No. 20-5032

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LEWIS LEE, PETITIONER

v.

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

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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Petitioner is a white supremacist who murdered an eight-year-old girl and her parents in 1996 in connection with an effort to establish an independent nation of white supremacists in the Pacific Northwest. Petitioner was convicted on three counts of capital murder and sentenced to death in the Eastern District of Arkansas. The district court in Arkansas and the Eighth Circuit have accorded petitioner extensive review on both direct appeal and collateral review under 28 U.S.C. 2255, and this Court has denied four petitions for writs of certiorari from the resulting judgments. Petitioner has also filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Indiana (his place of confinement), but the district court in

Indiana denied the petition and the Seventh Circuit affirmed its judgment.

Now, two decades after petitioner's trial, the government is prepared to carry out petitioner's lawful sentence. Petitioner, however, seeks a stay of execution pending this Court's consideration of his petition for a writ of certiorari seeking review of the Seventh Circuit's rejection of the Section 2241 petition. That application lacks merit, and both it and the accompanying petition for a writ of certiorari should be denied. The decision below is correct and does not conflict with any decision of this Court or another court of appeals, and neither extraordinary relief nor further review is warranted.

First, Congress has established Section 2255, not Section 2241, as the principal means of testing a federal prisoner's detention, and it has provided that a prisoner may bring a claim under Section 2241 only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). As the district court and the court of appeals have both determined, petitioner's current claims do not satisfy that standard. Petitioner could have brought his claims under Section 2255; indeed, he did bring them under Section 2255, and they were rejected. The court of appeals described petitioner's contrary arguments for invoking Section 2241 as

"frivolous." Lee v. Warden, No. 20-2128, 2020 WL 3888196, at *2 (July 10, 2020).

Second, petitioner's underlying claims lack merit. Petitioner contends that his trial lawyers rendered ineffective assistance by failing to object to the government's cross-examination of a defense expert witness. But petitioner has advanced multiple versions of that argument on direct review and in motions under Section 2255, and his contentions have repeatedly been rejected by the district court in Arkansas and the Eighth Circuit. Petitioner also contends that the government violated its obligations under Napue v. Illinois, 360 U.S. 264 (1959), and Brady v. Maryland, 373 U.S. 83 (1963), by relying on false evidence and by failing to disclose exculpatory evidence during his sentencing hearing. But the government did not present false evidence, and as the court of appeals observed here, the supposedly exculpatory evidence was already "known to [petitioner]" and "publicly available in the court record" of a previous murder case in which petitioner was involved. Lee, 2020 WL 3888196, at *2.

Finally, the effect of granting petitioner's requested stay would likely be to delay his execution significantly. This Court has previously refused to permit such "unjustified delay" in light of the public's "'important interest in the timely enforcement of a [capital] sentence.'" Bucklew v. Precythe, 139 S. Ct. 1112, 1133-1134 (2019) (citation omitted).

Petitioner's lawful sentence for a triple murder should be carried out promptly. His application for a stay should be denied.

STATEMENT

1. Petitioner and his co-defendant Chevie Kehoe were members of Aryan Peoples' Republic or Aryan Peoples' Resistance, a white supremacist organization that sought to establish an independent nation of white supremacists in the Pacific Northwest. United States v. Lee, 374 F.3d 637, 641 (8th Cir. 2004), cert. denied, 545 U.S. 1141 (2005). They traveled from Washington State to the Arkansas home of William Mueller, a gun dealer, expecting to find guns and ammunition there. Ibid. They incapacitated Mueller and his wife, and they then questioned their eight-year-old daughter Sarah Powell about the location of the guns and ammunition. Id. at 641-642. After taking weapons worth about $30,000, as well as $50,000 in cash, petitioner and Kehoe shot the Muellers and Sarah with a stun gun, placed plastic trash bags over their heads, and sealed the bags with duct tape in order to asphyxiate them. See United States v. Lee, No. 97-cr-243, 2008 WL 4079315, at *4 & n.52 (E.D. Ark. Aug. 28, 2008). Petitioner and Kehoe then taped rocks to the Muellers and Sarah and threw them into the nearby Illinois Bayou. Lee, 374 F.3d at 642; United States v. Kehoe, 310 F.3d 579, 590 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003).

A grand jury in the Eastern District of Arkansas indicted petitioner and Kehoe for racketeering, in violation of 18 U.S.C. 1962(c); conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); and three capital counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). Lee, 374 F.3d at 642. The government provided notice of its intent to seek the death penalty against both defendants for each of the three murders. Ibid. Following a two-month trial, a jury found both petitioner and Kehoe guilty on all counts. Id. at 643.

