No. 20A-4

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, ET AL., APPLICANTS

v.

WESLEY IRA PURKEY

(CAPITAL CASE)

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR VACATUR OF STAY

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On July 13, 2020, a panel of the court of appeals entered an order -- attached hereto -- denying the government's motion for reconsideration of its entry of a stay of execution in this case. See Suppl. App., infra, 1-3. In doing so, the panel also noted that the government had filed an application asking this Court to vacate the stay, and the panel therefore sought to "explain further * * * why we are not persuaded that it should be set aside." Id. at 2. That order does not provide a sound basis to keep the stay in place. In particular, it identifies no meaningful reason why the panel's decision on the merits -- rejecting petitioner's position -- is substantially likely to be reversed by the en banc court or this Court. The stay should be vacated.

1. In today's order, the court of appeals panel reiterated its view that a stay "is necessary in order to complete our proceedings in an orderly way," and that there is "no reason why

we should fore-shorten the time for the filing of a petition for rehearing, or why we should order the mandate to issue forthwith." Suppl. App., infra, 3. It also suggested, once again, that Nken v. Holder, 556 U.S. 418 (2009), was unlike this case because "[a]n immigrant such as Nken can continue to pursue many forms of relief even after removal, but once someone has been executed, that is the end." Suppl. App., infra, 3. And finally, the panel indicated for the first time its view "that [respondent] has made a strong argument to the effect that, under * * * Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013)," an applicant for habeas corpus relief should be entitled to pursue previously un-asserted claims of ineffective assistance of counsel "using the vehicle of section 2241." Suppl. App., infra, 3.

The panel itself, however, remained unpersuaded by that argument. And it did not explain in any meaningful detail why it deemed that unpersuasive argument "strong" or how or why that argument might ultimately prevail before the en banc court of appeals or this Court. Instead, the panel indicated that "[o]nly the Supreme Court can tell us whether this is a proper application of its decisions," and "deem[ed]" respondent's "chances of success on this point to be strong enough to satisfy Nken's first requirement." Suppl. App., infra, 3.

2. The court of appeals panel's new order confirms the need for this Court's intervention. Although the panel has now labeled

the argument it unanimously rejected as "strong," Suppl. App., infra, 3, it identifies no reason to conclude that either the en banc court of appeals or this Court is substantially likely to accept respondent's novel interpretation. No such reason exists, and the stay should therefore be vacated. See Hill v. McDonough, 547 U.S. 573, 584 (2006).

As to en banc review, the panel has never suggested that its decision in this case was controlled by prior circuit precedent with which it disagreed, so no reason exists to believe that such review will occur, or would produce a different outcome from the panel's own decision. Indeed, six of the court of appeals' 11 active judges have in the past two weeks joined in opinions rejecting respondent's position, with three of them joining an opinion that described that position as "frivolous" and declined to grant a stay to allow the capital prisoner there to pursue it. Lee v. Watson, No. 19-3318, 2020 WL 3888196, at *2-*3 (7th Cir. July 10, 2020); see Stay Application Appendix (App.) 1a-27a. And the panel's order denying the government's motion for reconsideration indicated that "[o]nly the Supreme Court can tell us whether [respondent's position] is a proper application of its decisions," strongly suggesting that the panel did not itself view en banc reversal as a significant possibility. Suppl. App., infra, 3.

Review and reversal by this Court are similarly unlikely. As the government has previously explained, see, e.g., Stay Reply 4-6, no court has ever adopted respondent's capacious understanding of the Section 2255(e) saving clause, or been willing to grant the equitable exception that he would carve into the statute's text. Notwithstanding that absence of support for respondent's position, the court of appeals panel indicated that it would not "speculate about the way in which the Supreme Court would view" attempts to extend Martinez, supra, and Trevino, supra, to create novel exceptions to federal statutes. Suppl. App., infra, 3. But the panel's refusal to speculate does not suggest a significant likelihood of review and reversal in this Court, whose precedent does not support respondent's reliance on Martinez and Trevino.

This Court has already made clear that even if "judge-made * * * doctrines" like the procedural default rule at issue in Martinez and Trevino "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. The court of appeals panel may believe, as a policy matter, that there are "compelling reasons" for creating exceptions to Section 2255's procedural provisions in cases like this one. Suppl. App., infra, 3; see App. 22a ("It is * * * worth noting that nothing prevents Congress

from changing the rules[.]"). But as the panel ultimately acknowledged, Congress has concluded otherwise -- and courts cannot undermine Congress's decision through equitable exceptions. See App. 25a. This Court is not likely to, and should not, back away from that bedrock principle here.

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For the foregoing reasons, and those stated in the government's application and reply, this Court should vacate the court of appeals' stay of execution.

Respectfully submitted.

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JULY 2020