No. 20A4

IN THE

Supreme Court of the United States

T.J. WATSON, WARDEN OF USP TERRE HAUTE,
UNITED STATES OF AMERICA,

Applicants,

v.

WESLEY PURKEY,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION

Less than 36 hours after the Seventh Circuit issued a brief stay of Mr. Purkey's execution, the Government filed a petition for rehearing in that court seeking to immediately vacate the stay. Then, rather than wait for the Seventh Circuit to decide its petition, the Government filed another emergency application with this Court on Saturday, July 11, asking this Court to vacate the court of appeals' stay, primarily on the ground that the panel had not found likelihood of success on the merits, as required by *Nken* v. *Holder*, 556 U.S. 418 (2009). Mr. Purkey opposed that application on July 12.

On July 13, while the Government's emergency application to this Court was pending, the Seventh Circuit panel issued an order denying the Government's request to vacate the stay. The panel clarified that, in granting the stay, it "concluded that Purkey has made a strong argument to the effect that, under the Supreme Court's decisions in *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), a habeas

corpus petitioner who has *never* been able to test the effectiveness of his counsel under the Sixth Amendment can overcome his procedural default in failing to do so in his first and only motion under section 2255" and that, for that reason, he "would be entitled to a hearing on the merits using the vehicle of section 2241." Supp. App. 3. Accordingly, the panel explained, "we deem Purkey's chances of success on this point to be strong enough to satisfy *Nken*'s first requirement[.]" *Id.* The panel reiterated that it found "serious" the argument that, if Mr. Purkey cannot press his substantial claims of ineffective assistance of trial counsel in a § 2241 petition, "he could literally go to his death without ever having the opportunity first to demonstrate that his Sixth Amendment rights were violated, and … if he succeeds, to have a new trial untainted by that failing," explaining that "all defendants, including capital defendants, have a right to constitutionally effective counsel" and "[t]he information proffered in Purkey's section 2241 petition gives us concern that Purkey never received such counsel." Supp. App. 1-2.

With this in mind, the panel stated again that a "brief stay is necessary to complete our proceedings in an orderly way," including the resolution of a forthcoming petition for panel or en banc rehearing from Mr. Purkey. Supp. App. 3. Although the stay "would expire at the earliest … on Monday, August 24" (which the panel recognized is "a few weeks after July 15, the government's desired execution date"), the panel noted that the Government had neither provided a "reason why we should fore-shorten the time" for proceedings to conclude in the Seventh Circuit, nor established "that it would experience difficulty in re-scheduling Purkey's execution date for a time after our court has completed its review." Supp. App. 2-3.

The panel's order clarifies what was already clear—that the Seventh Circuit did not abuse its discretion in entering a brief stay of Mr. Purkey's execution. None of the Government's arguments establishes otherwise.

The Government asserts that en banc rehearing is unlikely because "the panel has never suggested that its decision in this case was controlled by prior circuit precedent with which it disagreed." Supp. Br. 3. That misunderstands both the standard for en banc review and the state of the law in the Seventh Circuit. Rehearing en banc is warranted where it "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. This case easily meets that standard. As explained (Stay Opp. 13-15), in addition to conflicting with *Martinez* and *Trevino*, the panel's decision conflicts with the Seventh Circuit's own decision in *Ramirez* v. *United States*, 799 F.3d 845 (7th Cir. 2015). The full Seventh Circuit is likely to grant rehearing and reverse to correct this inconsistency in its case law. This case also presents a question of exceptional importance—now that the United States has begun scheduling executions for the first time in nearly two decades, the question of whether § 2241 is available for federal capital prisoners in Mr. Purkey's position is likely to recur. This question is of paramount importance in the Seventh Circuit, where nearly all federal death row inmates are housed, and thus where nearly all such § 2241 petitions must be brought. For these reasons, en banc review and reversal is particularly likely, as the panel implicitly recognized in clarifying its stay order. Contrary to the Government's regurgitated assertion (Supp Br. 3), that other panels of the Seventh Circuit, who are bound by the

panel's ruling in this case, have denied identical claims, is neither surprising nor suggestive of the en banc court's likelihood of reversal. *See* Stay Opp. 14 n.4.

For much the same reasons, this Court is likely to grant certiorari and reverse. *See* Stay Opp. 9-13. In *Martinez* and *Trevino*, this Court held that where a state prisoner receives ineffective assistance at his initial-review collateral proceeding, some further opportunity for review of substantial claims of ineffective assistance of trial counsel must be made available. Whether and by what procedural mechanism federal capital prisoners who are in the analogous position of the state prisoners in *Martinez* and *Trevino*—*i.e.*, whose substantial claims of ineffective assistance of trial counsel were defaulted by ineffective § 2255 counsel—may press such claims, is an important question that merits this Court's review. In the absence of guidance from this Court, the courts of appeals have reached divergent answers to this important question. *See Ramirez*, 799 F.3d at 852-854; *United States* v. *Lee*, 792 F.3d 1021, 1024 (8th Cir. 2015). The Seventh's Circuit's decision that § 2241 is not available under these circumstances not only conflicts with *Martinez* and *Trevino* and deepens this circuit split, but also creates an unjustified distinction between state and federal prisoners that uniquely disfavors the latter. *See* Supp. App. 3 (noting that "there are compelling reasons to extend existing precedents"). For these reasons, reversal by this Court is also likely.

At bottom, the Government's argument is that if a party is unsuccessful before a lower court, that court can *never* stay its ruling, because that party will not be able to establish likelihood of success on the merits before that court. As the panel recognized, Supp. App. 3, that cannot be the standard. Rather, this Court's precedents leave open that where the movant makes a strong showing of likelihood of success on appeal, and the

movant makes a strong showing on all of the other stay factors, a stay may be entered. The Seventh Circuit panel rightly found that this was such a case.

The Government's emergency application should be denied.

Respectfully submitted.

/s/ Alan E. Schoenfeld

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CERTIFICATE OF SERVICE

I, Alan E. Schoenfeld, a member of the bar of this Court, hereby certify that on this 13th day of July, 2020, I caused all parties requiring service in this matter to be served with three copies of the accompanying Supplemental Brief in Opposition to Application to Vacate Stay of Execution by overnight courier to the address below:

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