The Federal Death Penalty Act of 1994, 18 U.S.C. 3591-3598, required the jury to determine whether aggravating factors proved by the government sufficiently outweighed any mitigating factors proved by the defendants to justify the death penalty. See Jones v. United States, 527 U.S. 373, 377-378 (1999). At petitioner's sentencing hearing, the government emphasized the aggravating factor of his future dangerousness, while the defense argued principally that petitioner suffered from mental impairment because of his troubled upbringing. E.g., Trial Tr. 7379-7388.

Two features of the sentencing hearing are relevant to petitioner's claims here. First, during trial, the government cross-examined a defense expert, Dr. Mark Cunningham, regarding a psychological test -- the Hare Psychopathy Checklist Revised, or PCL-R -- that, in the view of a government expert, demonstrated petitioner's future dangerousness. See Trial Tr. 7755, 7825-7827.

In response to the government's cross-examination, Dr. Cunningham testified that PCL-R is predictive of "criminal activity and violence in the community," but that it had not "been shown to be predictive of correctional institutional violence." Trial Tr. 7812; see Trial Tr. 7795-7798, 7806-7819. Dr. Cunningham also testified that he had reviewed the government expert's report and that the report had "identified [petitioner] by his scoring of the PCL-R as falling into the psychopathy range." Trial Tr. 7825-7828. Petitioner's counsel interposed a continuing objection to that testimony, arguing that it exceeded the proper scope of cross-examination. Trial Tr. 7832. The district court initially allowed the cross-examination to continue, but at the end of Dr. Cunningham's testimony, it stated that it had "probably permitted the government to go much farther on cross-examination than is proper." Trial Tr. 7836. The court accordingly granted petitioner's motion to exclude any further reference to psychopathy or to the PCL-R, and when the government later called its expert as a rebuttal witness, he did not offer testimony on those issues. Trial Tr. 7836, 7906-7931.

Second, the government introduced evidence that, in 1990, petitioner had been involved in another killing -- the murder of Joey Wavra. See Trial Tr. 7389-7461, 7470. After Wavra angered petitioner at a party in Oklahoma, petitioner beat up Wavra, forced him down a manhole into a storm sewer, and engaged in "talk of a

coin toss to see if [Wavra] would live or die." Trial Tr. 7414; see Trial Tr. 7412-7414, 7426-7440. Petitioner then retrieved a knife for an accomplice (his cousin), who repeatedly stabbed Wavra and slit his throat. Trial Tr. 7395-7396, 7403-7407, 7446. Petitioner was at first charged with first-degree murder, but he ultimately pleaded guilty to robbery and received a suspended sentence. Trial Tr. 7470. In the sentencing hearing here, the government argued that petitioner received an "incredible [plea] deal" for Wavra's killing, but that he squandered that second chance when he savagely murdered the Mueller family. Trial Tr. 7963-7964.

After weighing the aggravating and mitigating factors, the jury unanimously recommended that petitioner be sentenced to death on each of the charges of murder, and the court imposed sentence accordingly. Trial Tr. 8019-8022. At a separate sentencing hearing for co-defendant Kehoe, the same jury decided against death and in favor of life imprisonment without the possibility of release. Trial Tr. 7328-7337.

2. After his conviction and sentence, petitioner obtained multiple rounds of review in the Arkansas district court and Eighth Circuit. He also filed four petitions for writs of certiorari in this Court, but on each occasion, the Court denied review.

First, petitioner moved after his sentencing for a new sentencing hearing, arguing, as relevant here, that the government

exceeded the scope of permissible cross-examination during Dr. Cunningham's testimony. United States v. Lee, 89 F. Supp. 2d 1017, 1021-1022 (E.D. Ark. 2000). The district court granted the motion for a new hearing. Id. at 1042. The Eighth Circuit, however, determined that the government's cross-examination had not been improper; it accordingly reversed the district court's decision and reinstated the death sentence. See United States v. Lee, 274 F.3d 485 (8th Cir. 2001). This Court denied review. Lee v. United States, 537 U.S. 1000 (2002).

Second, petitioner raised a multitude of arguments on direct appeal, but the Eighth Circuit rejected those contentions and affirmed the conviction and sentence. See Lee, 374 F.3d at 642-654. This Court again denied review. Lee v. United States, 545 U.S. 1141 (2005).

