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

REPLY TO UNITED STATES' OPPOSITION TO STAY AND PETITION FOR CERTIORARI

The touchstone of the savings clause is the inadequacy of 28 U.S.C. §2255. This is the question before this Court: Did the operation of the statute in post-conviction proceedings, in two separate instances, deny Daniel Lee meaningful review? Both present powerful claims. Reaching the merits of either, according to three federal judgments, would require invalidating this death sentence.

The Government's Response obscures the issues and misrepresents the facts. Lee does not contend 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." GR.17. That is the defendant *Purkey v. United States*, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2

2020), the case the lower court erroneously relied upon. Lee's case is not Purkey's. Where Purkey believed §2241 available for any omission by federal collateral counsel, Lee has shown that in his case, given the timing and the procedural error committed, §2255 was construed so as to deny him review pursuant to *Trevino* that was granted others in his precise position.

Obfuscation helps neither this petitioner nor this Court. Daniel Lee offers this brief reply to the Government's opposition to review of these two claims.

A. Lee is not now (and never has) argued that the ineffectiveness of his § 2255 allows him to proceed in § 2241.

Like the Seventh Circuit's erroneous ruling, Respondent ascribes to Lee a theory he has never propounded: That "case-specific errors of [habeas] counsel" render § 2255 inadequate or ineffective. GR. 17. Lee is not asking this Court to allow him to raise his IAC claim for the first time pursuant to §2241. This is a defining distinction between the *Purkey* case the lower court and Respondent rely so heavily on. Purkey never raised the IAC claims presented in his § 2241 petition in his § 2255 proceeding; never gave the § 2255 reviewing court the opportunity to review the claims; and made no attempt to point to a discrete procedural glitch that prevented him from raising them earlier. Lee did all those things but was foreclosed when the Eighth Circuit held Rule 60(b) inapplicable to federal prisoners who sought to reconsider a claim or evidence foreclosed by initial habeas counsel's failures.

The Government whittles Lee's argument in small parts and attacks each as if they stood alone. But it fails to address the argument Lee has pressed for years

that the application of Rule 60(b) in his case blocked his unobstructed procedural shot on his IAC claim. Instead, it retreats to assertions that Lee could have raised the claim in his initial §2255 motion and that ends the story. *See*, *e.g.*, GR at 16. This is no answer. Rule 60(b) is part and parcel of initial §2255 proceedings and must be available to correct an improper foreclosure of review as occurred in Lee's case.

This is not wishful thinking on Lee's part. Federal circuit courts have said as much. *See Ramirez v. United States,* 799 F.3d 845, 853 (7th Cir. 2015) (granting 60(b) relief where initial §2255 failed to attach supporting evidence to motion; *United States v. Sheppard*, 742 Fed. Appx. 599 (3rd Cir. 2018) (denying § 2241 jurisdiction where *Martinez* issues could be remedied through a Rule 60(b) in §2255 proceedings).

And as Lee pointed out in his petition, less than a month ago, the Government itself told the Seventh Circuit that if "something about [§ 2255] counsel performance created a procedural bar to hearing the claim, then I think 60(b) is the avenue." Lee Pet. at 19.

Lee pursued that avenue immediately after *Trevino* was decided, yet the Government has been obstructing his access to court every step of the way. It now seeks to execute him with no court ever conducting full review of the persuasive evidence that was previously foreclosed, and despite the fact that the trial and §2255 judge in his case stated it was "very questionable" that the jury would have returned a death sentence without the psychopathy presentation. *Lee*, 89 F.

Supp.2d at 1031. Rule 60(b) is part and parcel of initial habeas proceedings and when, as here, that corrective process is absent, §2255 is inadequate and ineffectual.

