeld

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