Third, in June 2006, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, raising, as relevant here, a claim that trial counsel had been ineffective for failing to object to the government's cross-examination of Dr. Cunningham. See Lee, 2008 WL 4079315, at *2, *46. The district court denied the motion, finding the claim to be "without merit" and noting that "[t]rial counsel performed as [petitioner] now argues that they should have -- by interposing a continuing objection to said cross-examination of Dr. Cunningham." Id. at 46. Petitioner then filed a motion for reconsideration, contending

that his trial lawyers had rendered ineffective assistance by failing to object that the PCL-R test discussed during Dr. Cunningham's cross-examination was scientifically unsound. See United States v. Lee, No. 97-cr-243, 2010 WL 5347174, at *5-*6 (E.D. Ark. Dec. 22, 2010). The district court denied the motion for reconsideration, finding it procedurally barred as well as "lacking in merit." Id. at *5. The Eighth Circuit denied a certificate of appealability on the PCL-R issue, and it affirmed the denial of the Section 2255 motion. United States v. Lee, 715 F.3d 215, 224-225 (8th Cir. 2013). This Court once more denied review. Lee v. United States, 574 U.S. 834 (2014).

Fourth, in September 2013, petitioner filed a motion in which he argued that his lawyers in the Section 2255 proceedings were ineffective, and that their ineffectiveness in turn justified revisiting his underlying claim that his trial lawyers were ineffective for failing to object to Dr. Cunningham's discussion of the PCL-R test. See United States v. Lee, No. 97-CR-243, 2014 WL 1093197, at *3 (E.D. Ark. Mar. 18, 2014). Petitioner labeled his motion as one under Federal Rule of Civil Procedure 60(b) to reopen the judgment, but the district court found that it was in substance a second or successive motion for relief under Section 2255. Id. at *4; see Gonzalez v. Crosby, 545 U.S. 524, 530-531 (2005). The court determined that it lacked jurisdiction over that motion because petitioner had failed to satisfy 28 U.S.C.

2255(h), which permits second or successive Section 2255 motions only when a court of appeals has certified that they contain persuasive new evidence of innocence or rest on a new rule of constitutional law made retroactive by this Court. Lee, 2014 WL 1093197, at *4. The Eighth Circuit affirmed, see United States v. Lee, 792 F.3d 1021 (8th Cir. 2015), and this Court denied petitioner's fourth petition for a writ of certiorari, see Lee v. United States, 137 S. Ct. 1577 (2017).

Fifth, in September 2018, petitioner filed a second or successive motion for relief under Section 2255. See 97-cr-243 Doc. 1297 (Sept. 10, 2018). Petitioner claimed that he had found new evidence concerning his Oklahoma prosecution for the murder of Joey Wavra -- a fee application filed by his court-appointed lawyer in that case. See id. at 52-61. Petitioner contended that prosecutors at the sentencing hearing in his federal murder case had argued that he had received a favorable plea agreement in connection with the Wavra killing, but that the fee application showed that the murder charge in the Wavra case had been dismissed for insufficient evidence. Ibid. Petitioner contended that the federal government had failed to disclose the Wavra-related fee application at his sentencing hearing here, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and that it had used false evidence to obtain the death penalty, in violation of Napue v. Illinois, 360 U.S. 264 (1959). 97-cr-243 Doc. 1297, at 52-61 (E.D.

Ark.). The district court denied the motion, explaining that petitioner had once again failed to comply with Section 2255(h)'s prerequisites. See 97-cr-243 Doc. 1313, at 14-17 (E.D. Ark. Feb. 26, 2019). The Eighth Circuit denied a certificate of appealability. Lee v. United States, No. 19-2432 (order entered Nov. 4, 2019).

4. In July 2019, the government scheduled petitioner's execution for December 9, 2019. Two months later, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Indiana (where he is confined). D. Ct. Doc. 1 (Sept. 26, 2019). The district court stayed petitioner's execution pending its resolution of that petition, see Lee v. Warden USP Terre Haute, No. 2:19-cv-468, 2019 WL 6608724 (S.D. Ind. Dec. 5, 2019), but the court of appeals vacated the stay, see Lee v. Watson, No. 19-3399, 2019 WL 6718924 (7th Cir. Dec. 6, 2019).