B. Lee's 60(b) denial was not a routine application of *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

The Government attempts to diminish the significance of Mr. Lee's 60(b) denial by claiming it to be a run-of-the-mine application of *Gonzalez*. It is not. Although the circuit cited *Gonzalez*, its holding cut a broad swath: No federal prisoner can reopen a § 2255 proceeding to revisit a procedural issue based on habeas counsel's errors. Its ruling did not suggest Lee's motion failed to address a procedural defect; it instead barred such review for all federal prisoners because it believed *Trevino* had nothing say about § 2255 counsel. Lee is not attacking the substance of the Eighth Circuit's holding here. Whatever the merit of that holding, its effect on Lee was to deprive him of access to a part and parcel of his § 2255 proceeding, something a Seventh or Third Circuit movant could employ. This created a structural lacuna in his § 2255.

C. The Government's argument that the Sixth Amendment violation Lee seeks to remedy has already been decided on the merits is incorrect and misleading.

The Government argues that Lee's IAC claim was considered and rejected on the merits in his initial §2255. This only confuses the issue. No court has ever reviewed the evidence that initial §2255 counsel failed to timely submit to the district court. That court noted prior counsel submitted "numerous affidavits, presented in 65 pages" but that the "Court is foreclosed by existing legal principles

from considering the information now…" A76-A77. No court has ever reviewed Lee's full IAC claim on the merits. *See also United States v. Daniel Lewis Lee*, No. 4:97-cr-243, 2020 WL 3625732 at *6 (E.D. Ark. July 2, 2020) ("The Court determines that Judge Eisele did not consider the new evidence submitted by Mr. Lee with his Rule 59(e) motion…").

The fact that initial §2255 counsel raised an IAC claim (absent proper support) does not mean that Lee's full claim can never be reviewed. This would gut the Sixth Amendment right counsel. Counsel can be ineffective in myriad ways, including for failing to raise a claim or for failing to properly brief one. *See*, *e.g.*, *Nelson v. Davis*, 952 F.3d 651, 672 (5th Cir. 2020) (IAC can be due to failure to "properly brief or argue certain issues."); *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (same); *see also Ramirez v. United States,* 799 F.3d 845, 853 (7th Cir. 2015) (granting 60(b) relief where §2255 counsel raised claim but failed to attach underlying records to support the claim).

If the Government's argument is correct, anytime initial collateral counsel raised a claim, no matter how poorly, no court could ever review it again, even in initial habeas proceedings. This clearly is not the law.

Judge Eisele's alternative "merits" ruling was a ruling on the claim as it was before him; deprived of the proof and argument that was foreclosed to him by initial §2255 counsel's ineffectiveness.[1] This ruling has no bearing on the ultimate decision

[1] Judge Eisele's opinion is also factually incorrect. It asserted that the relevant challenge would not have been available to Lee's counsel because Dr. Ryan's declaration stated that he first became aware of the challenge himself in 2000. But

here, should *Trevino* be properly applied to Lee's case. If the court is able to consider the trial IAC issue, it will do so without the bar caused by post-conviction counsel's ineffectiveness.

D. Mr. Lee's trial IAC claim has never been fully resolved.

The Government argues that Mr. Lee's IAC claim has been rejected many times on the merits. GR 26-27. This is simply false. The citations Respondent points this Court to deferred deferring entirely to the Eighth Circuit's previous appellate ruling. The circuit ruling, however, was addressing an evidentiary issue, not an IAC claim, and its harm analysis has no bearing on a proper *Strickland* prejudice analysis. The issue before the Eighth Circuit was whether the psychopathy evidence was more probative than prejudicial, not whether there was a reasonable probability that the outcome of the proceeding would have been different if the jury had never heard that evidence in the first place. That claim has continued to evade review.

E. The circuits are split about when § 2241 is available

Respondent misses the point when it contends that there is no conflict among the courts on the interpretation of § 2241. GR 21. The issue is not whether other circuits have addressed the same set of facts, whether the First Circuit has considered an ineffective assistance of counsel claim or the Fifth a claim involving

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as the declaration makes clear, Dr. Ryan stated that counsel could actually have raised the same challenge prior to his testimony in the *United States v. Stitt* trial, which occurred in 1998—the year before Lee's trial. It is unfortunate that the Government continues to muddy the waters with what was clearly a factual error by Judge Eisele.

change of law. The question is the scope of the § 2241 remedy and how to apply it. As the Government's own request for review in Wheeler makes clear, there is widespread disagreement among the circuits as to what satisfies inadequacy in the § 2255 statute and what circumstances will open the doors to § 2241 review. The particular facts of a case will of course vary, but some single standard or standards for the circuits to follow remains elusive.

