No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LEWIS LEE,
PETITIONER,

v.

T.J. WATSON, WARDEN, AND UNITED STATES OF AMERICA,
RESPONDENTS.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

APPLICATION FOR STAY OF EXECUTION

--- CAPITAL CASE ---
LEE IS SCHEDULED TO BE EXECUTED TODAY,
JULY 13, 2020 AT 4:00 P.M. EASTERN TIME

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To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Petitioner, Daniel Lee, respectfully requests a stay of his execution, which is scheduled for today, July 13, 2020, at 4:00 PM. Petitioner asks this Court to stay his execution in order to maintain the status quo and preserve the Court's eventual jurisdiction to review a petition for certiorari to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The issues to be raised will become moot if Mr. Lee is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring). Pursuant to Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted.

Introduction

Daniel Lee was sentenced to die for two reasons alone: first, because a psychological test proved he was a "psychopath" who would be a danger in the future; and second, because his jury heard he was guilty of a prior murder but had "gotten away with it." Both of these claims were false. Had trial counsel accurately challenged the test's use in his case the jury would not have heard the spurious evidence; had the prosecution not withheld the truth about the prior murder no death sentence would have ensued. So clear is that result that three federal judges found based on these two different grounds that Danny Lee's death sentence likely violates the Constitution and should be invalidated. Unfortunately, two of those jurists believed that the structure of the §2255 statute prevented them from granting the necessary relief. The third found §2241 nevertheless unavailable to Lee. This appeal arises from that third finding.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in Mr. Lee's case.

First, there exists a significant possibility of reversal of the lower court's decision. As demonstrated in Mr. Lee's Petition, the court below treated his claim regarding trial counsel's ineffectiveness as indistinguishable from the allegation in *Purkey v. United States*, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2, 2020). This was a gross misunderstanding of the case. The petitioner in *Purkey* never raised the ineffectiveness claims presented in his § 2241 petition during his § 2255 proceeding, never gave the § 2255 reviewing court the opportunity to review the claims, and made no attempt to point to any discrete procedural barrier that prevented the opportunity to raise them earlier. Mr. Lee did all those things but was foreclosed when the Eighth Circuit held Rule 60(b) inapplicable to all federal prisoners relying on the decision in *Trevino v. Thaler,* 569 U.S. 413 (2013). Indeed, as Mr. Lee's Petition notes, he did exactly what the Government lawyer in *Purkey* faulted Purkey for failing to do. The court below failed to answer the issues presented in Mr. Lee's case because it overlooked the fact that Mr. Lee's § 2241 argument

addressed the failure not of counsel, but of the structure of the § 2255 proceedings itself.

By denying Mr. Lee access to § 2241 in this case, the Seventh Circuit failed to recognize how his § 2255 proceedings deprived him of the ability to challenge the legality of his detention, He remains set for execution despite the unconstitutionality of his death sentence.

Second, Mr. Lee's petition for a writ of *certiorari* raises important federal and statutory questions for federal criminal law. As the Government itself has written in petitions before this Court, the circuit courts are in desperate need of guidance about how and when § 2241 is available to federal prisoners. The legal patchwork that now exists in circuit courts threatens the fair and accurate administration of justice.

Mr. Lee's Petition also asks this Court to resolve a conflict within the circuits regarding the application of a "due diligence" test to *Brady* claims. *Brady v. Maryland,* 373 U.S. 83 (1963). Such a test contravenes this Court's opinion in *Banks v. Dretke*, 540 U.S. 668 (2004), yet there remains a major disagreement about it in the circuit courts of appeals. *See Biles v. United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014) ("The Supreme Court has not explicitly addressed and state and federal courts are split on this 'due diligence' question."). The Seventh Circuit's application of this test to the *Brady* claim in Mr. Lee's § 2241 petition was error and this Court should grant review to resolve this conflict in the circuits.

Mr. Lee would suffer irreparable injury if the Court were to deny his motion for a stay of execution. *See*, *e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (granting stay of execution in light of the "obviously irreversible nature of the death penalty").

Finally, the public interest also weighs in favor of a stay of Mr. Lee's execution. There is no public interest in an unconstitutional execution: a stay would vindicate the public's interest in making sure that the federal government does not violate the U.S. Constitution. Mr. Lee seeks a stay to have a meaningful opportunity to have this Court consider the serious allegations that without *either* the ineffective representation provided him *or* the government misconduct there would have been no death sentence here.