The district court subsequently denied petitioner's Section 2241 petition. Lee v. Warden USP Terre Haute, No. 2:19-cv-468, 2020 WL 1317449 (Mar. 20, 2020). The court observed that, under 28 U.S.C. 2255(e) (the "saving clause"), a prisoner may bring a habeas petition under Section 2241 only if "the remedy by motion" under Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e); see Lee, 2020 WL 1317449, at *2. The court found that neither of petitioner's

claims -- the claim of ineffective assistance of counsel in connection with Dr. Cunningham's cross-examination and the claim under Brady and Napue -- satisfied that standard. Id. at *2-*3. Petitioner moved to alter or amend the judgment, but the court denied that motion as well. See Lee v. Warden USP Terre Haute, No. 2:19-cv-468, 2020 WL 3489355 (S.D. Ind. June 26, 2020).

On July 10, 2020, the court of appeals affirmed and denied petitioner's motion for a stay of execution. Lee v. Watson, No. 20-2128, 2020 WL 3888196 (7th Cir. July 10, 2020). In the course of doing so, it described petitioner's arguments as "frivolous." Id. at *2. The court explained that, under its precedents, "a § 2241 petition may not proceed under the Savings Clause" unless the prisoner shows that there was "something 'structurally inadequate or ineffective about section 2255 as a vehicle' for the arguments raised in the § 2241 petition." Id. at 3 (citations omitted). The court determined that petitioner's claims failed to satisfy that standard. Ibid. Observing that petitioner had already "raised a claim of ineffective assistance of trial counsel in his § 2255 motion," but "now seeks to use § 2241 as a vehicle to raise a new argument about trial counsel's ineffectiveness," the court explained that "there was nothing structurally inadequate about § 2255 as a vehicle for this argument." Ibid. The court further determined that "[petitioner's] Brady/Napue claim fares no better," observing that "the alleged 'newly

discovered' evidence on which this claim rests was known to [petitioner] and is contained in the publicly available court record in petitioner's [prosecution for the killing of Joey Wavra]." Ibid.

ARGUMENT

Petitioner's application for a stay, and his petition for a writ of certiorari, should be denied. In order to obtain a stay of execution pending consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). Once the movant satisfies those prerequisites, the Court considers whether a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009); see, e.g., Gomez v. United States District Court, 503 U.S. 653, 653-654 (1992) (per curiam).

Petitioner cannot satisfy those well-established standards. First, petitioner has failed to establish a reasonable probability

that this Court will review and reverse the court of appeals' decision that 28 U.S.C. 2241 is an inappropriate vehicle for his current claims. That decision is correct and does not conflict with any decision of this Court or another court of appeals, and certiorari should be denied. Second, petitioner has failed to establish that the underlying claims are likely to succeed on the merits, rendering both a stay and certiorari unwarranted. Finally, a stay would undermine the government's and the public's interest in the timely enforcement of petitioner's lawful sentence.

I. PETITIONER HAS FAILED TO SHOW THAT THIS COURT IS LIKELY TO REVIEW AND REVERSE THE SEVENTH CIRCUIT'S DECISION

A. Petitioner Has Failed To Establish That He Can Pursue His Current Claims Through Section 2241

The court of appeals correctly affirmed the district court's denial of petitioner's Section 2241 petition on the ground that Section 2241 is an inappropriate vehicle for bringing his current claims of ineffective assistance of trial counsel and violation of the prosecution's obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959). Petitioner has established neither "a reasonable probability that four Members of the Court would consider [that] issue sufficiently meritorious for the grant of certiorari" nor "a significant possibility of reversal of the lower court's decision." Barefoot, 463 U.S. at 895 (citation omitted). The court of appeals rejected petitioner's arguments for invoking Section 2241 as "frivolous,"

Lee v. Warden, No. 20-2128, 2020 WL 3888196, at *2 (July 10, 2020); he identifies no court that has embraced the expansive reading of 28 U.S.C. 2255(e)'s saving clause that he advocates; and he advances no sound reason for this Court to grant certiorari and do so.