F. The suppressed evidence was material.

Two different federal judges reviewing Mr. Lee's due process claims have determined that "[i]n light of the government's reliance on the Wavra murder during sentencing, it is reasonably likely that, if it had been discovered at trial that the Oklahoma court found the evidence insufficient to establish that Lee was guilty of murder, the outcome at sentencing would have been different." A37.

The Government has no response to this. Instead, it claims the facts it presented to the jury regarding Lee's involvement in the Wavra murder remain the same regardless of the disposition of the charges against Lee because those facts were taken from Lee's testimony at his cousin Patton's preliminary hearing. GR at 24-25. This misses the mark.

Lee's claim is that the Government falsely told the jury that Lee was given a "gift" by the Oklahoma prosecutors even though he was "legally and morally responsible for the Wavra murder." This was highly inflammatory, and also false. In fact, it appears that the Oklahoma murder charge was so weak the judge found it did not satisfy the low evidentiary standard of "probable cause" *even with his prior*

testimony and live witnesses. See 22 OK Stat. §22-258 ("The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime.").

Clearly the evidence against Mr. Lee was not what the federal capital jury was led to believe. The Oklahoma court—which considered Mr. Lee's prior testimony, along with whatever other evidence was available to the State to establish probable cause for the charges—rendered a judicial finding that cannot be squared with the Government's contention that Mr. Lee was "morally and legally responsible for the Wavra murder." Yet this evidence played a central role in the penalty phase case against him. *See* A94 ("Both Judge Eisele and the Eighth Circuit recognized the Wavra evidence was an integral piece of the Government's penalty-phase case. … Judge Eisele acknowledged evidence of Lee's participation in that crime was powerful and likely contributed to or influenced the jury's ultimate decision in favor of a death sentence.") (Internal quotation marks and citation omitted). The suppressed evidence thus wholly undercuts one of the Government's most compelling arguments for death.

Additionally, Lee proffered numerous documents supporting his allegation that the federal prosecution team worked closely enough with local Oklahoma authorities and that they knew or should have known that Lee was not allowed to plead to the lesser-charge of robbery because of prosecutorial charity, but rather because the murder charge was not legally viable. A40. (Indeed, by the Government's logic, if the mere the existence of the fee application was enough to

alert defense counsel that this narrative was bogus, presumably the Government should have been aware, too.) The Government simply never addresses the fact that: (1) a *Napue* violation does not require a showing of suppression; and (2) that the federal prosecutors who tried Lee's case had an *independent* obligation to correct any false or misleading evidence that Lee was "legally and morally" responsible for the Wavra murder.

Relief is warranted on a *Napue* violation when there is any likelihood the false testimony could have affected the judgment of the jury. *United States v. Augurs*, 427 U.S. 97, 103 (1976). This standard is "more defense friendly," *Hammond v. Hall*, 586 F.3d 1289, 1306-07 (11th Cir. 2009), and "favors granting relief." *Ford v. Hall*, 546 F.3d 1326, 1333-34 (11th Cir. 2008). Given that two federal judges have acknowledged that Lee's allegations, if true, would establish that if the jury knew the truth about the Oklahoma plea "it is reasonably likely that…the outcome at sentencing would have been different," Lee can certainly establish his *Napue* violation here.

G. The Seventh Circuit's imposition of a "due diligence" standard warrants review

The Government claims that Lee misreads the Seventh Circuit's discussion of "due diligence," and that, in fact, it treated diligence as a requirement for invoking the savings clause on the basis of newly discovered evidence. It is telling, however, that in its excerpt of the circuit court's opinion, it has substituted the actual text with its own bracketed statement. *See* GR 23 (inserting the phrase "precedents

interpreting the savings clause" in its block quote of *Lee v. Watson*, 2020 WL 3888196, at *2-*3 (7th Cir. 2020)).

