No. 20A-4

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ET AL., APPLICANTS

v.

WESLEY IRA PURKEY

(CAPITAL CASE)

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# REPLY IN SUPPORT OF APPLICATION FOR VACATUR OF STAY

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T.J. WATSON, WARDEN, ET AL., APPLICANTS

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This Court has held that a lower court "abuse[s] its discretion" when it "enjoin[s] [an] execution without finding that [the capital prisoner] has a significant possibility of success on the merits." Dunn v. McNabb, 138 S. Ct. 369, 369 (2017). In such circumstances, the proper remedy is summary vacatur of the lower court's stay. Ibid. And those are the circumstances here.

Respondent does not and cannot identify any finding by the court of appeals that his claims are likely to succeed, which would require the en banc court or this Court to grant further review and reverse the panel's decision. If (as respondent claims) the court of appeals actually thought respondent had "made a strong showing that he is likely to succeed on the merits," Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted), it would have had no reason to suggest -- incorrectly -- that such a requirement is inapplicable in capital cases. See Stay Application Appendix

(App.) 26a ("Importantly, although the Nken Court held that something more than a 'better than negligible' chance of success is necessary, it also stressed that the injury the applicant faced [there] was not 'categorically irreparable.'") (citation omitted).

Respondent's argument in response to the government's application largely focuses on his expansive view of the saving clause in 28 U.S.C. 2255(e), which no court has endorsed and which the court of appeals panel in this very case unanimously rejected. His argument in this Court cannot substitute for the requisite finding by the court below that he has a substantial likelihood of prevailing on the merits. In any event, respondent's Section 2255(e) argument does not show any likelihood of further review and reversal. As the court below recognized, respondent's reading of Section 2255(e) is inconsistent with the statutory text, lacks any limiting principle, and asks courts to create equitable exceptions to clear statutory commands -- problems to which respondent offers no meaningful answer.

Respondent likewise fails to establish the other stay factors. He does not dispute that by May 2017, he possessed all the evidence he needed to assert one of the ineffective assistance claims on which the court of appeals focused -- yet held that claim in reserve for more than two years, bringing it forward only after an execution date had been set. And while he claims that he used that time to gather evidence to support other claims, the best

example he can find is simply a cumulative declaration by relatives. By allowing respondent to delay his execution on the basis of such a late-filed and meritless collateral attack, the court of appeals failed to show proper respect for the government's and victims' interest in seeing justice finally done in this case. This Court should lift the stay that the court of appeals improperly entered.

## I. RESPONDENT CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS IN THIS CASE

The absence of a determination by the court of appeals that respondent has any substantial likelihood of prevailing in this case -- which at this point would require reversal of the decision below by the en banc court or this Court -- calls for summary vacatur of the stay that the panel nevertheless entered. Rather than making the requisite finding, the panel instead took the view that because this is a capital case, a stay could be granted based on the bare possibility that "our reading of the safety valve is too restrictive." App. 26a. As the government has explained (Stay Appl. 16-18), and respondent does not dispute, however, this Court has squarely rejected application of such a watered-down stay standard to capital cases. See, e.g., Dunn, 138 S. Ct. at 369.

Even assuming that respondent's argument to this Court could itself provide the finding that the court of appeals failed to make, he cannot make the strong showing of a likelihood of success that this Court's cases require. Respondent contends that a motion

under Section 2255 is "'inadequate or ineffective'" to test the legality of a claim of ineffective assistance of trial counsel unless the Section 2255 movant is provided with the effective assistance of counsel in his Section 2255 proceedings. See Opp. 11-12. 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 recognized (App. 20), 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." Indeed, as respondent acknowledges, Opp. 12, 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 postconviction 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.