1. Congress has established two mechanisms for a federal prisoner to obtain collateral review of his conviction and sentence: (1) a motion under 28 U.S.C. 2255 in the district where he was sentenced and (2) a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district where he is being confined. See United States v. Hayman, 342 U.S. 205, 211-223 (1952). Congress has made clear that Section 2255, not Section 2241, constitutes the ordinary mechanism for collaterally attacking a conviction or sentence. It has provided that, as a general matter, a prisoner may not bring a collateral challenge under Section 2241 if he "has failed to apply for relief [under Section 2255]" or if the court "has denied him [that] relief." 28 U.S.C. 2255(e). That arrangement reflects the understanding that the sentencing court is usually a better venue for collateral review than the district of incarceration, and that concentrating federal collateral attacks in the few districts that house major federal penitentiaries would lead to "serious administrative problems." Hayman, 342 U.S. at 212. Congress's restrictions on the use of Section 2241 also ensure that prisoners do not turn to Section

2241 to circumvent the procedural limitations on motions under Section 2255. See 28 U.S.C. 2255(f) (statute of limitations); 28 U.S.C. 2255(h) (limits on second or successive motions).

In a provision that has been termed the "saving clause," Congress has allowed a federal prisoner to proceed under Section 2241 rather than Section 2255 only where "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). The saving clause allows prisoners to use Section 2241 only in narrow circumstances, usually where a particular type of claim is simply not cognizable under Section 2255. A prisoner might, for example, use Section 2241 to challenge "the deprivation of good-time credits" and "parole determinations" -- claims that could not be pressed under Section 2255, because they attack "the execution of [the] sentence" rather than the sentence itself. See, e.g., McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1092-1093 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017).

In this case, the Seventh Circuit correctly determined that petitioner's current claims fall outside the saving clause. A motion under Section 2255 would have been fully adequate to test both petitioner's claim of ineffective assistance of trial counsel and his Brady/Napue claim. In fact, petitioner did bring his ineffective-assistance claim in his first Section 2255 motion; the claim simply failed on the merits. See Lee v. United States, No.

97-cr-243, 2008 WL 4079315, at *46 (E.D. Ark. Aug. 28, 2008) (first Section 2255 motion); United States v. Lee, No. 97-cr-243, 2010 WL 5347174, at *5 (E.D. Ark. Dec. 22, 2010) (motion for reconsideration of denial of first Section 2255 motion). And although petitioner could have brought his Brady/Napue claim in his first Section 2255 motion, he waited until his third such motion to do so, by which time the claim was procedurally barred. See 97-cr-243 Doc. 1313, at 10-17 (Feb. 26, 2019). Petitioner may not now use Section 2241 to relitigate an ineffective-assistance claim already considered and rejected under Section 2255, or to circumvent Section 2255's limitations on second or successive motions.

2. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 3-5) that the saving clause allows him to pursue his ineffective-assistance-of-trial-counsel claim through Section 2241 rather than Section 2255 because his Section 2255 lawyers were themselves ineffective in developing the claim. But Congress could not plausibly have considered "the remedy by motion" that it provided in Section 2255 to be "inadequate or ineffective to test the legality of his detention" based on asserted case-specific errors of counsel. 28 U.S.C. 2255(e). As the court of appeals has recognized, such a non-"structural" deficiency in the proceedings of a particular collateral attack does not suggest that the "the remedy by motion" is itself "inadequate or

ineffective." See Purkey v. United States, No. 19-3318, 2020 WL 3603779, at *10 (7th Cir. July 2, 2020). Indeed, the vast majority of federal prisoners have no right to counsel in Section 2255 proceedings at all. And respondent's unprecedented and expansive view of the saving clause would undermine Section 2255(e)'s general establishment of Section 2255 as the exclusive post-conviction remedy for federal prisoners, by inviting successive collateral attacks under 28 U.S.C. 2241, unbounded by timing requirements or other limitations in Section 2255 itself, that assert ineffective assistance of Section 2255 counsel.

Petitioner seeks to overcome those difficulties by observing (Pet. 5) that, in Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013), this Court held that a state prisoner may sometimes overcome a procedural default in a state post-conviction proceeding by showing that he received ineffective assistance of counsel in that post-conviction proceeding. But Martinez and Trevino involved the judge-made common-law doctrine of procedural default, whereas this case involves restrictions contained in an Act of Congress. See 28 U.S.C. 2255(e). While "judge-made * * * doctrines, even if flatly stated at first, remain amenable to judge-made exceptions," "a statutory * * * provision stands on a different footing." Ross v. Blake, 136 S. Ct. 1850, 1857 (2016). "There, Congress sets the rules -- and courts have a role in creating exceptions only if Congress wants

them to." Ibid. Congress has neither created nor authorized courts to create the ineffective-assistance exception that petitioner seeks here.