In Mr. Lee's case, however, the actual interests of the public in going forward with an execution now are well-documented and starkly different from the abstract interests the Government may try to assert, despite knowing better. This case has raised extraordinary concern. The Eastern District of Arkansas Judge who presided at trial and post-conviction remain troubled by the manner in which the sentence was obtained as well as the result. Long before the new evidence in this appeal came to light, he had written:

> That Petitioner's death sentence is not redressable under existing legal principles does not mean that it constitutes a fair and rational result under

> the peculiar and special circumstances of this particular case….the end result leaves me with the firm conviction that justice was not served in this particular case, solely with regard to the sentence of death imposed on Daniel Lewis Lee.

Exh. A, Letter from Mr. Lee's trial and initial §2255 Judge Eisele to A.G. Holder et al.

Former Assistant United States Attorney and lead prosecutor in Mr. Lee's case, Dan Stripling, also opposes Mr. Lee's execution. He is convinced that the disparate sentencing outcomes in this case—Mr. Lee's death sentence, compared with his more culpable co-defendant's life-without-parole sentence—were the result of arbitrary factors given the evidence against the two men:

> There is simply no knowing why, under the facts before the jury, Lee was given a death sentence and Kehoe not. Kehoe is intelligent, appeared clean cut, and had support of convincing witnesses who genuinely supported him. Lee had none of those benefits. If this was the reason for the jury's decision, life should not be taken because of these disparities.

Exh. B, Letter from Former AUSA Dan Stripling to A.G. Holder.

Although in its execution notice, Defendants unthinkingly invoked the interests of "the families left behind" when setting Mr. Lee's execution date, the actual family members of the victims, including Earlene Branch Peterson, mother of Nancy Mueller and grandmother of Sarah Elizabeth Powell, do not want Mr. Lee executed and has made her views known publicly. *See* Sadie Gurman, "First federal execution since 2003 is set for Monday," Wall Street Journal, July 9, 2020. (https://www.wsj.com/articles/first-federal-execution-since-2003-is-set-for-monday-11594292401) ("A conservative Trump supporter, Ms. Peterson sent the president a videotaped plea begging him to commute Mr. Lee's sentence to life in prison, the

same punishment Mr. Kehoe received. 'We were hopeful that they had heard us and maybe listened to us, but that's not what they have done,' Ms. Peterson said in an interview. 'Putting Daniel Lee to death would dishonor my whole family. That's not how we live our lives.'").[1]

Given the concerns voiced by members of the public who would usually be supporting a given sentence, it is fair to ask who in the public would be well served by executing Mr. Lee now, before he has had meaningful review of these strong claims. The rare opposition of the lead prosecutor and trial judge—one sought the death penalty and the other presided over both the trial and post-conviction proceedings—should give pause. Given the lack of expected support for executing Daniel Lee in this case, it is difficult to see in whose interest suddenly rushing this execution truly might be.

Under these circumstances, where it benefits the public for Mr. Lee's constitutional rights to be fully considered and where the trial judge, the trial prosecutors, the family of the victims who attended the trial daily all oppose this execution the public interest clearly weighs in favor of a stay.

CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mr. Lee's petition for writ of *certiorari*.

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[1] *See also* "Murder victim's family urge Donald Trump to spare life of man facing execution," Arkansas Times, June 25, 2020 (https://arktimes.com/arkansas-blog/2020/06/25/murder-victims-family-urge-donald-trump-to-spare-life-of-man-facing-execution) (including video).

Respectfully submitted,

/s/ Morris H. Moon
MORRIS H. MOON
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Dated: July 13, 2020

EXHIBIT A

G. THOMAS EISELE

[redacted]

Little Rock, AR [redacted]

[redacted]

November 7, 2014

Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Christopher R. Thyer
United States Attorney
Eastern District of Arkansas
P.O. Box 1229
Little Rock, Arkansas 72203

Re: *United States v. Daniel Lewis Lee,*
Eastern District of Arkansas, Court Case No. 4:97-cr-000243

Attorney General Holder and U.S. Attorney Thyer:

I am the federal judge who presided over the criminal trial of Daniel Lee ("Lee") back in 1999, the result of which was a penalty of death being imposed upon Lee, but not on the ringleader Chevie Kehoe ("Kehoe"). I am 91 years old, and I have not had an active docket for several years.