Respondent identifies no court that has endorsed such a result. He quotes (Opp. 12) then-Judge Gorsuch's opinion in Prost v. Anderson, 636 F.3d 578, 584-585 (10th Cir. 2011), cert. denied,

565 U.S. 1111 (2012), for the proposition that a prisoner must have "'an opportunity to bring his argument,'" but that opinion does not support respondent's position here. Respondent had an opportunity to bring claims of ineffective assistance of trial counsel under Section 2255 -- and, indeed, brought 17 of them. See App. 20a-21a. There is thus no question that respondent's current claims "could have been tested in [his] initial § 2255 motion," which is "[t]he relevant metric or measure" under which a saving-clause claim must be tested. Prost, 636 F.3d at 584; see id. at 589 ("[T]he fact that Mr. Prost or his counsel may not have thought of a [particular] argument earlier doesn't speak to the relevant question whether § 2255 itself provided him with an adequate and effective remedial mechanism for testing such an argument.").

Unable to ground his position in any reasonable reading of Section 2255(e)'s text, respondent places his primary reliance instead on this Court's decisions in Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013), as well as the Seventh Circuit's decision in Ramirez v. United States, 799 F.3d 845 (2015). See Opp. 9-15. But as the court of appeals recognized below -- in an opinion by the same judge who authored Ramirez, supra -- this case is different from those in a critical respect: "[T]he availability of further relief for someone in [respondent's] position is not a simple matter of federal common

law. It is governed by statutes." App. 25a. Respondent has no meaningful response to that dispositive distinction and makes no attempt to provide one.

In the absence of any conflict in the lower courts, and given respondent's failure to offer any basis on which courts could create the sort of freestanding equitable exception to Section 2255(e) that he desires, there is no substantial likelihood that the en banc court or this Court will adopt such an approach in this case. Indeed, the court of appeals' own decision two days ago not to grant a stay in another capital case involving an "indistinguishable" saving-clause argument, Lee v. Watson, No. 19-3318, 2020 WL 3888196, at *3 (7th Cir. July 10, 2020), confirms that further review in that court is exceedingly unlikely. And respondent makes no meaningful argument that four Justices would vote to grant certiorari in this case, or that five Justices would adopt his broad view of the saving clause.

II. EQUITABLE FACTORS ALSO WEIGH AGAINST A STAY

Equitable considerations and the public interest also weigh against a stay. As the government explained in its application (Stay Appl. 23-25), the record here makes clear that by May 2017, respondent's counsel had in their possession all of the evidence they needed to assert one of the two ineffective assistance claims on which the court of appeals focused (concerning Juror 13). Respondent does not dispute that point, nor does he explain why

-- if he believed that claim had merit -- he did not bring it forward expeditiously in 2017 so that it could be litigated in an orderly fashion. And as this Court has recognized, there exists "'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)).

Rather than address his indisputable delay with respect to the Juror 13-related claim, respondent instead emphasizes (Opp. 17) that his petition "contained seven other claims that [respondent] pursued up until filing." But respondent does not show that those claims depended on previously unavailable evidence, either. One of them, for example, asserted that capital punishment is categorically unconstitutional under the Eighth Amendment. See D. Ct. Doc. 1, at 164-192 (Aug. 27, 2019). And even with respect to the claims that depended on an investigation of respondent's case and history, the only example respondent offers of the evidence that he was "pursu[ing] up until filing," Opp. 17, is a pair of declarations signed by one of his cousins and her husband, providing general background about other members of respondent's family but few specifics about respondent himself. See D. Ct. Doc. 23-5, at 77-85 (Sept. 12, 2019). Respondent identifies no reason that he could not have obtained those

declarations earlier, or filed his claims without them, in order to present his claims in a timely -- rather than last-minute -- fashion.

Instead, respondent takes the untenable view -- which the court of appeals appeared to share, see App. 9a -- that there was no "necessity" to expedite the claims challenging his conviction and sentence until the government scheduled an execution date. Opp. 18 (emphasis omitted). That approach is inconsistent with the "'important interest [this Court has recognized] in the timely enforcement of a sentence,'" Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill, 547 U.S. at 584) (emphasis added). If federal prisoners pursue their claims in earnest only once an execution is scheduled, there will always be a reason for further delay, and finality will never be achieved.

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This Court should vacate the court of appeals' stay of execution in order to allow respondent's execution to proceed as scheduled on July 15, 2020.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2020