In all events, petitioner has not shown that his Section 2255 lawyers rendered ineffective assistance. Petitioner contends (Pet. 4-5) that those lawyers failed to raise certain contentions regarding Dr. Cunningham's testimony in his original Section 2255 motion. Yet petitioner recognizes (ibid.) that counsel did advance those arguments in a subsequent motion for reconsideration. And while petitioner notes (Pet. 5) that the Arkansas district court denied the reconsideration motion on procedural grounds, he fails to note that the district court also determined in the alternative that his arguments were "lacking in merit." Lee, 2010 WL 5347174, at *5 (E.D. Ark. Dec. 22, 2010). The failure to properly make an argument does not amount to ineffective assistance if the argument turns out to be meritless. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

Petitioner also states (Pet. 20-22) that his argument for invoking the saving clause goes beyond ineffectiveness of Section 2255 counsel. He contends (Pet. 21) that the Eighth Circuit improperly "deprived him of a corrective process in § 2255" when it "reject[ed] his Rule 60(b)" motion. But that motion was rejected because, although labeled a Rule 60(b) motion, it was in substance a second or successive Section 2255 motion. See United

States v. Lee, No. 97-cr-243, 2014 WL 1093197, at *4 (E.D. Ark. Mar. 18, 2014). The district court's determination was a routine application of Gonzalez v. Crosby, 545 U.S. 524, 530-531 (2005). The Eighth Circuit affirmed that decision, see United States v. Lee, 792 F.3d 1021 (8th Cir. 2015), and this Court denied a petition for a writ of certiorari, see Lee v. United States, 137 S. Ct. 1577 (2017). Petitioner may not now reopen the merits of that decision by collaterally attacking the resolution of his previous collateral attack.

Finally, petitioner contends (Pet. 15) that the saving clause allows him to bring his Brady/Napue claim through Section 2241 because the claim rests on "newly discovered evidence." But even assuming, as the court of appeals here has concluded, see Webster v. Daniels, 784 F.3d 1123, 1139 (7th Cir. 2015) (en banc), that "newly discovered evidence" can show that Section 2255 was "inadequate or ineffective to test the legality of [the] detention," "the alleged 'newly discovered' evidence" in this case is not, in fact, newly discovered, Lee, 2020 WL 3888196, at *3. The evidence -- information about petitioner's previous prosecution for the murder of Joey Wavra -- "was known to [petitioner]," who was present for and participated in that previous case. Ibid. The evidence also was "contained in the publicly available court record in [petitioner's] 1990 Oklahoma

murder case and thus was available with reasonable diligence" long before petitioner says he "discovered" it. Ibid.

3. Petitioner argues (Pet. 16-20) that the circuits are in disagreement about the precise scope of Section 2255, and he observes (Pet. 18) that the government (unsuccessfully) sought this Court's review of that conflict in United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). The conflict in Wheeler, however, concerned whether a prisoner whose Section 2255 motion was denied may later proceed under Section 2241 "on the ground that the circuit's interpretation of the relevant statute has changed." Pet. at I, Wheeler, supra. Indeed, petitioner himself describes (Pet. 17) that conflict as relating to "changes in law." This case does not involve any change in a circuit's interpretation of the applicable statute or other change in law. It therefore does not implicate that circuit conflict.

Petitioner has failed to identify any circuit conflict on the particular point at issue here -- whether a litigant may proceed under Section 2241 because his Section 2255 lawyers were ineffective. He also has failed to identify any court of appeals whose test for applying the saving clause would apply in the circumstances of this case. Petitioner claims (Pet. 17) that he would have "been allowed to proceed in § 2241 had he been confined" in the Second, Third, Eighth, or Ninth Circuits, but the cases he cites provide no support for that assertion. All of those cases

instead focus on circumstances where a defendant is actually innocent of the crime, but could not effectively raise the claim of innocence under Section 2255. See Harrison v. Ollison, 519 F.3d 952, 959 (9th Cir. 2008) (allowing resort to Section 2241 "when a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim"); Abdullah v. Hedrick, 392 F.3d 957, 960 (8th Cir. 2004) (noting the possibility that "a claim of 'actual innocence' allows a petitioner to * * * proceed with a § 2241 habeas corpus petition"); In re Dorsainvil, 119 F.3d 245, 250-251 (3d Cir. 1997) (allowing resort to Section 2241 where there has been "a complete miscarriage of justice" because an "intervening decision" establishes that the defendant is being "punished * * * for an act that the law does not make criminal"); Triestman v. United States, 124 F.3d 361, 363, 377 (2d Cir. 1997) (allowing resort to Section 2241 where "the failure to allow for collateral review would raise serious constitutional questions" because "a person who can prove his actual innocence * * * could not have effectively raised his claim of innocence at an earlier time"). Petitioner's underlying collateral attack here rests on a claim of ineffective assistance of counsel, not a claim that he can show -- in light of an intervening decision of statutory interpretation -- that he was convicted for conduct no longer deemed criminal or erroneously subjected to a statutorily enhanced sentence.