I was informed by counsel for Daniel Lee ("Lee") in a letter dated October 6, 2014, that settlement discussions were ongoing between the Government and Lee's current counsel regarding whether a life sentence "best serves the interests of justice." I declined Lee's counsel's request for an in-person meeting, but took under advisement whether to write a letter. Since that time, I have given considerable thought to the matter.

I obtained copies of and reviewed the prior opinions in the case for the purpose of squaring my memories of the case with the legal record.[1] I feel compelled to write this letter, which I would not normally do, because I believe that requiring Lee to pay the ultimate penalty – death – is unjust under the peculiar circumstances of this case. Of course, this is nothing more than my view, entitled to no weight other than that which you in your official positions deem appropriate.

All who review the record will recognize the unequal and disparate roles that Kehoe and Lee played in their horrific crime spree, which Kehoe directed and Lee joined intermittently. Kehoe

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[1] The facts and opinions expressed herein are consistent with the record in this case and the views expressed in my post-trial rulings and opinions.

recruited Lee. Kehoe was the charismatic leader; Lee the obedient follower. Lee "participated in the murder of the adults, but would have no part in the killing of [8-year-old] Sarah Powell so Kehoe had done it alone."[2] There was no question that Kehoe was the more culpable of the two with regard to the criminal acts charged in the indictment and proved at trial.

This clear disparity in culpability was recognized when "the Government announced *in camera* [while the jury was considering the penalty phase in Kehoe's case] that if the jury sentenced Defendant Kehoe to life imprisonment, it would not pursue the death penalty for Defendant Lee."[3] As I wrote in a letter to the parties shortly after the death verdict was returned:

> Before the jury determined that Mr. Lee should die, all of the attorneys in the case appeared to be of a mind that the death penalty would be inappropriate in the case of Mr. Lee because the jury had failed to sentence Mr. Kehoe to death. Everyone seemed to be in agreement that the death penalties for both defendants would have been a possible and appropriate outcome, and life without parole for both defendants would have been a possible and appropriate outcome, but no one believed that it would be appropriate to seek the death penalty for Lee if the death penalty had not been imposed upon Mr. Kehoe.[4]

Initially, I set aside the death penalty based on two issues, both of which are addressed briefly below. The Eighth Circuit set aside my opinion and reinstated the death penalty.

Death Penalty Protocol:

I set aside the death penalty after concluding that the United States failed to follow its own "Death Penalty Protocol."[5] While this issue ultimately became about whether Lee had "standing" to require the Attorney General to follow her Death Penalty Protocol, this technical framing of the issue does not capture adequately the events leading up to the holding or its impact.

When the jury handed down its life sentence for Kehoe, whose sentencing phase was first, I believed that Lee's sentence was resolved as well, as had been represented. It was surprising to learn that this was not the case and that formal permission to withdraw the death penalty as to Lee had to be received from Washington, D.C. It was even more surprising to learn that permission was being denied, in direct conflict with the recommendation of the local United States Attorney and her assistants in Little Rock, all of them very capable prosecutors.

The chain of events moved swiftly after the Court was advised that the effort to seek death for Lee would in fact go forward. At that point, the trial had been underway for over two months.

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[2] 374 F.3d 637 (8th Cir. 2004).
[3] 89 F. Supp. 2d 1017, 1032 (E.D. Ark. 2000), rev'd, 274 F.3d 485 (8th Cir. 2001).
[4] No. 4:97CR00243, 2008 U.S. Dist. LEXIS 109771, at * 182 (E.D. Ark. Aug. 28, 2008) (quoting letter).
[5] 89 F.Supp. 2d at 1041.

All were weary. After the announcement of the life sentence for Kehoe, but before the jury had decided Lee's fate, I allowed the jurors to return to their homes. I have often wondered whether I made a mistake in not sequestering the jurors for the entire penalty phase.

Future Dangerousness (Hare "Psychopathy" Tool):

I set aside the death penalty after concluding that I erred in allowing the introduction of evidence regarding Lee's future dangerousness during the penalty phase of the trial.[6] In making this finding, I held that introduction of the psychopathy evidence improperly emphasized Lee's "future dangerousness" during sentencing even though Lee "chose neither to perform a risk assessment analysis nor to present rebuttal evidence on the future dangerousness aggravating factor" and "was therefore ill-equipped to handle the Government's discussion of psychopathy."[7] Fifteen years later, there is more reason than ever to question the use of the Hare Psychopathy instrument or prejudicial labeling relied upon at sentencing.[8]

I frequently have second-guessed my own decisions in this case and wondered what, if anything, I could have done differently that might have resulted in a more rational outcome. I have no doubt that all involved did the best they could at the time with the knowledge that they had. Still, the end result leaves me with the firm conviction that justice was not served in this particular case, solely with regard to the sentence of death imposed on Daniel Lewis Lee.