The case cited by the circuit court is *Webster v. Daniels*, 784 F.3d 1123, 1140 (7th Cir. 2015) (en banc). *See* A8. Although this is a savings clause case, the issue there was whether *trial counsel* was diligent in attempting to locate Social Security records demonstrating that the client was intellectually disabled. Indeed, the *en banc* court remanded the case to make *that* factual determination, not whether initial § 2255 counsel was diligent. *See Webster v. Lockett*, 2018 WL 4181706, at *1 (S.D. Ind. Aug. 31, 2018) ("The purpose of the hearing was to allow Webster to present evidence as to whether certain Social Security records were unavailable to him *and his counsel at the time of trial*. The Seventh Circuit instructed this Court *to evaluate trial counsel's diligence* when considering that question.") (emphasis added).

But even if the Government were correct, its position would run headlong into contrary precedent in this Court. In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court examined 28 U.S.C. §2254(e)(2) to determine what constituted "due diligence" of habeas counsel. The lower court held state habeas counsel did not exercise due diligence because he failed to discover court records §2254 counsel later uncovered proving a previous marriage between a juror and a sheriff deputy. 529 U.S. at 442. It reasoned that since federal habeas counsel was able to uncover the relationship in a public record in a county courthouse, then state habeas counsel could have discovered the same facts with due diligence. *Id.* at 443.

This Court explicitly rejected this reasoning. First, the "underdevelopment of these matters" was attributable to the prosecutor and juror. *Id*. Because of their "silence," counsel had "no reason" to suspect that they had not properly disclosed their relationships and "no basis" to investigate further. *Id*. at 442-43. Second, the Court rejected the notion that federal habeas counsel's discovery of the publicly available record proved that state habeas counsel lacked diligence. *Id*. at 443 ("We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror.").[2]

Indeed, "due diligence" is a legal term; it makes no sense that it should mean one thing in the context of state habeas counsel's performance, and another in the context of § 2255 counsel's performance.

Moreover, whether initial § 2255 counsel exercised due diligence is a fact-specific question, and the district court made no such fact-findings here—despite recognizing that such findings would need to be made:

> As to the United States' argument that publicly available evidence cannot be suppressed under *Brady*, at best, more information is needed to determine whether the alleged *Brady* information was publicly available at the time. All the United States has offered is that the fee application "is listed on the public docket sheet from the Oklahoma case and contained within the publicly-available court file." Dkt. 14 at 69. Whether or not this alone establishes that the fee application was

[2] As in *Williams*, the nature of the record at issue here is also relevant to the analysis: a fee application is not the type of document one would reasonably consider to be part of the "record" of the criminal proceedings and final judgment in a case. It is an extra-record document submitted for an administrative purpose, to ensure payment for services rendered by court-appointed counsel. The Seventh Circuit's application of "due diligence" to these facts was erroneous.

> publicly available at the time of Mr. Lee's trial, it says nothing about whether the other alleged *Brady* material was publicly available.

A41. The Seventh Circuit had no facts, either.[3] In place of a record, it substituted a legal supposition—that evidence cannot be suppressed if a defendant could have discovered it through the exercise of due diligence—which plainly contrary to *Banks*. And it compounded this error by using this flawed understanding as a gatekeeping tool to block access to § 2241 as a remedy,

The Seventh Circuit is not alone in applying a "defense due diligence" standard to *Brady* claims. The circuit split is deep. Indeed, it is telling that the only response the Government can muster is a citation to one of its own briefs. GR 24. But its own self-serving gloss on the state of the law is no substitute for an actual survey of the Circuits. *See* Pet. 24-26.

Respectfully submitted,

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[3] This Seventh Circuit's vacatur of the stay left open factual questions about whether Lee had any understanding of the "potential significance" of the 1990 preliminary hearing to his 1999 federal capital trial. The lower court made no such findings. No facts exist showing that the Oklahoma judge made any statements in Lee's presence; and none reveal juvenile Lee's communications with his lawyer.

Dated: July 13, 2020