B. Petitioner's Brady Claim Also Does Not Warrant This Court's Review

Petitioner also seeks (Pet. 22-26) this Court's review on the merits of his Brady claim. The Brady claim, however, is not properly before this Court. The district court and the court of appeals both held that petitioner may not proceed under Section 2241 in the first place. There is thus no basis for reaching any claim under Brady.

Petitioner argues (Pet. 23) that the court of appeals imposed a "due diligence" requirement for Brady, but that argument misinterprets the court's opinion. The court stated:

> § 2255 may be inadequate or ineffective if [it] * * * does not permit a prisoner to present newly discovered evidence that * * * was unavailable 'despite diligence on the part of the defense.' * * * [T]he alleged 'newly discovered' evidence on which the claim rests was known to [petitioner] and is contained in the publicly available court record in [his] Oklahoma murder case and thus was available with reasonable diligence. Accordingly, the evidence is neither newly discovered under [precedents interpreting the saving clause] nor suppressed within the meaning of Brady.

Lee, 2020 WL 3888196, at *2-*3.

As that discussion makes clear, the court of appeals treated diligence as a requirement for invoking the saving clause on the basis of newly discovered evidence -- not necessarily as a separate requirement for Brady. The court of appeals did go on to state that the evidence was not "suppressed within the meaning of Brady," but that statement is fully supported by its determination that the evidence "was known to [petitioner]," quite apart from any

issue of due diligence. Lee, 2020 WL 3888196, at *3. "The government is under no obligation to disclose to the defendant that which he already knows." United States v. Wilson, 787 F.2d 375, 389 (8th Cir.), cert. denied, 479 U.S. 857, and 479 U.S. 865 (1986).

In any event, petitioner's understanding of Brady is wrong. As the government has previously explained, "courts of appeals have uniformly found no Brady violation * * * where the documents in question were publicly available and where the defense was reasonably aware of the underlying event that gave rise to the document." Gov't Br. in Opp. at 13, Georgiou v. United States, 136 S. Ct. 401 (2015) (No. 14-1535) (collecting cases). Petitioner contends (Pet. 24-26) that courts of appeals have reached conflicting results regarding the role of due diligence under Brady. As the government has previously noted, however, "whatever disagreement exists among the courts of appeals concerning the contours of due diligence doctrine generally, * * * no court has found a Brady violation in a case" -- like this one -- "involving publicly available court records" Id. at 15; see id. at 15-17 (discussing and distinguishing cases).

In addition, petitioner has not established that the evidence about the Oklahoma court hearing is material. See Brady, 373 U.S. at 87 (requiring a showing of materiality). During the sentencing proceedings here, the government argued that petitioner received

an "incredible [plea] deal" for his involvement in the killing of Joey Wavra, but that he squandered his second chance by murdering the Mueller family. Trial Tr. 7963-7964. Petitioner contends (Pet. 11-12) that the information about the Oklahoma hearing would have undermined that prosecution argument, because it would have shown that the judge in the Oklahoma case found the evidence insufficient to support a murder charge. But at the sentencing hearing in this case, the government presented ample independent evidence of petitioner's participation in that previous murder. See Trial Tr. 7389-7461. Petitioner's information thus casts no doubt on his involvement in the killing of Joey Wavra; at most, it suggests that the reason for the plea agreement was the Oklahoma prosecutors' failure to marshal sufficient evidence at the time. Petitioner fails to explain why the reason he received an "incredible deal" in the Oklahoma case would have affected the jury's ultimate decision.

II. PETITIONER ALSO HAS FAILED TO ESTABLISH THAT HIS UNDERLYING CLAIMS ARE MERITORIOUS

Petitioner also cannot establish a likelihood of success on the merits, or a sound basis for a writ of certiorari, because his underlying ineffective-assistance and Brady/Napue claims lack merit. The merits of the Brady claim are addressed above, and the Napue claim of presentation of false evidence, which relies on the same underlying facts, lacks merit for the same reasons.