Suffice it to say that, now, more than ever, I agree with my following statement, made in concluding that I was unable to grant Lee post-conviction relief under existing law:

> That Petitioner's death sentence is not redressable under existing legal principles does not mean that it constitutes a fair and rational result under the peculiar and special circumstances of this particular case. Perhaps more than anything else, this case illustrates that the most carefully crafted capital punishment regime in the hands of the humans who must carry it out can never be completely free of arbitrariness in all of its implementations.[9]

I wish you both the best. I remain,

Yours truly,

G. Thomas Eisele

G. Thomas Eisele

cc: Karl Schwartz [Attorney for Daniel Lee]

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[6] *Id.* at 1032.

[7] 89 F. Supp. 2d at 1030.

[8] *See, e.g.*, Kathleen Wayland & Sean D. O'Brien, Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels, 42 Hofstra L. Rev. 519, 521 (2013).

[9] 2008 U.S. Dist. LEXIS 109771 at *185.

EXHIBIT B

Dan Stripling
[redacted]
Little Rock, Arkansas [redacted]
October 28, 2014

Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Christopher R. Thyer
United States Attorney
Eastern District of Arkansas
PO Box 1229
Little Rock, Arkansas 72203

General Holder and US Attorney Thyer:

Re: Pending execution of Danny Lee

At the request of Danny Lee's representatives, I am writing you regarding my feelings about the pending execution of Danny Lee. I am pleased to honor their request.

As an Assistant United States Attorney, I was lead prosecutor in the investigation and trialof Chevie Kehoe, Danny Lee, and others who plotted to create an Aryan Nation free of other races or ethnic groups. In the course of numerous, varied criminal activities, the Muller family was killed. The investigation lasted two years, and the trial lasted many weeks. Kehoe was unquestionably the leader of the organization and plotter of the Muller murders. Lee's role was that of the "Aryan Hit Man." Evidence presented at trial established that Lee killed the two adults but was unable to execute the little girl. This Kehoe did after insulting Lee for his weakness.

The United States Attorney sought DOJ approval to seek the death penalty against both Kehoe and Lee. Certification was granted. At the time, and today, I thought this the correct decision. After conviction, the jury found that Kehoe should receive a life sentence rather than the death penalty. Following this jury decision, the United States Attorney sought DOJ decertification of Lee's death penalty request. This was denied. At the time, and today, I think decertification would have been the correct decision.

Kehoe was clearly the leader of the group. The robbery and murder of the Muller family were entirely his plan. Lee was the henchman Kehoe used to assist him in this ghastly undertaking.

The decision to seek DOJ approval to withdraw the capital designation in Lee's case was not lightly made. First Assistant Michael Johnson discussed the issue with the victim's family and those law enforcement officers and agents most involved in the investigation and prosecution. Prior to the return of the Kehoe penalty verdict, Johnson and United States Attorney Paula Casey had discussed the action to be taken should the jury not return a death verdict against Kehoe with line prosecutors. There was agreement that should Kehoe not receive a death sentence, none should be sought against Lee.

Prior to becoming an Assistant United States Attorney, I was a state prosecutor and, for fifteen years, in private practice defending most types of criminal cases. I was lead defense attorney in numerous cases in which a capital charge was a consideration and one that resulted in a capital charge, conviction, and defendant's execution. Over decades, my feelings about capital punishment have matured. I do not feel that capital punishment is inherently wrong or that death rows are teeming with innocent people. However, I find very disturbing the randomness with which defendants are charged, convicted, and sentenced in capital cases. This case perfectly illustrates this unexplainable randomness. It is this unpreventable disparity in outcomes that convinced me that the Lee capital designation should have been decertified. There is simply no knowing why, under the facts before the jury, Lee was given a death sentence and Kehoe not. Kehoe is intelligent, appeared clean cut, and had support of convincing witnesses who genuinely supported him. Lee had none of those benefits. If this was the reason for the jury's decision, life should not be taken because of these disparities.

May God bless you in your decision.

Sincerely,

Dan Stripling

Dan Stripling

cc: Karl Schwartz, Esq.