And the prior proceedings in this case amply demonstrate that petitioner's remaining argument (Pet. 2-4) that his trial counsel rendered ineffective assistance by failing to object fully and adequately to the government's cross-examination of Dr. Cunningham -- in particular, to its elicitation of testimony regarding the PCL-R test and petitioner's psychopathy -- is likewise wrong on the merits. "The subject of Dr. Cunningham's testimony has [already] received extensive scrutiny" in federal court. Lee, 2008 WL 4079315, at *46. In particular, petitioner's contentions relating to that testimony (or to counsel's alleged ineffectiveness in connection with that testimony) have already been rejected on the merits by:

> (1) The court of appeals, on appeal from the district court's ruling on a post-sentencing motion. See United States v. Lee, 274 F.3d 485, 495 (2001) ("The district court did not commit error in admitting testimony concerning psychopathy on cross examination."), cert. denied, 537 U.S. 1000 (2002).
>
> (2) The district court, on petitioner's first motion under 28 U.S.C. 2255. See United States v. Lee, No. 97-cr-243, 2008 WL 4079315, at *46 (E.D. Ark. Aug. 28, 2008) ("The subject of Dr. Cunningham's testimony has [already] received extensive scrutiny. * * * Petitioner's argument is without merit.").
>
> (3) The district court, on petitioner's motion to reconsider the denial of the first Section 2255 motion. See United States v. Lee, No. 97-cr-243, 2010 WL 5347174, at *5-*6 (E.D. Ark. Dec. 22, 2010) ("Petitioner contends that his counsel was ineffective for failing to fully and adequately object to the psychopathy evidence presented during the cross-examination of defense expert Dr. Mark Cunningham. * * * [T]he claim, even if considered on the merits, is problematic.").

> (4) The court of appeals, on petitioner's appeal from the denial of the first Section 2255 motion. See United States v. Lee, 715 F.3d 215, 224 (8th Cir. 2013) ("[T]here was no 'threat of unfair prejudice' from the elicitation in this case of psychopathy evidence by the government."), cert. denied, 574 U.S. 834 (2014).

No sound basis exists to grant certiorari, or to delay petitioner's execution, when his underlying substantive claims lack merit.

III. EQUITABLE CONSIDERATIONS WEIGH AGAINST A STAY

This Court has explained that "[a] court considering a stay must * * * apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Hill v. McDonough, 547 U.S. 573, 584 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)); see, e.g., Gomez, 503 U.S. at 653-654. In particular, the "last-minute nature of an application" is itself a sufficient justification for denying "an application to stay execution" where the "claim could have been brought [years] ago." Gomez, 503 U.S. at 654. Here, petitioner himself acknowledged below that his ineffective-assistance claim "should have been litigated in [the initial motion under] § 2255," more than a decade ago. Petitioner C.A. Br. 25. Petitioner also has acknowledged, in a letter to then-Attorney General Eric Holder, that he knew all of the facts needed to raise his Brady/Napue claims no later than November 2014. See D. Ct. Doc. 14, at 66 (citing Letter from Ruth E. Friedman to Attorney

General Eric Holder (Nov. 4, 2014) (on file with government)). Yet petitioner waited to file the present Section 2241 petition until September 2019 -- after his execution had been scheduled. Under those circumstances, petitioner has no equitable right to demand that his execution be further delayed. See Hill, 547 U.S. at 584.

This Court also has repeatedly emphasized in the context of state executions that "'[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence.'" Bucklew, 139 S. Ct. at 1133 (quoting Hill, 547 U.S. at 584); see, e.g., Nelson, 541 U.S. at 650 (describing "the State's significant interest in enforcing its criminal judgments"); Gomez, 503 U.S. at 654 (noting that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). That interest is "magnified by the heinous nature of the offenses committed by [the defendant]." In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 127 (D.C. Cir. 2020) (Katsas, J., concurring).

Petitioner here "overpower[ed] a couple and their eight-year-old daughter in their home, * * * 'shot the three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape,' * * * then drove the family to a bayou, taped rocks to their bodies, and threw them into the water to suffocate or drown." Ibid. Petitioner has already pursued direct

review, three rounds of collateral review in the Arkansas district court and Eight Circuit, and now a further round of collateral review in the Indiana district court and Seventh Circuit. No further review of his case, or further delay of his sentence, is warranted.

CONCLUSION

The application for a stay and the accompanying petition for a writ of certiorari should be denied.

Respectfully submitted.

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